73315-0

73315-0

No. 733150-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD and MARNIE FOX, husband and wife,
Appellant,

v.

SKAGIT COUNTY, a municipal corporation, SKAGIT COUNTY BOARD OF HEALTH, an RCW 70.05 local board of health, DALE PERNULA, DIRECTOR of the SKAGIT COUNTY PLANNING AND DEVELOPMENT SERVICES and JENNIFER KINGSLEY, DIRECTOR of the SKAGIT COUNTY BOARD OF HEALTH AKA SKAGIT COUNTY PUBLIC HEALTH DEPARTMENT,

Respondents,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY
No. 14-2-00947-2

OPENING BRIEF OF APPELLANT

Peter C. Ojala, WSBA# 42163
OJALA LAW INC., P.S.
21 Avenue A, Suite C Snohomish, WA 98290
(360) 568 9825; peter@ojalalaw.com
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Skagit County Code

Washington Administrative Code/Rules

Colorado Authority

Other Authorities

Select Secondary Sources

I. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that RCW 19.27.097 and/or Skagit County code requires a showing of adequate water availability beyond a showing in a building permit application that a person and use qualifies for an exemption under RCW 90.44.050.

2. The trial court erred in ruling that WAC 173-503 governs permit exempt groundwater uses, and specifically the Foxes' groundwater use, whether their use is an existing use or a "new use," and erred in placing the burden of proof on the Foxes to show their use would not reduce flows on the Skagit River.

3. The trial court erred in ruling that any water right associated with the Foxes' well would be junior to WAC 173-503 to prevent the legal availability of water shown in the building permit application and materials, under the Instream Flow Rule's plain terms and water law principles.

4. The trial court erred in ruling that it lacked jurisdiction to consider the validity of WAC 173-503 as applied to the Foxes under constitutional due process grounds, and erred in applying the rule to prohibit the building permit from issuing.

5. The trial court erred in determining the Foxes' water supply was subject to interruption, and erred in concluding that the Foxes were required to show year round water rights.

6. The trial court erred in entering the order of dismissal.

7. The trial court erred in not reconsidering the decision to dismiss the case in light of Ecology's interpretation of WAC 173-503, and commitment that the State would mitigate for all domestic exempt well users in the basin potentially subject to the Instream Flow Rule, consistent with the State's statutory obligations, as any interpretation that requires an exempt user to present a mitigation plan is in contravention to RCW 90.44.050 and *Campbell & Gwinn.*

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Is a Writ of Mandamus to issue a building permit appropriate relief if the requirements of Skagit County Code and RCW 19.27.097 are met? (Assignment of Error No. 1)**

   Short Answer: Yes.

2. **Are The Requirements of Adequate Water In RCW 19.27.097 Met Where An Applicant For A Building Permit Supplies Evidence Of A Use That Qualifies As Exempt Under RCW 90.44.050? (Assignment of Error No. 1 and No.2)**

   Short Answer: Yes.

3. **In the alternative, does WAC 173-503 (2001) otherwise alter the requirements of RCW 19.27.097 and RCW 90.44.050 or otherwise prohibit Mr. Fox's building permit application from being complete where Mr. Fox presented evidence the Foxes and their use qualified to be exempt from permitting, and presented evidence of a common law correlative groundwater right and/or a common law appropriative right not subject to or otherwise senior to the Instream Flow Rule? (Assignment of Error No. 3 and No. 5).**

   Short answer – No.

4. **In the alternative, if WAC 173-503 applies to preclude the Foxes well, by itself, from qualifying as an adequate supply of water, did the court err in failing to reconsider its dismissal order in light of Ecology's January 2015 letter interpreting WAC 173-503 and commitments to mitigate for all exempt well users in the basin? (Assignment of Error No. 6)**

   Short Answer: Yes.

5. **Does the trial court's interpretation and application of WAC 173-503 (2001) violate the constitutional due process rights of the Foxes? (Assignment of Error No. 4).**

   Short Answer – Yes.

6. **Are the Foxes entitled to attorney's fees under the private attorney general basis or recognized ground in equity?**

   Short Answer – Yes. The Foxes have done everything the law required them to do, and this case benefits many people in the state of Washington providing clarity in a matter of first impression regarding important legislative principles underlying RCW 90.44.050 and RCW 19.27.097.

III. STATEMENT OF CASE

This is a writ of mandamus action by the Foxes against Skagit County for a building permit, where the Foxes submitted their building permit application for their single-family home according to their long term plans in preparation of their retirement years. (CP 290-291). The Foxes had acquired the property in or around 2000, which had been their long time neighbors' property, with the intent of subdividing it into two buildable lots – one for their retirement home on a new lot with the existing barn, and one lot for the existing farm house. (CP 288-291). They lawfully divided the property into these two building lots in 2000 with a recorded short plat in the County records (CP 660), showing the location of groundwater wells (CP 661). Consistent with their retirement plans the Foxes hired a builder (CP 290-291) and submitted their building permit in the beginning of 2014. (CP 679). The application included a copy of a groundwater claim for their

property one of their predecessors in title had filed for domestic and other purposes on the property on June 18, 1974. (CP 681).

However, the County refused to act to approve the building permit. The Foxes, as the building permit applicants, have and had otherwise met all the requirements of a building permit under county code according to the County (CP 652-664) except for the County's incomplete letter, and no one argues that the Foxes are required to apply for a water right permit under RCW 90.44.050.

The County stated the application was incomplete only because they needed to show one of several "documentations of water availability" (CP 666) (March 26, 2014 Letter from Skagit County). The County listed these purported requirements as "[a] letter or email from Ecology ... [1] acknowledging [Foxes' parcel] has an approved water right or transfer... [or] [2] an approved mitigation proposal," or "a submittal of an Engineered Plan for a Rainwater Catchment System [to the County]." (CP 666).

On May 16, 2014 the Foxes supplied additional information and clarification of their legal right to water in a *legal opinion* submitted to the County. (CP 668-731). The County did nothing in fourteen days after receiving the information. The County has refused to act (neither approving nor denying the building permit application).

Faced with governmental inaction and silence, on June 11, 2014 the Foxes obtained an alternative writ of mandamus and a show cause order in Skagit County Superior Court, why the building permit should not issue forthwith. (CP 643). The Skagit judges recused themselves (CP 731), and Honorable George F. B. Appel presided over the matter from Snohomish County. (CP 731); (CP216-226). After the issuance and service of the writ on the County on June 12, 2014 (CP 216-217), on June 17, 2014, Ecology submitted a letter into the building permit application file suggesting, inter alia, that Mr. Fox was not diligent enough from when he subdivided the property in 2000 to the date of his building permit application in 2014. (CP 237-246). Department of Ecology and the Swinomish Tribe intervened in the mandamus matter, with Ecology expressing that the court's decision could have wide ranging impacts on water policy and administration throughout the state. (CP 837).

At the July 23, 2014 show cause hearing, the court ordered the hearing be continued, and directed the parties to prepare an agreed order implementing the continuance and a briefing schedule on issues of law.

Ultimately, the trial court denied the Foxes motion to affirm the writ of mandamus as a matter of law, at the issues of law hearing on December 16, 2014, and stated that there was no need for trial and for the parties to

present an order. (CP 582). On January 15, 2015 Ecology issued a letter interpreting WAC 173-503 (2001) in response to a formal Administrative Procedures Act petition by a third party (CP 95-164), and expressing certain commitments to resolve mitigation problems for exempt wells in the Skagit River Basin (CP 491-497). On January 28, 2015, the trial court ruled the Foxes failed to show an adequate supply of ground water, and failed to show their water use would not reduce the flows of the Skagit River, and dismissed the writ of mandamus action. (CP 582)(minute entry from December 16, 2014);(CP 629-632))(Order of dismissal January 28, 2015).

The Foxes sought reconsideration based upon the January 15, 2015 Ecology letter. The court denied the motion. (CP 640). The Foxes appeal both decisions. (CP 600-607).

IV. ARGUMENT

A. THE STANDARD OF REVIEW DISMISSING THE MANDAMUS ACTION IS *DE NOVO* AND STATUTORY CONSTRUCTION IS REVIEWED *DE NOVO*.

The interpretation and requirements of RCW 19.27.097 and RCW 90.44.050 and other statues is a question of law reviewed *de novo*. *Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 6, 43 P.3d 4 (2002).

The superior court rules apply to mandamus proceedings. *Chief Seattle Properties, Inc. v. Kitsap County*, 86 Wash. 2d 7, 28, 541 P.2d 699,

712 (1975)("We find no inconsistency between CR 81(a) and mandamus proceedings and therefore hold CR 81(a) applies."). A decision on mandamus has different standards of review, depending upon the element at issue. *See, Eugster v. City of Spokane,* 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *review denied,* 151 Wn.2d 1027, 94 P.3d 959 (2004) (review of remedy element is for abuse of discretion and whether a statute imposes a duty to act is reviewed *de novo*); *River Park Square, LLC v. Miggins,* 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

Here, Fox brought a motion to affirm the alternative writ in the matter on questions of law, similar to a summary judgment motion. The trial court denied the motion, and dismissed the case. Accordingly, for purposes of review, the motion would be treated as a motion for summary judgment, as matters outside the pleadings were considered. CR 12(c). Review on appeal therefore is de novo, with all facts of Fox as true and reasonable inferences in favor of Fox as if summary judgment were granted against him. *See, Clements v. Travelers Indem. Co.,* 121 Wn.2d 243, 249 (1993)(appellate court engages in the same inquiry as the trial court, applies the standards in CR 56(c)).

B. ARGUMENT ON ISSUES RELATED TO ASSIGNMENT OF ERROR

1. A Writ of Mandamus to issue a building permit appropriate is appropriate relief when the requirements of Skagit County Code and RCW 19.27.097 are met. (Assignment of Error No. 1)

It is error for a writ to not issue where "(1) [T]he party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no 'plain, speedy and adequate remedy in the ordinary course of law,' RCW 7.16.170; and (3) the applicant is 'beneficially interested.'" *Eugster v. City of Spokane,* 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *review denied,* 151 Wn.2d 1027, 94 P.3d 959 (2004); *See also*, *Putnam v. Carroll,* 13 Wn. App. 201 (1979). In a mandamus action "*the remedy issue turns on whether the duty the plaintiff seeks to enforce 'cannot be directly enforced*' by any means other than mandamus'" *Eugster,* 118 Wn. App. at 414 (quoting *Bd. of Liquidation v. McComb,* 92 U.S. 531, 536, 23 L.Ed. 531, 2 Otto 531 (1875))(emphasis added). Here, the duty is the issuance of a building permit.

RCW 7.16.360 provides: "This chapter does not apply to state agency action reviewable under chapter 34.05 RCW or to land use decisions of local jurisdictions reviewable under chapter 36.70C RCW." The Foxes are not seeking mandamus relief against Ecology, though Ecology has

intervened in the matter. And LUPA, by its terms expressly does not replace writ of mandamus compelling a land use determination (administrative remedy) that has otherwise not been made or denied ((here, the issuance of a building permit) RCW 36.70C.030(1)(b). Inaction is not reviewable under LUPA because it is not a "land use decision." *See, Id.*

A court may issue a writ of mandamus to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. RCW 7.16.200. All parties agreed the ultimate issue below was whether the Foxes have a complete building permit application. It is well settled under the laws of this state and the uniform building code, that when a building permit application is complete, a building permit must issue and this is a ministerial decision. *See, Putnam v. Carroll,* 13 Wn. App. 201 (1979) (holding the trial court erred in not issuing the writ of mandamus if and where the building permit applicant qualified for an exemption from a shoreline permit)*; See also, State ex rel. Klappsa v. City of Enumclaw*, 73 Wn.2d 451, 454, 439 P.2d 246, 248 (1968); *State ex rel Craven v. Tacoma,* 63 Wn.2d 23, 385 P.2d 372 (1963); *Hull v. Hunt*, 53 Wn.2d 125 (1958)(mandamus appropriate to protect due process rights in context of building and vesting to land use codes); *Allenbach v. City of Tukwila,* 101 Wn.2d 193, 200, 676 P.2d 473 (1984).

There is no dispute Petitioner does not have any further administrative remedies before the County. (CP233-234)(Answer ¶ 3.13, 3.15). Ecology in its letter to the County also admits Petitioner is not required to apply for permit application to Ecology. ("Even though Mr. Fox is not required to file a permit application with Ecology...")(CP 240)(Answer Ex. A, p. June 17, 2014 letter to County). Accordingly, because the remedy element is to focus is on the duty sought to be enforced (issuing a building permit), coupled with these admissions, there is no genuine dispute that Mr. Fox has no plain speedy adequate remedy at law to have Skagit County issue him a building permit.

Nonetheless, the trial court ruled that Mr. Fox did not meet the requirements of RCW 19.27.097 adequate water provision, because of WAC 173-503 (2001), and dismissed the action.

A writ of mandamus is appropriate relief here because the sole overarching issue is whether a building permit application is complete under Skagit County Code 12.48 et seq and RCW 19.27.097. As discussed below, the County has no discretion with respect to the legal availability of water portion of "adequate water" in RCW 19.27.097 where an applicant demonstrates evidence that a water permit is not required under RCW 90.44.050. While other portions of RCW 19.27.097 water adequacy

requirements could be subject to discretion (i.e. potability issues) or whether a use actually utilizes less than 5000 gallons per day and the applicant is the intended user (these facts are not in controversy here), there is no discretion in the County with respect to legal availability when the building permit applicant otherwise qualifies for an exemption. *See, Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 6, 16 (2002) (RCW 90.44.050 plainly exempts a qualified user from governmental inquiry into (1) whether water is available (2) whether a use is beneficial (3) whether a use will impair existing rights, and (4) whether the use will be detrimental to the public welfare). *Cf. Rettkowski v. Ecology,* 122 Wn.2d 219, 230, 858 P.2d 232 (1993). Ecology has no jurisdiction to allocate water resources on the basis of its own determination of priorities – RCW 90.03.110 is the sole procedure – and so it was inappropriate for Ecology to issue administrative orders curtailing groundwater users who were impacting surface waters). Mandamus is appropriate relief. In any event, lesser relief than that requested in an alternative writ is available in a mandamus action if appropriate. *Klappsa v. Enumclaw,* 73 Wn.2d 451, 454, 439 P.2d 246 (1968). The trial court erred in dismissing the action.

The trial court erred in interpreting the statutory provisions of RCW 19.27.097 and RCW 90.44.050 as invoking the Instream Flow Rule to

render the Foxes building permit application incomplete, and erred in going one step further in interpreting and applying the language of WAC 173-503 to find that the Foxes do not have "adequate" water to satisfy RCW 19.27.097. (CP 629-632).

2. The Requirements of Adequate Water In RCW 19.27.097 and Skagit County Code Are Met Because the Foxes, As Applicant For A Building Permit, Has Provided Evidence Of A Use That Qualifies As Exempt Under RCW 90.44.050. (Assignment of Error No. 1 and No.2)

a. Qualification to be exempt from permitting under RCW 90.44.050 is a legal availability of water under RCW 19.27.097 – without more.

RCW 19.27.097 requires each building permit applicant to provide "evidence of an adequate water supply for the intended use of the building" and is to be implemented by local code. RCW 19.27.095(2).

RCW 19.27.097 provides:

> (1) Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. *** An application for a water right shall not be sufficient proof of an adequate water supply.

RCW 19.27.095(2) indicates that the requirements of a complete building permit application "shall be defined by local ordinance." RCW 19.27.097(3) further provides Ecology may pass administrative rules to implement RCW 19.27.097, but only after and in consultation with the local government and Counties. Ecology has not passed any rules to implement RCW 19.27.097. It is appropriate to first examine Skagit County Code. RCW 19.27.095(2). Fox meets the requirements of the local Skagit County ordinance, so a building permit must issue.

1. Skagit County Code recognizes that qualification for an exemption under RCW 90.44.050 is legal availability of water implementing RCW 19.27.097.

Skagit County code 12.48 et seq (**Appendix A**) discusses what the permit application must include to meet the adequate supply of water, and local code is satisfied when a permit is not required under RCW 90.44.050. Local code defines "adequate water supply" as "a water supply which is capable of supplying at least three hundred fifty (350) gallons of water per day, meets the siting criteria established by State and local regulations, and meets water quality standards in SCC 12.48.110. SCC 12.48.030. Accordingly, there is no basis in Skagit County code for the "incomplete" letter provided to the Foxes. The only permissible inquiry under Skagit

County Code is whether or not the Foxes qualify for an exemption i.e. "if a permit is required" or not. SCC 12.48.100(2).

2. An adequate supply of water under RCW 19.27.097 has been interpreted to include a legal availability of water under *Kittitas County v. EWGMHB,* which is also merely a determination of whether someone qualifies for the RCW 90.44.050 exemption.

Ordinances are to be interpreted consistent with state law. *Eugster v. City of Spokane,* 118 Wn. App. 383, 406 (2003), and RCW 90.44.050 exempts certain uses from inquiries into additional legal availability determinations conducted by Ecology in the permit process. *Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 6, 43 P.3d 4 (2002). The term "adequate" in reference to the water supply in RCW 19.27.097 has been interpreted by *Kittitas County v. EWGMHB,* 172 Wn.2d 144, 178-180 (2011) to mean evidence of both factual and legal availability of water is required, though in *Kittitas* the issue was the subdivision statute not RCW 19.27.097 per se. *Kittitas County v. EWGMHB,* 172 Wn.2d 144, 178-180, 179 (2011)("[RCW 19.27.097 and RCW 58.17.110] require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications."); *Accord,* 1992 AGO No. 17 ("potable" is just one element of the term "adequate" in RCW 19.27.097(1) the other being physical quantity). *Compare,* RCW 58.17.110 (using term

"potable" with respect to water), and RCW 19.27.097 using the term "adequate" water). The Supreme Court required the Kittitas County planning to have a code in place so that the County could administratively determine whether someone and their project truly qualified for an exemption under RCW 90.44.050. *Id* at 179 ("[T]he County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning."). This was so there would not be an improper "overuse" of the exemption from permitting, through daisy-chaining subdivision applications, to "evade permitting laws," but rather an inquiry into qualification of the applicant for RCW 90.44.050 was required to meet the "adequate potable water" requirement of RCW 19.27.097/RCW 58.17.110. *Id.* at 180 (recognizing that "**overuse** of the well permit exemption" could affect existing rights and resources and therefore the County was required to have code in place to ensure applicants actually qualified for an RCW 90.44.050 exemption)(emphasis added). So, as interpreted in *Kittitas,* the legal availability of water test of "adequate" water is whether someone (an applicant for a land use permit) properly qualifies for an RCW 90.44.050 exemption from water permitting. *Id.* at 180.

To interpret that the legal availability portion of "adequate" water in RCW 19.27.097 requires an "approved mitigation proposal" for a permit

exempt well would defeat the exemption from the four part inquiry in RCW 90.44.050, because pre-approval from Ecology would be required. This is simply a permit by another name, RCW 34.05.010(9)(a)(an "approval" and a "permit" are both a "license"), which is not required by RCW 90.44.050.

Kittitas does not require the County to inquire into the four part test of a water right permit. To interpret the legal availability portion of "adequate" water in RCW 19.27.097 to include a determination by the County of priority of water rights (i.e. the Foxes right versus the Instream Flow Rule), would be inconsistent with RCW 34.05.010(9) and with the general stream adjudication procedures which the legislature has vested solely in the superior courts, initiated by Ecology, to afford proper due process. *See, Rettkowski v. Department of Ecology,* 122 Wn.2d 219, 228-230, 858 P.2d 232 (1993) ("A general adjudication, pursuant to RCW 90.03, is a process whereby all those claiming the right to use waters of a river or stream are joined in a single action to determine water rights and priorities between claimants."); *See also, Mack v. Eldorado Water Dist.,* 56 Wn.2d 584, 587 (1960).

Unlike in *Kittitas,* no one here has asserted that Skagit County's code SCC 12.48 is insufficient or allows a person to "evade the permitting

laws" to "overuse the permit exemption." SCC 12.48 is sufficient and is consistent with RCW 90.44.050 as applied to the Foxes.

b. RCW 90.44.050 exempts certain withdrawals of groundwater from originating in the water code and so it is also proper that qualifying for RCW 90.44.050 exemption is appropriate to satisfy the legal availability requirements of RCW 19.27.097.

It is proper to interpret RCW 19.27.097 and RCW 90.44.050 together. The groundwater code was enacted in 1945, and the definition of groundwater in RCW 90.44.035 was amended in 1973 to include percolating ground waters.

The right to certain domestic water, particularly for human needs, has been carefully recognized and placed in a special place in Washington's history, and in deed throughout the United States. *See, Hunter Land Co. v. Laugenour,* 140 Wash. 558, 565 (1926). As stated in *Hunter Land Co.,* quoting Gould on Waters:

> "Each riparian proprietor has a right to the ordinary use of water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for the domestic purposes of his home or farm, such as drinking, washing, cooking, and for his stock. For these natural uses, by the weight of authority, he may, if necessary, consume all the water of the stream. This right is his only, and is strictly confined to riparian land" *** "The term 'domestic purposes' extends to the culinary and household purposes, to the watering of a garden, and to the

> cleaning, washing, feeding and supplying the ordinary quantity of cattle."). *Id* at 575.

It is not a mere fortuity that the exemptions in RCW 90.44.050, in the wisdom of the legislature, track and are largely consistent with the domestic purposes articulated in *Hunter Land Co. v. Laugenour,* 140 Wn. 558, 575.

To originate a water right under the code, in order to help prevent conflicts in use, an application must meet the four part test of RCW 90.03.290, unless the applicant qualifies for exemption under RCW 90.44.050. RCW 90.44.050.

In the origination of water rights, RCW 90.44.050 has always provided certain exemptions from the permitting procedure particularly for domestic human supply. *See, Ecology v. Abbot,* 103 Wn.2d 686, 694 P.2d 1071 (1985)(recognizing exemptions in groundwater code distinguished it from the surface water code in holding that the surface water code did away with common law riparian rights where the ground water instead had certain exemptions). The court decisions have been very protective of the legislative balance struck in RCW 90.44.050, and have rejected both developers' interpretations attempting to expand the narrowly circumscribed criteria, *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002), and Ecology and PCHB interpretations trying to

narrow and do away with the exemptions. *Kim v. Pollution Control Hearings Board,* 115 Wn. App. 157, fn.6, 61 P.3d 1211 (2003)(recognizing RCW 90.44.050 has withstood many legislative proposal to change it, the PCHB's position that "the policy context for interpreting the 1945 statute must be illuminated by our current scientific understanding of ground and surface water continuity, the federal mandates to protect endangered salmon, and the increasing demand for water to serve our growing populations and economy.").

The exemption from needing a permit for domestic use provides:

> That any withdrawal of public groundwaters ... for single or group domestic uses in an amount not exceeding five thousand gallons a day, is and shall be exempt from [permitting inquiries and other limitations] of this section..."

RCW 90.44.050. *See, Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 16, 43 P.3d 4, (2002).

Appropriate to 1945 water code, Black's Law Dictionary (4th Ed.) (1951) provides:

> "Words of exemption: It is a maxim of law that words of exemption are not to be construed to import any liability; the maxim *expression unius exclusion alterius,* or its converse, *exclusion unius inclusion alterius,* not applying to such a case. For example, an exemption from the crown from the

> bankruptcy act of 1869, in one specified particular, would not inferentially subject the crown to the act in any other particular.[1] Brown." (**Appendix B**).

The words of exemption, applicable only to carefully circumscribed qualified uses, create exemption from the most fundamental requirements (specified particulars) of the Water Code to originate or establish statutory water rights, and so must be interpreted to mean the particular carefully circumscribed rights in question exist and originate outside of the statute, including that they are not liable to the four part inquiry in their origination (specified particulars). *See, Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 6, 16 (2002). The Supreme Court held and reasoned that a person and use qualifying for the exemption is excused from governmental inquiry of RCW 90.03.290 into whether (1) that water is available (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare. *Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 6, 16 (2002)(indicating the four part test applies to groundwater appropriations, except exempt persons and uses, as the legislature "struck the balance.").

---

[1] Coincidently, the bankruptcy code has been analogized to the general stream adjudication procedure which is the only means of determining priorities of water rights under RCW 90.03. *Rettkowski v. Ecology,* 122 Wn.2d 219, 230-31 (1993).

In *Abbot,* a claimant for water claimed that he had natural rights to domestic waters from the surface water that were riparian and superior to appropriative waters. The trial court agreed, holding that the water code regarding appropriation applied only to waters in excess of those needed to satisfy the natural needs (as opposed to extraordinary needs) of a riparian. The Supreme Court reversed reasoning the surface water code did not have any exemptions allowing for a domestic use exemption. *Id* at 693.

In *Abbot* the Supreme Court, in interpreting whether the surface water code removed all *surface* water riparian rights ruled:

> "The trial judge in this case, despite the shift away from the primacy of riparian rights by the courts and Legislature, concluded that the appropriative permit system embodied in the 1917 water code applied only to *surplus* waters in excess of those required for "ordinary" or "natural" domestic uses by riparians. He also interpreted the forfeiture provisions of the water rights act as applying only to public uses enumerated in article 1, § 16 of the state constitution. Although we need not decide questions concerning that here, even partial adoption of the trial court **opinion would effectively create a domestic use exemption from the permit system and state management of water resources. The Legislature did expressly create a domestic exemption in the groundwater code, RCW 90.44.050, but it has never seen fit to create such an exemption for surface water.**" (Emphasis added)

Ecology v. Abbot, 103 Wn.2d 686, 693, 694 P.2d 1071, 1075 (1985). Accordingly, the groundwater code exemptions, even in 1985, reflect a domestic riparian groundwater right.

It is the longstanding natural and statutory law of Washington that RCW 90.44.050 says a human domestic user of ground water may establish and use an amount of water that is less than 5000 gallons per day for natural domestic purposes, and if so such right does not require any permit or pre-approval from Ecology, nor anyone else for that matter. RCW 90.44.050. The statute also says such a right "is and shall be exempt from the provisions of this section." RCW 90.44.050. The "is and shall be" language suggests both existing rights (correlative or reasonable use groundwater rights) and future rights (purely appropriative rights). Further, Black's Law (4th Ed) makes it clear that the exemption excuses such rights from *liability* – in a Hofeldian sense. And so, common law groundwater rights that are today within RCW 90.44.050, are excused from liability certain liabilities– though they may enjoy the same protections/rights as an appropriative right once used. RCW 90.44.050. *See, Meyer v. Tacoma Light & Water Co.*, 8 Wn. 144, 35 P.601 (1894).

That is, an overlying landowner with unexercised riparian groundwater domestic uses couldn't be the "dog in a manger" so to speak,

with respect to other users, but if they wanted to put those rights in the groundwater to a beneficial purpose on the overlying land to make reasonable use of the land, they would be free from liability subject to sharing,[2] so long as no water right permit were required under RCW 90.44.050 (i.e. they met the carefully circumscribed criteria), and the rights were used on the land reasonably. *See, Evans v. City of Seattle,* 182 Wash. 450, 47 P.2d 984 (1935); *See also,* A. Dan Tarlock, Law of Water Rights and Resources, §4.8 (2014)("Groundwater use remains an incident of the land ownership under the reasonable use rule, but three restraints are imposed on its use: (1) the use must be reasonable, (2) the use must be for a beneficial purpose on the overlying land, and (3) use on non-overlying land is per se unreasonable")

RCW 90.44.050 indicates that a right to water exempt from permitting is protected like an appropriative right to the extent it is finally used beneficially (i.e. absolutely, not correlatively), but does not say that it must also only originate only through common law of appropriation.

---

[2] 3 Waters and Water Rights §21.01 21-3 – 21-4 (Beck ed. 1991 Ed. 2013 replacement volume) "Correlative Rights Today" ("Both correlative rights and the reasonable use rule require a sharing of the groundwater resources among those who have legitimate claims on them")

While the RCW 90.44.050 carefully circumscribes who and what type of use qualifies to be exempt, where a statute does not control the origination of the right, the common law does. RCW 4.04.010 (The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the State of Washington nor incompatible with the institutions and condition of society of this state, shall be the rule of decision in all courts of this state.)

At common law, origination and nature of water rights in groundwater are recognized as both riparian (i.e. correlative/reasonable use ground water rights as an incident of ownership of the land) *Evans v. City of Seattle,* 182 Wash. 450 (1935), *State Highway Commission v. Ponten,* 77 Wn.2d 463 (1969), and also appropriative (i.e. dependent upon use, not location of the land) like common law appropriative surface waters. *See, Sander v. Bull,* 76 Wash. 1, 4 (1913).

The surface water code removed all possibility of origination of water rights from to unused riparian rights to surface water, fifteen years after 1917 as a matter of due process and notice, but the groundwater code did not remove certain carefully circumscribed unused groundwater riparian rights because of the exemptions in RCW 90.44.050. *See, Ecology v. Abbot,* 103 Wn.2d 686, 694 P.2d 1071 (1985)(recognizing exemptions in

groundwater code allow for a common law right to water for natural purposes as an incident of ownership, as distinguished from the surface water code where there are no exemptions).

Recent case law does not alter this result, nor could it under *stare decisis.* While distinguishable on additional grounds discussed below in context of interpreting the provisions of WAC 173-503 (2001), *Swinomish v. Pollution Control Hearings Board* carefully limited its language to those rare instances when a person that qualifies for an exemption elects to submit and submits an "application[] for exempt well." *Swinomish v. Ecology,* 178 Wn.2d at 598 ("But exempt wells are provided for by statute and Ecology's **actions on applications for exempt wells** are clearly set out in the water code—without any provision permitting a "jump to the head of the line" in priority as a result of Ecology's reservations of water and use of the overriding considerations exception.")(emphasis added).

In dicta, the courts have suggested that some exempt rights are merely appropriative and subject to "first in time first in right" but those decisions have not discussed RCW 90.44.040, nor does it appear anyone in those actions asserted common law riparian groundwater rights or common law appropriative rights. *See, Squaxin Island Tribe v. Ecology,* 177 Wn. App. 734, 744 fn.3, fn.10, 312 P.3d 766 (2013)(Upholding Ecology's

decision to not conduct rulemaking to prohibit permit exempt wells that the Tribe contended impaired an instream flow, recognizing that Ecology's position was that a site specific study was required to determine whether there was impairment of a particular exempt well). *Compare with, Welch v. Ecology,* PCHB No. 98-108 et seq (May 4, 2000)(recognizing appropriative rights are "subject to" correlative rights in groundwater, rejecting Ecology's narrow interpretation of the word "established" in the context of accepting claims for filing in the registry).

By definition, a riparian right is not dependent upon use to exist, but arises as an incident of ownership of the earth. *State Highway Commission v. Ponten,* 77 Wn.2d 463 (1969). The groundwater code and rights born out of the code are subject to these rights. RCW 90.44.040. *See, Welch v. Ecology,* PCHB No. 98-108 et seq (May 4, 2000). At common law, a senior surface user was not protected from a user of percolating groundwater from a gravel deposit of varying depth across the stream valley that is, the groundwater use had no *liability* to the surface water. *Meyer v. Tacoma Light & Water Co.,* 8 Wn. 144, 35 P. 601 (1894).

The exemptions in RCW 90.44.050 and RCW 90.44.040 (applying groundwater code "subject to existing rights") reflect the existence of both used and unused groundwater riparian rights. *See, Welch v. Ecology,* PCHB

No. 98-108 et seq (May 4, 2000); *State Highway Commission v. Ponten,* 77 Wn.2d 463 (1969); *See also, Sporhase v. Nebraska,* 458 U.S. 941, 951 (1982)(rejecting the states' "public ownership" of water theory).

Such rights to the small quantities reflected in the exemptions in RCW 90.44.050 have been described as "entitlements" by the Pollution Control Hearings Board ("PCHB") not subject to basin closures and hydraulic connectivity. *Green v. Ecology,* PCHB 91-139, 91, 141, 91-149 (1992)(allowing exempt rights to proceed even in an adjudicated and "highly over-appropriated" basin); *See also, Schrum v. Ecology,* PCHB 96-36 (1996)(well was in hydraulic connectivity with closed basin, so applicant limited to exempt amount of water and Ecology could not deny a permit application for less than 5000 gallons for domestic purposes). The PCHB decisions can be persuasive authority on this court, but are binding on Ecology actions. *Postema v. PCHB,* 142 Wn.2d 68, 121 (2000)("Ecology has no adjudicative authority, because the Legislature passed that authority to the Pollutions Control Hearings Board.")(citing RCW 43.21B.240; .010; .110; .230).

Accordingly, if an applicant for a building permit demonstrates they and their use qualify for an exemption under RCW 90.44.050, it is a legal availability of water, and here RCW 19.27.097 is satisfied to the extent legal

availability must be shown. Nothing in Skagit County code requires a showing of what the County asked for in its incomplete letter. SCC 12.48 et seq. The Foxes have met the requirements here of RCW 19.27.097. They demonstrated a water claim from June 18, 1974, the plat from 2000 showing the well, and that the use is for human domestic purposes in an amount of approximately 400 gallons per day, and that the quality was sufficient. The priority of a water claim may only be determined in a formal adjudication initiated by Ecology but determined by a superior court. *Rettkowski,* 122 Wn.2d at 229-230. The writ of mandamus action was not an adjudication. *Id.* It was error to not issue the writ, irrespective of WAC 173-503 (2001).

3. **In the alternative, does WAC 173-503 (2001) otherwise alter the requirements of RCW 19.27.097 and RCW 90.44.050 or otherwise prohibit Mr. Fox's building permit application from being complete where Mr. Fox presented evidence the Foxes and their use qualified to be exempt from permitting, and presented evidence of a common law correlative groundwater right and/or a common law appropriative right not subject to or otherwise senior to the Instream Flow Rule? (Assignment of Error No. 3 and No. 5).**

The 2001 Instream Flow Rule is a minimum flow established under the authority of RCW 90.22 and RCW 90.54. WAC 173-503-010 (2001).[3] The 2001 Instream Flow Rule was passed in accordance with RCW

[3] "Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-010, filed 3/14/01, effective 4/14/01." Available at: http://app.leg.wa.gov/WAC/default.aspx?cite=173-503&full=true

90.22.010 as a "minimum flow." *See, Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013). The purposes of RCW 90.22.010 through .030 are to pass minimum flows that protect *all* beneficial uses, including human domestic needs. *See, Id* at 604 (*dissenting opinion*)(discussing the purposes of minimum flow rules)(citing Legis. Water Resources Comm., Final Report of Findings to 42d Legislature Pursuant to Provisions of Substitute H. Con. Res. 15, cmt. at 6 (Jan.1971) (on file with Wash. State Archives))."

During the pendency of this matter before the trial court, in *Whatcom County v. Western Wash. Growth Mgmt. Hr'gs Bd.,* 186 Wn. App. 32 (Feb. 23, 2015), this court indicated in dicta that WAC 173-503 (2001) applied to uses that do not require a permit under RCW 90.44.050. *Id* at 60. The issue of whether WAC 173-503 applied or not to exempt wells was not in controversy in the matter, but was used as an illustration by Ecology in distinguishing the language of the Whatcom Instream Flow Rule. *Id.* The court in *Whatcom County* appropriately distinguished *Postema* as not controlling over an instream flow rule's application to RCW 90.44.050, and also appropriately ruled that an instream flow rule, as a water right, does not per se prohibit domestic exempt wells under even prior appropriation principles. *Id* at 62.

Nor was the issue of a single domestic exemption in RCW 90.44.050 in controversy in *Swinomish v. Ecology,* 178 Wn.2d 571, 577, 311 P.3d 6 (2013) where no party in controversy plainly qualified for and did not need a water right permit- and all parties assumed WAC 173-503 (2001) applied to exempt wells. Rather, the Supreme Court in *Swinomish* was careful in its discussion of RCW 90.44.050 and exempt wells in not casting the narrow shadow of its core holding too broadly, and only discussed those rare circumstances when someone submits an "application for exempt well." *Swinomish v. Ecology,* 178 Wn.2d at 598. The Supreme Court referred to exempt wells in the context of a person applying for a permit, because of RCW 90.03.247 (protecting minimum flows only from uses requiring a permit).

This Court must examine the language of WAC 173-503 (2001) to see if in fairness to Fox, consistent with the water code, and consistent with the common law of Washington, does the rule in fact apply to prohibit Mr. Fox's building permit from being complete. The trial court failed to do so, and erred in weighing priorities of water rights.

a. WAC 173-503 (2001) et seq does not apply to prohibit a qualified user to use an exempt well because this is consistent with the plain meaning of the rule interpreted in the context of the state law under which it was promulgated.

The Supreme Court ruled, just prior to the passage of the 2001 instream flow rule that: "we reject the premise that the fact that a stream has unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals." *Postema v. PCHB,* 142 Wn.2d 68, 93 (2000). The rule must be interpreted consistent with this principle of no impairment *per se*.

WAC 173-503-040(5) states that "Future consumptive water right **permits** issued hereafter for diversion of surface water ..., and withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be **expressly** subject to the instream flows ... as measured at the appropriate gage, and **also subject to WAC 173-503-060**." (emphasis added).

WAC 173-503-060 provides, in turn: "If the department determines that there is a hydraulic continuity between surface water and the proposed groundwater source, **a water right permit or certificate** shall not be issued unless the department determines the withdrawal of ground water from the

source aquifer would not interfere with stream flows during the period of stream closure or with maintenance of minimum instream flows."

This plain language shows WAC 173-503 applies only to water rights requiring a permit. *But see, Whatcom County v. Western Wash. Growth Mgmt. Hr'gs Bd.,* 186 Wn. App. 32 (Feb. 23, 2015)(in dicta, suggesting otherwise without analyzing all the language and statutory scheme).

Regulations must be consistent with the statutes under which they are promulgated and should be read consistently therewith. *Postema v. PCHB,* 142 Wn.2d 68, 83 (citing *Winans v. W.A.S., Inc.* 112 Wn.2d 529, 540, 772 P.2d 1001 (1989)). Arguments which overlook the relevant statutory scheme are to be rejected. *Postema,* 142 Wn.2d at 84. And "[a]dministrative rules or regulations cannot amend or change legislative enactments.' " *Ecology v. Campbell & Gwinn*, LLC, 146 Wn.2d 1, 19, 43 P.3d 4 (2002) (quoting *Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998)).

RCW 90.54.020(5) provides: "**Adequate** and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." WAC 173-503 (2001), being passed subject to RCW 90.54, must be read consistent with this mandate and it is appropriate to

presumed that WAC 173-503 (2001) is consistent with ensuring there is an adequate and safe supply of water for human *domestic* needs, including Mr. Fox's needs. As stated many times, the use of the word "potable" is just one element of "adequate." The term "adequate" includes *legal availability* of water. *Kittitas County v. EWGMHB,* 172 Wn.2d 144, 180 (2011).

RCW 90.54.010(1)(a) likewise provides: "**Adequate** water supplies are essential to meet the needs of the state's growing population and economy. **At the same time** instream resources and values must be preserved and protected so that future generations can continue to enjoy them." (emphasis added).

The 2001 Instream Flow Rule is a minimum flow established under the authority of RCW 90.22 and RCW 90.54. WAC 173-503-010 (2001).

Such an instream flow is merely an appropriative water right with a priority date as of the effective date of the rule and subject to all statutory limitations. *Postema v. PCHB,* 142 Wn.2d 68, 81 (2000). Subject to the limitations of the code under which it was enacted, the water right had to meet the four part test of a water right and is likewise "subject to" existing rights and is a water right itself that may not be impaired (without being repealed) by subsequent withdrawals to which the rule applies. *See, Id.* (citing RCW 90.03.345; 90.44.030); RCW 90.03.247; *Ecology v. Campbell*

& Gwinn, LLC, 146 Wn.2d 1, 6 (2002)(four part test includes availability of water); *See also,* RCW 90.03.240 (requirement that if there is not enough water available for the required purposes, the appropriator must condemn senior users).

RCW 90.03.247 provides the protection of instream flows from future junior appropriative water rights obtained with a **permit**, and by its terms, all other statutes must be read consistent with it. RCW 90.03.247 provides:

> "Whenever an application for a **permit** ...is approved relating to a stream ... for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the levels or flows. *** The provisions of other statutes, including but not limited to RCW 77.55.100 and chapter 43.21C RCW, may not be interpreted in a manner that is inconsistent with this section."

RCW 90.03.247 cannot be held to apply to prevent a use that does not require a permit under RCW 90.44.050.

Accordingly, RCW 90.03.247/RCW 90.22.010 Instream Flows cannot be held to apply to prevent a use that does not require an application for a permit under RCW 90.44.050, and such instream flow rules are not so generally held or interpreted. *Whatcom County v. Western Wash. Growth Mgmt. Hr'gs Bd.,* 186 Wn. App. 32 (Feb. 23, 2015); *Accord, Squaxin Island*

Tribe v. Ecology, 177 Wn. App. 734, 744 fn.10, 312 P.3d 766 (2013)(Ecology did not interpret the instream flow rule to prohibit exempt wells that were otherwise causing reduction in surface flows).

WAC 173-503(2001) simply does not prohibit Mr. Fox from receiving a building permit where he unambiguously qualifies for an exemption from permitting under RCW 90.44.050.

b. WAC 173-503 (2001) et seq does not apply to prohibit a qualified user to use an exempt well because such an interpretation is consistent with the rulemaking file that shows the rule did apply to exempt wells during a prior version, and then that language was removed and no information was available on the impacts of exempt wells on flows during the public process.

The Instream Flow Rule does not expressly apply to exempt well use and this interpretation is supported by the documents in the rule making file, which are provided from the State Archives as shown in the Declaration of Bill Clarke in the record. (CP 292-314).

WAC 173-503 (2001) has a storied history, resulting initially from a storied Memorandum of Agreement (MOA) as shown in the rule making file. (CP 310);(See Decl. of Bill Clarke re: Documents, Ex. C). The MOA was the subject of *Swinomish v. Skagit County. Swinomish v. Skagit County,* 138 Wn. App. 771 (2007) (requiring the Swinomish Tribe to challenge

individual land use decisions related to these very water law questions). Whether effective or not, Skagit County (the Tribe and Ecology) had negotiated and agreed that all exempt wells, like the Foxes' (CP 0001) particularly above the PUD pipeline would not be subject to the Instream Flow Rule under the MOA. (CP 0009); (CP 0099).

This history and rulemaking file indicate that Ecology contemplated having the rule might possibly govern exempt wells, albeit in a limited fashion (see proposed WAC 173-503-090(2) in Ex. B to the Decl. of Bill Clarke);(CP 303-308).. When asked in public comment regarding exempt wells, the rulemaking file indicates Ecology's response was that no science or "information that would relate to this [issue] available for the environmental documents or public hearings." (CP 312); (Decl. of Bill Clarke, Ex. D p.24 comment 4). Further, the rule making file on the subject of groundwater indicates "Dan" wanted to have it apply to and exclude exempt wells, but the comment was "there does not seem to be a clear justification." (CP 314); (Decl. of Bill Clarke, Ex. E).

The rule was appropriately and ultimately silent on express applicability to exempt wells where there was no information in the public record or hearings showing "solid proof that an exempt well or group of exempt wells would have a negative impact on instream flow" (Decl. Bill

Clarke, Ex. D); (CP 312). An agency would otherwise be acting arbitrarily and capriciously passing rules where no information was in the record to support regulation. Hydraulic connection is not enough. Exhibit E also provides a conceptualization of water available under the rule. (CP 314). No information has been provided by Ecology indicating the fate of the water available in the "cushion" under WAC 173-503 (CP 314) – instead, they passed unlawful amendments to the rule in 2006. The interpretation that WAC 173-503 (2001) somehow applies to prevent exempt wells is simply not supported by the plain text of the rule, the statutes under which it was passed, and also the rulemaking history.

c. The WAC 173-503 (2001) Instream Flow Rule, being an appropriative right borne only in the Code, is "subject to" and does not apply to existing rights, which include common law ground water rights and common law inchoate appropriative rights – both of which Mr. Fox relies upon but he is not required to adjudicate these and/or such are otherwise un-rebuttable questions of fact.

This action is not a general adjudication and the action does not necessarily need to determine the priority of rights to meet the requirements of RCW 19.27.097 and have a building permit issue.

WAC 173-503-070 provides: "(1) Nothing in this chapter shall affect existing water rights, including perfected riparian rights, federal

Indian and non-Indian reserved rights, or other appropriative rights existing on the effective date of this chapter." The language should be interpreted consistent with state water law RCW 90.44.040.

1. Common law groundwater riparian rights

As discussed above, Washington is a dual state – recognizing both appropriative rights and common law rights in ground water. *State v. Ponten,* 77 Wn.2d 463, 463 P.2d 150 (1969)("[The reasonable user doctrine] not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted")(citations omitted). Accordingly, during claims registration at various times the legislature has opened such up to registration, persons with riparian groundwater rights could register their claims:

> "The Ground Water Code states that it was adopted subject to existing rights. RCW 90.44.040. Among such existing rights may be correlative rights in ground water. Correlative rights arise as an indicia of real property ownership. *State v. Ponten*, 77 Wn.2d 463, 463 P.2d 150 (1969). The correlative right is akin to a riparian right applied to ground water. A. Tarlock, Law of

> Water Rights and Resources, § 4.06(3), at 4-18, n. 16 (1989)."

Welch v. Ecology, PCHB No. 98-108 et seq (May 4, 2000)

In *Welch,* Ecology argued that it could reject claims to riparian groundwater that had not been put to beneficial use as of the date of passage of the groundwater code under RCW 90.44.040. The PCHB rejected Ecology's narrow interpretation of "existing rights." Integrating these rights with the appropriation scheme, Ecology's narrow interpretation of "existing" common law riparian groundwater rights, i.e. the theory that such riparian rights must be exercised and put to beneficial use, to be recognized and protected, has been rejected by the PCHB. *Welch v. Ecology,* PCHB No. 98-108 et seq (May 4, 2000)(recognizing appropriative rights are "subject to" correlative rights in groundwater, rejecting Ecology's narrow interpretation of the word "established" in the context of established rights)(citing *State v. Ponten,* 77 Wn.2d 463, 463 P.2d 150 (1969)).

The 2001 instream flow rule WAC 173-503 is "subject to" those irreducible common law correlative water rights necessary for the reasonable development of the property for domestic purposes. WAC 173-503-070; RCW 90.03.010("Subject to existing rights..."); RCW 90.44.040("Subject to existing rights..."). This common law irreducible minimum is consistent with statutory code that places high and mandatory

priority on protection of domestic household use by Ecology. RCW 90.54.020(5). The Foxes have a claim registered on June 18, 1974 which includes domestic uses. (CP 681). Here, particularly on the West side of the state, as a matter of law it is an amount sufficient to support a single domestic residential house (at a minimum 350-400 gallons per day). Reasonable minds could not differ. The trial court should be reversed.

2. Common law appropriative rights.

Under the common law of appropriation, a person gains rights in ground water through an overt act or notice to the world of an intent to appropriate, and the person is reasonably diligent thereafter in applying the water to beneficial use. *See* 6 Washington Real Property Deskbook 11.3(b); *Sander v. Bull,* 76 Wash. 1, 4 (1913); *In re Water Rights of Crab Creek & Moses Lake,* 134 Wash. 7, 12, 15 (1925). The full appropriative common law right is determined only in an adjudication which includes a priority date, a place of use, a type of use, and an instantaneous quantity and an annual consumptive quantity. *See, In re Alpowa Creek,* 129 Wash. 9, 224 P. 29 (1924). The priority of a water claim may only be determined in a formal adjudication initiated by Ecology but determined by a superior court. *Rettkowski,* 122 Wn.2d at 229-230.

A leading treatise on water law provides that the common law of appropriation applies to certain exempt uses, including the relation back doctrine:

> "For most water uses today, the user must have a permit. *** Historically, before the permit process came into existence, **and presumably for those uses today that are exempt from the permit process**, the priority date depended on when the "first step" to appropriate water was taken; then, if the succeeding steps were completed with "due diligence," the priority date related back to the date of the first step. *** In general, the first step had to occur on the ground to give evidence of the *bona fide* intent to appropriate. Because this first step required some initial investment of time and money by the claimant, it gave evidence of *bona fide* intent and therefore was justification for protecting the claim."

2 Waters and Water Rights §12.02 (Amy K. Kelly ed., 3rd ed. LexisNexis/MatthewBender 2015).

Whether an overt act qualifies as a valid first step is an issue examined recently in Colorado, and Ecology even cites to Colorado decisions for common law appropriation principles (CP 237-246).

The priority date of an appropriative right originating under the common law follows the test discussed in *City of Thorton v. City of Fort Collins,* 830 P.2d 915, 925-927 (1992) and the first step includes an intent

prong and an overt act prong which require bona fide investment to further purposes of predictability and certainty. **(Appendix C)**.

Accordingly, where the Foxes (1) manifested the intent to appropriate water to beneficial use, *Id*; (2) took a substantial step toward the application of the water to beneficial use *Id*; (3) acts constituted due notice to interested parties of the nature and extent of the proposed demand upon the water supply *Id*; and (4) were and have been reasonably diligent thereafter in their plans to put the water to beneficial use, *In re Alpowa Creek,* 129 Wash. 9, 224 P. 29 (1924), they would have an appropriative right senior to the 2001 Instream Flow Rule under the prior appropriation doctrine and western water law principles. *See, Id; City of Thorton,* at 927. Some physical act is required, but it need not be physical diversion, but planning and other formal acts qualify. *City of Thorton,* at 927.

These are generally mixed questions of law and fact, the resolution of which must be made by *a court* on the particular facts of the case. *City of Thorton v. City of Fort Collins,* 830 P.2d at 927 (1992). In Washington, after a land use determination is made with respect to water rights, it appears a senior user would no longer have standing to challenge on water availability grounds. *JZ Knight v. City of Yelm,* 173 Wn.2d 325 (2011)(senior water rights holder has standing under LUPA). A priority

date consistent with such official planning acts and determinations, which require non speculative investment and intention, like an approval and recording of a short plat, is consistent with the basis and reason for appropriative rights – certainty and predictability. *Compare,* RCW 58.17.110 (inquiry and public interest determinations, including adequate water determination) *with* RCW 90.03.290 (4 part test for a permit). While distinctly and analytically different, the process is sufficiently related, in the interest of predictability and certainty, to not allow a redetermination or collateral attack thereon. The world has notice of an intent to use water at the subdivision stage, which requires non speculative investment and intent. RCW 58.17.110; RCW 58.17.070 (short plat); *JZ Knight v. City of Yelm,* 173 Wn.2d 325 (2011); *Cf. Kittitas County v. EWGMHB,* 172 Wn.2d at 180 (County has duty to inquire into whether someone qualifies for an exemption at the subdivision stage of development).

Here, on Foxes short plat, the County made a water availability determination on 4/17/2000 pursuant to local code (CP 656), and approved the short plat, which was recorded (CP 660-661)(plat map). The Foxes have continued their plans since in a reasonable period of time. While ordinarily a question of fact, *Id.,* here, the County nor Ecology, nor the Tribe appealed Mr. Fox's 2000 short plat and the water availability determination made at

that time for the Foxes exact same use shouldn't be subject to collateral attack or redetermination. *JZ Knight v. City of Yelm,* 173 Wn.2d 325 (2011). They can't do so now or later. *Id.*

4. **In the alternative, if WAC 173-503 applies to preclude the Foxes well, by itself, from qualifying as an adequate supply of water, did the court err in failing to reconsider its dismissal order in light of Ecology's January 2015 letter interpreting WAC 173-503 and commitments to mitigate for all exempt well users in the basin? (Assignment of Error No. 6)**

Motions for reconsideration are reviewed for an abuse of discretion. Here, in light of the January 15, 2015 formal interpretation of WAC 173-503 (2001), the trial court erred in not reconsidering the dismissal order. The motion assumed that WAC 173-503(2001) required there to be an offset for the Foxes use. Based upon the January 15, 2015 letter, and Ecology's mandatory duties to protect "adequate" supply for human domestic purposes in RCW 90.54.020(5), where "adequate" means both factual and legal availability of water, if WAC 173-503 (2001) operates in the manner under the prior appropriation doctrine to apply to a permit exempt use, the obligation and duty to offset that use is not upon the individual, but upon Ecology with its powers of and skills of basin wide management.

RCW 90.03.290 requires a user of water to meet a four part test, including adequate water availability with respect to conflict in rights, before they may obtain a permit from Ecology to use water. RCW

90.44.050 requires a user of groundwater to meet that same four part test, and exempts other small uses from preapproval of that 4-part test, including priority of water rights. *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 16, 43 P.3d 4, 12-13 (2002). The legislature has spoken and struck the balance. *Id.* If WAC 173-503 applies to permit-exempt uses to create a legal conflict of priority of rights, then the duty to fully offset those permit-exempt uses related to human domestic use is on Ecology, RCW 90.54.020(5), because there is no legal mechanism to foist a requirement of a showing upon the applicant that qualifies for an exemption from the four part inquiry without rendering the exemption meaningless.

RCW 90.54.020(5) directs Ecology that "**[a]dequate** and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." (emphasis added). RCW 90.54.050(1) also requires Ecology to "reserve and set aside waters for beneficial utilization in the future, ..." The Supreme Court has indicated that the term "adequate" water under RCW 19.27.097 means both factually available water and legally available water. *Kittitas County v. E. Wash. Growth Mgmt. Hearings Board,* 172 Wn.2d 178-179. The term "adequate" is used by the legislature in RCW 19.27.097 in the context of water availability, and likewise is used in RCW 90.54.020(5) in the context of water availability.

Where the legislature uses the same term in the same or similar context, it is axiomatic that it must have the same meaning. Accordingly, the use of the term "adequate" in RCW 90.54.020(5) means Ecology must ensure both factually available water and legally available water for human domestic needs – consistent with the plain language of the provision.

Ecology has the ability to meter exempt uses. RCW 90.44.050. It is appropriate therefore that with such data, if needed, it would be able to determine and supply appropriate offset. This properly places the relative burdens appropriately on the State agency, not upon the individual land owner who qualifies for an exemption under RCW 90.44.050. If the individual had to offset, and an individual mitigation plan had to be approved, this would be no different than conducting the prohibited four part inquiry- and is just a permit by a different name. RCW 34.05.010(9)(a)(an "approval" and "permit" are both a "license"). Such an interpretation that would require a qualified individual to submit a mitigation plan would render the exemption in RCW 90.44.050 meaningless. Accordingly, the duty to mitigate is on Ecology, not the individual and use that qualifies for an exemption.

5. **Does the trial court's interpretation and application of WAC 173-503 (2001) violate the constitutional due process rights of the Foxes? (Assignment of Error No. 4).**

While the above arguments interpreting and harmonizing RCW 19.27.097, RCW 90.44.050, RCW 90.44.040, RCW 90.54.020(5), RCW 90.03.247 should be sufficient to carry the day, the alternative is that any other interpretation of WAC 173-503 (2001) violates the due process rights of the Foxes – it is essentially an unfair surprise that without notice on October 3, 2014 the Foxes could no longer obtain a building permit for their home they were planning on building.

Constitutional due process as applied protects against unfair surprise against disruption to property rights, entitlements, and reasonable investment backed expectations, and was the basis of *Hull v. Hunt*, 53 Wn.2d 125 (1958)(mandamus appropriate to protect due process rights in context of building and vesting to land use codes). The result is invalidation of the rule as applied to Fox. The exemptions in RCW 90.44.050 have been jealously guarded by the courts against those who would abuse them. *Campbell & Gwinn; Kittitas County.* The reason for this is so that RCW 90.44.050 remains for those who plainly and truly qualify – like the Foxes.

The water rights reflected in RCW 90.44.050 related to human domestic needs are foundational property right is axiomatic and is reflected in *Ecology v. Abbot* and *Hunter Land. See also, Sporhase v. Nebraska*, 458 U.S. 941, 951 (1982)(rejecting the states' public ownership of water theory). Even more recently, as articulated on December 11, 2014 by the Supreme Court of Washington:

> "'Property' under the Fourteenth Amendment encompasses more than tangible physical property. U.S. Const. amend. XIV ***
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. 408 U.S. at 577. Constitutionally protected property interests may be created either through (1) contract, (2) common law, or (3) statutes and regulations. *See Conrad,* 119 Wn.2d at 529-30. ***
> Courts have found that a property interest exists when an applicant is entitled to a permit or variance having met certain criteria. *See Foss v. National Marine Fisheries Serv.* 161 F.3d 584, 588 (9th Cir. 1998)(holding that 'specific, mandatory' and 'carefully circumscribed' requirements constrained discretion enough to give rise to a property interest).

Durland et al v. San Juan County et al., 182 Wn.2d 55, 71-72 (2014).

The requirements for qualification in RCW 90.44.050 are the "specific, mandatory, and carefully circumscribed" circumstances articulated in *Durland,* carefully protected by the courts. *See, Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d at 16; *Kim v. Pollution PCHB,* 115

Wn. App. 157, 61 P.3d 1211 (2003). A decision in October of 2013, where all the while leading up to that decision Mr. Fox would have been able to have a building permit issue under applicable code and rules, cannot simply, without more, remove those rights. Accordingly, either WAC 173-503(2001) does not apply as a matter of law to the Foxes, or it cannot apply as a matter of due process, to prevent the issuance of the building permit.

6. Are the Foxes entitled to attorney's fees under the private attorney general basis or recognized ground in equity on appeal?

Fox requests attorney's fees, as appropriate. Attorney's fees are generally not awarded in mandamus matters. However, Attorney's fees are appropriate in this extraordinary matter, both on appeal and at the trial court level, where the Foxes have incurred significant economic expense to effectuate the important legislative policies of the water code, particularly reflected in RCW 90.44.050. *Moitke v. Spokane,* 101 Wn.2d 307, 340-341 (1984) (recognizing both the private attorney general theory protection constitutional principles, and also when effectuating an important legislative policy that benefits a large class of people.).

Here, the Foxes have incurred considerable expense, RCW 90.44.050 exemptions reflect an important public policy, and this matter will correct a course of action in Washington that will be beneficial to a large number of people – at a minimum, providing needed certainty to the

water rights laws. The Foxes have been faced with a County that refuses to act, and has shifting positions in this litigation. The Foxes are faced with the State of Washington Department of Ecology that also has shifted its position over the years. They are left holding the bag for others' mismanagement. Remand is appropriate for an award of reasonable attorney's fees on appeal and at the trial court level related to the private attorney general theory of recovery.

V. CONCLUSION

The Foxes have met the requirements of RCW 19.27.097 because they qualify for an exemption under RCW 90.44.050 as a matter of law, also showing both groundwater common law riparian and appropriative rights to which the Instream Flow Rule cannot apply on the facts here. The Court of Appeals should reverse the decision of the trial court, and remand for reinstatement of the mandamus. In the alternative, remand is appropriate as there is a question of fact on priorities or common law groundwater rights.

Dated this 2nd day of July, 2015.

Respectfully submitted,

Peter C. Ojala, WSBA#42163
Attorney for Appellant Fox
OJALA LAW INC., P.S.
21 Avenue A, Suite C Snohomish, WA 98290
(360) 568 9825; peter@ojalalaw.com

VI. APPENDIX

APPENDIX A

Chapter 12.48
RULES AND REGULATIONS OF THE SKAGIT COUNTY BOARD OF HEALTH GOVERNING INDIVIDUAL AND PUBLIC DRINKING WATER SYSTEMS*

Sections:

*Prior history: Resolution 11111.

12.48.010 Purpose and intent.

These rules and regulations are established by the Skagit County Board of Health pursuant to its authority under RCW 70.05.060 and WAC 246-290-030 permitting local boards of health to enact local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof. The purpose of these rules is to:

(1) Define minimum regulatory requirements and to protect the health of consumers whether they drink from an individual or a public water system and to meet the intent of the Growth Management Act; and

(2) Comply with and implement the requirements of Chapters 173-160, 246-290 and 246-291 WAC, and Chapters 12.05 and 14.24 SCC; and

(3) Whenever possible, carry out powers in manners which are consistent with Chapter 90.54 RCW and Chapters 173-503 and 173-505 WAC, as the same may hereafter be amended; and

(4) Direct the public to the best source of drinking water and the best location for that source of water; and

(5) Apply the best public health development standards and practices for the protection of drinking water sources. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.015 Drinking water and well construction standards adopted.
The following rules and regulations are hereby adopted as minimum requirements. When any part of these rules and regulations conflicts with another part, the more restrictive rule or regulation shall apply.

(1) Chapter 246-290 WAC, Group A Public Water Systems, as the same may hereafter be amended; and

(2) Chapter 246-291 WAC, Group B Public Water Systems, as the same may hereafter be amended; and

(3) Well construction, capping and abandonment shall conform to Chapter 173-160 WAC, Minimum Standards for Construction and Maintenance of Wells, as the same may hereafter be amended. (Ord. O2007004 (part))

12.48.020 Applicability.
(1) These regulations:

(a) Shall apply to all public and individual water systems in Skagit County;

(b) Establish adequate and potable water supply requirements for existing and proposed development, including building permits and land divisions.

(2) The following development proposals are not subject to review by the Health Officer under these regulations:

(a) Repairs of existing buildings that will not increase the use of an existing water supply;

(b) Remodel or replacement of existing, nonresidential buildings when the new work will not increase the use of an existing water supply; and

(c) Remodel or replacement of existing residential buildings that do not:

(i) Increase the number of bedrooms; or

(ii) Add more than five hundred (500) square feet of gross floor area.

(d) Development determined by the Health Officer to not have a detrimental effect on public health or conflict with the intent of these regulations. (Ord. O20110012 Att. D: Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.030 Definitions.
For the purposes of these regulations the following definitions together with those in Chapters 173-160 and 246-290 WAC shall apply unless the context thereof clearly indicates to the contrary.

"Adequate water supply" means a water supply which is capable of supplying at least three hundred fifty (350) gallons of water per day, meets siting criteria established by State and local regulations, and meets water quality standards in SCC 12.48.110.

"Affected Indian tribe" means any Indian tribe, band, nation or community that is federally recognized by the United States Secretary of the Interior and that will or may be affected by a development proposal.

"Alternative source" means a drinking water source other than a drilled well constructed in conformance with Chapter 173-160 WAC and drilled by a licensed well driller, including a spring, dug well, jetted or driven point, cistern, homeowner-drilled well, or surface source.

"Aquifer assessment" means a SCPHD assessment of the aquifer's ability to serve a land division. This includes, but is not limited to:

(a) Copies of all available well logs within one-quarter (1/4) mile of the development;

(b) Approved sewage system site evaluation(s) and/or designs;

(c) Well site approval(s);

(d) U.S.D.A. Soil Conservation Service soil map of the project site; and

(e) Any other pertinent geological or topographical data.

"Board of Health" means the Board of Health of Skagit County pursuant to the provisions of Chapter 70.05 RCW.

"Building permits" means building permits and their related prior land use approvals for which either a connection to, or a determination of, adequate and potable water is required. This includes related land use approvals that could affect future building permits such as: special use permits, variances, "quasi-judicial" property rezones, shoreline substantial development/conditional use permits, and boundary line adjustments.

"CWSP" means the Skagit County Coordinated Water System Plan.

"DOH" means the Washington State Department of Health.

"Ecology" means the Washington State Department of Ecology.

"Evaluation" means:

(a) Review of an individual water system by the SCPHD using SCC 12.48.110; or

(b) Review of a public water system by either the SCPHD or DOH using SCC 12.48.220 and Chapters 246-290 and 246-291 WAC.

"Flow-sensitive basin" means a sub-basin management unit as identified in Chapter 173-503 WAC or a stream management unit as identified in Chapter 173-505 WAC.

"Group B public water system" means a public water system that meets the Group B public water system definition as stated in Chapter 246-291 WAC.

"Health Officer" means the Health Officer of Skagit County or his authorized representative.

"Individual water system" means a water system serving or proposed to serve a single-family dwelling unit.

"Land division" means an application for land development that proposes to create new lots or additional building sites, including long subdivision, short subdivision, planned unit developments, mobile home parks, and binding site plans.

"MCL" means the maximum contaminant level permissible in water delivered to any individual water system user.

"PDS" means Skagit County Planning and Development Services.

"Plot plan" means a project site drawing depicting:

(a) First and second choice for well location with one hundred (100) foot radius; and

(b) Within one hundred (100) feet of the well:

(i) Property dimensions, easements, related zoning and north indicator arrow,

(ii) Adjoining properties,

(iii) Existing and proposed septic tanks, drainfields and replacement drainfield areas, privies, and wastewater piping,

(iv) Existing and proposed buildings and roads (public and private) with distances,

(v) Lakes, streams, ditches, and swampy areas,

(vi) Slope with direction and percent, and

(vii) Other potential sources of contamination (e.g., underground storage tanks, railroad tracks, etc.)

"Potable" means water suitable for drinking.

"Public water system" means a system providing water for human consumption that is not an individual water system.

"RCW" means the Revised Code of Washington.

"Sanitary survey" means an on-site inspection of an existing public water system, performed by the Health Officer, including, but not limited to, the water source and its suitability for a public water supply, the physical construction of the system, the bacteriological and chemical quality of the water, source and system capacity, and compliance with state and local regulations.

"SCC" means the Skagit County Code.

"SCPHD" means the Skagit County Public Health Department.

"Sensitive area" means an area where drilled wells have been known to have potential quantity or quality problems.

"Spring" means a source of water percolating laterally through permeable material overlying an impermeable stratum or where the land surface intersects the water table.

"USGS" means the United States Geological Survey.

"WAC" means the Washington Administrative Code.

"Water system status report" means a report filed with the Auditor's Office that provides the status of the water system.

"Water well report" means a record of the construction or alteration of a well which is completed and filed with Ecology in accordance with Chapter 18.104 RCW.

"Well driller" means a person who is licensed by Ecology.

"Well-protection zone" means an area around a well that protects the well from contamination. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.040 Administration.
(1) The SCPHD will evaluate individual water systems according to this Chapter.

(2) These rules and regulations pertaining to public water systems are administered according to the interagency agreement between the DOH and the SCPHD.

(3) PDS shall not issue any building permit for a structure with plumbing, or land division approvals until the Health Officer has approved the water system.

(4) Fees shall be charged in accordance with the most recently adopted SCPHD schedule of charges or PDS fee schedule. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.050 Coordinated water system plan (CWSP).
(1) As required in Chapter 246-293 WAC, before a new public system is created, the applicant shall contact existing nearby purveyors to provide service. The service should be both timely and reasonable.

(2) The Health Officer shall inform applicants for individual water systems of nearby approved public water systems.

(3) The CWSP will define service areas.

(4) Design standards in the CWSP shall be compatible with the County's Comprehensive Plans and/or Zoning Map with consideration given to public health. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.060 Flow-sensitive basins—Public water system responsibilities, Health Officer duties and exemptions.
(1) Public Water System Responsibilities.

(a) All new public water systems within flow-sensitive basins shall install and maintain water source meters.

(b) All public water systems expanding after April 14, 2001, for areas subject to Chapter 173-503 WAC or after September 26, 2005, for areas subject to Chapter 173-505 WAC shall install and maintain water source meters.

(c) Public water systems that provide water service in flow-sensitive basins established in WAC 173-503-074 and 173-505-090 shall provide an annual report of monthly water use data to the Health Officer.

(2) Health Officer Duties. The Health Officer shall:

(a) Estimate the amount of water used or to be used for development activities established after April 14, 2001, that are located within a flow-sensitive basin defined in WAC 173-503-074 and development activities established after September 26, 2005, that are located within a flow-sensitive basin defined in WAC 173-505-090. Water estimates shall be based on actual meter data for new and expanding public water systems, where available. For individual wells and where meter data are otherwise unavailable, the Health Officer shall assume average daily demand of three hundred fifty (350) gallons per day for each new residential connection, reduced by fifty (50) percent of average daily demand to account for return flows, except to the extent sewage is transported outside the flow-sensitive basin for disposal.

(b) Provide an annual report to the Administrative Official, Ecology and affected Indian tribes of the amount of water remaining for each reservation quantity established in WAC 173-503-074 or the amount of water available established in WAC 173-505-090.

(3) Exemptions. The Health Officer's estimate of water use developed pursuant to Subsection (2)(a) of this Section shall not include water uses that are otherwise exempt from reservation quantity limits pursuant to Chapters 173-503 or 173-505 WAC. (Ord. O2007004 (part))

12.48.090 Individual well site approval.

(1) Well site approval for an individual water system must be performed by the SCPHD or a licensed well driller. The Health Officer has the option to view the well site prior to drilling. The applicant is responsible for advising the inspecting authority regarding the location of all potential sources of contamination.

(2) Lots with Individual Water Systems.

(a) For lots created before January 1, 1992, individual water systems should have one hundred (100) foot minimum well protection zones.

(i) If the well is located on property not owned by the applicant, the applicant will provide proof of easements and/or covenants to the SCPHD; and

(ii) The well must meet Chapter 173-160 WAC.

(b) For lots created after January 1, 1992, applicants for individual water systems must follow the provisions of SCC 12.48.240.

(c) Single-family residences and private roads are not considered a source of contamination for individual systems. Greater setback distances may be required by the Health Officer based on geological and hydrological data or local water quality trends.

(3) Wells located within the sphere of influence of an underground storage tank will comply with Chapter 173-360 WAC. If it is exempted from the underground storage tank regulations, the SCPHD may require appropriate mitigations. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.100 Water right permits, surface water diversions and groundwater withdrawal limits.

(1) Groundwater uses are subject to Chapter 90.44 RCW, and surface water uses are subject to Chapter 90.03 RCW.

(2) When a water right permit is required, a water right permit must be issued by Ecology before SCPHD can proceed with a water system evaluation. Water right permit applications

and water well reports are not acceptable substitutes. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.110 Individual water system utilizing drilled wells.
(1) An applicant proposing to rely on an individual water system to provide safe and reliable potable water service shall provide evidence of an adequate water supply by submitting the appropriate documents and meeting the requirements of this section:

(a) Water right permit, if required. Water right permit applications and water well reports are not acceptable substitutes.

(b) If the point of withdrawal for an individual water system is located within a flow-sensitive basin as defined in SCC 12.48.030, the applicant must demonstrate that there are no existing public water systems that are able to provide safe and reliable potable water service in a timely and reasonable manner.

(c) Well site approval document issued by the SCPHD or licensed well driller.

(d) Application with scaled plot plan of the project site.

(e) For properties requiring or containing on-site sewage systems, the SCPHD approved sewage system site evaluation(s) shall be included. Site evaluations or designs shall show location and general boundaries for components of the proposed or existing sewage systems.

(f) A detailed water well report.

(g) The written results of a bailer, air line, or pump test, any of which is performed for a minimum of one hour, verifying a minimum well yield of three hundred fifty (350) gallons per day.

(h) Water quality results, analyzed by a DOH certified laboratory, verifying compliance with minimum standards, including:

(i) Bacteriological satisfactory analysis result for sample collected within the past six months;

(ii) Inorganic chemicals and physical characteristics as listed in Table 1.

Table 1

Inorganic chemical or physical characteristic	MCL (in mg/L unless otherwise stated)
arsenic	0.05
antimony	0.006
barium	2.0
chromium	0.1
fluoride	4.0
mercury	0.002
nitrate	10.0
selenium	0.05

chloride	250
conductivity	700 µmhos/cm
iron	*
lead	*
hardness	*
manganese	*
pH	*
sodium	*
total dissolved solids	*
turbidity	*
*no MCL	

(A) Results that are above the maximum contaminant level must be resampled to confirm contamination.

(B) Inorganic testing will be acceptable for five years.

(iii) Such other parameters that the Health Officer deems significant based upon local trends of water quality.

(i) Construction documents or general as-built plans, as required.

(j) Additional information deemed necessary by the Health Officer.

(2) For systems needing water treatment equipment, as determined by the Health Officer, detailed water treatment plans will be reviewed by the SCPHD prior to installation, and raw and finished water will be evaluated for potability.

(3) The SCPHD evaluation will be satisfactorily completed before the applicant connects to the well. If SCPHD finds that a health hazard exists and no remedial treatment is available, an unsatisfactory evaluation will result.

(4) A satisfactory well site evaluation will be valid for five years provided that an updated plot plan demonstrates no potential contamination and that nearby wells drilled after the initial evaluation show adequate quality and quantity.

(5) Connecting an individual water system to another water system or water source without approval is prohibited. (Ord. O2007004 (part): Ord. 15314 (part), 1994; Ord. 14063 (part), 1991)

12.48.120 Group B public water systems.

(1) An applicant proposing to establish a Group B public water system, or alter or expand an existing Group B public water system is subject to the requirements stated in Chapter 246-291 WAC in addition to the conditions listed in this Subsection.

(a) The applicant must submit to the SCPHD for review the complete plans and specifications fully describing the proposed project, together with the appropriate application fee.

(b) Plans must be prepared by a professional engineer licensed in the State of Washington, except as noted in Subsection (c) of this Section.

(c) If a proposed system consists of a simple well and pressure tank with one pressure zone, and does not require treatment or special hydraulic considerations, and will not serve more than six (6) connections, the applicant may design the system if he or she plans to reside at the property to be served by the water system, provided he or she has the expertise to operate the proposed system. If the Health Officer determines that additional engineering expertise is required, a professional engineer shall be required to prepare plans and specifications.

(d) Applicant Requirements. If the applicant prepares the plans and specifications for the water system, the Health Officer must perform a final inspection. It shall be the responsibility of the applicant to schedule one or more inspections so the Health Officer can see the entire completed system, including water lines, valves and any other equipment which is to be buried.

(e) Professional Engineer Requirements. In preparation for final inspection by the Health Officer, the professional engineer designing the water system must complete a final inspection of the system and certify on an SPCHD furnished form that the system conforms to the approved plans and specifications. The Health Officer requires twenty-four (24) hour advance notice for final inspections, and may require the engineer to be present during the inspection.

(2) The Health Officer may inspect any Group B public water system for the purpose of conducting a sanitary survey, determining conformance with plans and specifications or to investigate a complaint about the system.

(3) If after investigation the Health Officer finds that any public water system or person fails to comply with Chapter 246-291 WAC, or with this Chapter, the Health Officer shall send a compliance letter to the purveyor of the Group B public water system or to any individual who connects to an unapproved Group B public water system or one that is not approved for the proper number of connections. This letter shall include the following:

(a) Specification of the areas where the public water system or person fails to meet the requirements of Chapter 246-291 WAC, or of this regulation; and

(b) A compliance schedule, which may include any steps designed to bring the public water system into compliance with Chapter 246-291 WAC, or with this Chapter.

(4) Service of the compliance letter shall be made either personally or by mailing a copy of such compliance letter by certified mail, postage prepaid, return receipt requested. If the address of any such person cannot reasonably be ascertained, then a copy of the notice and order shall be mailed to such person at the address of the location of the violation and a copy shall be posted in a conspicuous location on the premises. The failure of any such person to receive such notice shall not affect the validity of any enforcement proceedings. Service by mail in the manner herein provided shall be effective on the date of mailing.

(5) Failure to adhere to the compliance schedule shall be punishable by a fine established in the SCPHD schedule of charges.

(a) Each violation of this Chapter shall be a separate and distinct offense, and in the case of a continuing violation each day's continuance shall be a separate and distinct violation.

(b) The fine shall become due and payable within thirty (30) days after receipt of written notice from the Health Officer describing the violation with reasonable particularity and advising such person that the penalty is due.

(c) This fine may be appealed pursuant to SCC 12.48.290, Appeals.

(6) If a person continues to violate the provisions of this Chapter after being duly informed in writing by the Health Officer that he or she is in violation of these regulations and that he or she shall cease and desist from such violations, the appropriate law enforcement agency shall enforce these provisions.

(7) The Health Officer may make a written request to the Prosecuting Attorney to bring injunctive action against a violator of this Chapter in order to prevent further violation until such time as the violator's case is processed in the courts through and including any appeals.

(8) If the Health Officer finds evidence indicating that an injunction is violated, the Health Officer shall present evidence to the Prosecuting Attorney and request that contempt proceedings be filed in the court issuing the injunction. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.210 Group A public water systems.

(1) Applicants for a land division or building permit shall obtain from the proposed public water system purveyor a completed water system evaluation application stating the system's ability and intention to provide water for the proposed buildings or use(s). The water system must be in substantial compliance with Chapter 246-290 WAC before the PDS permit is issued.

(2) Prior to final approval by the SCPHD and as an alternative to completing installation of a Group A public water system, a land division applicant may provide a performance bond in favor of the SCPHD and sign an agreement with the SCPHD. The bond and agreement shall meet the following conditions:

(a) Guarantee that construction will be completed, including availability of water to each lot, within one year of the date of the approval of the agreement. If the applicant has not completed the water system within this time limit, the Health Officer may use the bond or escrow account referenced in this Subsection to construct the unfinished portions of the water system in accordance with the approved plans and specifications;

(b) The bond shall be on a satisfactory form and in an amount based on an estimate prepared by a professional engineer in conformance with Chapter 246-290 WAC plus thirty-five (35) percent (twenty (20) percent for a two (2) year inflationary period—ten (10) percent for contract expenditure and five (5) percent for administrative costs);

(c) Be to the satisfaction of DOH or the Health Officer and legal counsel for Skagit County;

(d) Before the SCPHD can accept the bond, the applicant must:

(i) Install the water source and pump, test the source for yield and submit bacteriologic, inorganic chemical and physical parameter test results, which must meet the water quality standards set forth in Chapter 246-290 WAC; and

(ii) Submit an itemized list of materials with the water system plans;

(e) The purveyor must install any water treatment facilities necessary to bring water quality into compliance with applicable standards before the SCPHD can accept the bond, and must document the treated water quality through testing to be determined by the Health Officer;

(f) The applicant may substitute an escrow impound account for completion of the water system in lieu of a bond if confirmed in writing to the satisfaction of the County. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.220 Rental housing individual water system requirements.
(1) Landlords must provide adequate and potable water to their renters pursuant to Chapter 59.18 RCW, Residential Landlord Tenant Act.

(2) The water quality and quantity will meet minimum requirements noted in SCC 12.48.110.

(3) In the event that the water supply ceases, the landlord shall:

(a) Provide potable drinking water within twenty-four (24) hours; and

(b) Repair major plumbing fixtures within seventy-two (72) hours (e.g., chlorinator, filters, or other devices that make the water safe); or

(c) Show a documented good faith attempt to meet minimum drinking water standards, subject to approval by the Health Officer.

(4) In the event of a valid complaint, as confirmed by the SPCHD investigation, the rental is to be kept vacant until the drinking water meets the minimum standards unless otherwise provided under Subsection (3)(c) of this Section. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.230 Water requirements for building permits.
(1) Each applicant for a building permit shall provide evidence of an adequate water supply for the intended use of the building as provided under this Chapter.

(2) Unless exempted by SCC 12.48.020(3), a building permit application to PDS for a new building or change of use of an existing building which will require potable water must include a satisfactory evaluation by SCPHD declaring that an individual water system or a public water system will serve the building(s) specified in the permit application.

(3) Final inspection and occupancy approval for any structure will be withheld until legal connection to the required water system has been demonstrated to, and approved by, the jurisdictional authority.

(4) Boundary line adjustments for lots served by existing or proposed individual water systems must be reviewed and approved by the SCPHD. Applicant must demonstrate that all well protection zones can be maintained and will not be diminished in size. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.240 Water requirements for land divisions.
(1) Each applicant for approval of a land division must provide evidence of an adequate water supply for the land division as provided under this Chapter. Land division applications to PDS must include:

(a) A satisfactory evaluation by the SCPHD declaring that a public water system will serve the land division; or satisfactory evaluation(s) of the existing individual water system(s) as required in SCC 12.48.110.

(b) If the land is not in a sensitive area and the applicant chooses to submit the land division application without the completed individual water system evaluation(s), the applicant is required to follow the following procedure:

(i) Step one is a SCPHD aquifer assessment with field visit which is to be completed prior to the submission of the PDS application. The applicant will sign and have notarized a disclaimer which acknowledges that the land division will not be approved until the SCPHD satisfactorily evaluates the individual water system(s). Depending on the aquifer assessment information submitted, the SCPHD will conclude one of the following:

(A) The development appears to be within or near a sensitive area and each lot must have a satisfactorily evaluated water system.

(B) The development appears to be in an area which has an adequate potable water supply, requiring only one of every four (4) lots in the proposed development to obtain a satisfactorily evaluated individual water system. Well locations must be representative of the geology and topography of the development and approved by the SCPHD. If any of the representative wells result in an unsatisfactory evaluation, SCPHD will declare all lots in the development to be within a sensitive area per SCC 12.48.260.

(C) If sufficient hydrogeological information is not available to make an assessment, the PDS shall not approve the land division application. Additional hydrogeological information will be requested by the SCPHD and may include additional wells with pump test data.

(ii) Step two is the appropriate evaluation(s) which is to be completed prior to the land division approval.

(c) Bacteriological tests may be waived at the discretion of the SCPHD.

(2) Requests to the PDS for final land division approval must include:

(a) Evidence that all lots have been stubbed at the property line or that buildings have been connected. Appropriate bonding will also be acceptable.

(b) Evidence that the SCPHD has confirmed compliance with Subsection (4) of this Section.

(3) All final plats will have notes that describe the approved public water system. If the water is to be supplied from individual water systems, the following statement shall be shown on the final plat:

Water will be supplied from individual water systems. Contact Skagit County Health Department to determine if additional water quality or quantity testing will be required for building permit approvals.

(4) All land division applicants proposing lots of less than five (5) acres in size must show well protection zone(s) and approved on-site sewage system area(s) on all preliminary and final plat maps.

(5) The one hundred (100) foot radius well protection zone for individual water systems must be located entirely on the proposed lot owned in fee simple, or the owner must have the right to exercise complete sanitary control of the land within the required well protection zone through other legal provisions, such as recorded covenants or easements. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.250 Individual water systems utilizing alternative sources.
(1) The Skagit County Public Health Department discourages alternative sources. Before an alternative source will be allowed by SCPHD, the applicant will be required to:

(a) Provide written documentation why either an approved public drinking water system or a drilled well cannot be utilized; and

(b) Follow appropriate regulations or guidance documents (DOH, Ecology or U.S. Environmental Protection Agency) and provide construction documents, when required; and

(c) Upgrade substandard sources; and

(d) Obtain the SCPHD plan approval before construction begins; and

(e) Collect the water in a drainable covered structure not vulnerable to contamination by surface water; and

(f) Consider surface sources as the last option; and

(g) Provide evidence of legal rights and utility access for well protection control if the source is off-site.

(2) If an alternative source is approved, the applicant and/or property owner shall:

(a) Submit quarterly quality and quantity data on a schedule determined by the SCPHD throughout the year; and

(b) Provide minimum treatment via disinfection and filtration by a method approved by the Health Officer unless sufficient evidence is submitted to the Health Officer showing that the source does not require such treatment. If treatment is used, raw and finished water quality will be evaluated. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.260 Sensitive areas.
(1) SCPHD may require more extensive testing if a proposed well, or a well nearby the proposed well, is in an area where water quantity or quality is poor (e.g., seawater intrusion).

(2) Following DOH and Ecology protocol, SCPHD may require well head source meters for some water systems. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.270 Water system status report.
(1) A water system status report will be on a form approved by the Health Officer and properly filed with the Auditor's Office under the following circumstances:

(a) Quality. The water source contaminants exceed MCL standards, but can be reduced by treatment to the MCL standard or below; or

(b) Quantity. The well produces less than three hundred fifty (350) gallons per day; or

(c) An alternative source requiring special treatment is utilized; or

(d) The evaluation is unsatisfactory.

(2) If a water system status report is filed for a water system, the system shall not be used for the creation of new lots. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.280 Waivers and variances.

(1) The Health Officer may upon written petition by the applicant, and upon concurrence of the BOH, waive such rule or regulation or portion thereof; provided, that the waiver is consistent with the intent of these rules and regulations, Chapters 173-160, 246-290 and 246-291 WAC, and that no public health hazard will result. A written response will be made within ten (10) working days of receipt of the petition.

(2) In the event the regulation to be waived is also a state law or regulation, the concurrence of the Secretary of the DOH or Department of Ecology must be obtained prior to the granting of the waiver.

(3) Well site variances for individual water systems will be processed by Ecology following Chapter 173-160 WAC. Copies of their written approval must be submitted as part of the application. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.290 Appeals.

(1) Persons aggrieved by a notice of violation, order, fine or assessed costs issued pursuant to this Chapter may request a hearing with the Health Officer for the purpose of disputing or requesting a stay or modification of such notice, order, fine or assessed costs.

(2) A request for hearing before the Health Officer shall be made in writing and served to the Health Officer within ten (10) working days of the serving of the notice, order, fine or assessed costs. The request shall be made by fully completing and submitting a request for hearing form supplied by SCPHD.

(3) The Health Officer shall hold a hearing not less than twenty (20) days nor more than thirty (30) days from the serving of the notice, order, fine or assessed costs unless mutually agreed upon in writing by the Health Officer and person requesting the appeal.

(4) Notice of the hearing shall be given the person requesting the appeal and the property owner, if different from the person requesting the appeal, via personal service at least three (3) days prior to the hearing date or via certified mail at least ten (10) days prior to the hearing date.

(5) Upon holding the hearing requested, the Health Officer shall provide written notice of intent sustaining the order, fine or assessed costs within five (5) working days of the hearing. Notice shall be served personally or via certified mail to the person requesting the appeal and property owner, if different than the person requesting the appeal.

(6) The aggrieved party may make a written request to appeal the Health Officer's decision to the BOH within ten (10) working days of the date the decision is issued. The request for appeal must meet the requirements of Subsection (2) of this Section. The BOH will hear the request for appeal within sixty (60) days of receipt of the application to appeal the Health Officer's decision.

(a) A fee in the amount listed in the most current Skagit County Health Department schedule of charges is due and payable when an appeal of the Health Officer's decision is made to the BOH.

(7) Following the issuance of the BOH's written decision, an aggrieved person may file a writ of certiorari in a court of competent jurisdiction to appeal such decision within thirty (30) days of the issuance of such decision.

(8) The filing of a request for hearing or appeal pursuant to this Section shall operate as a stay from the requirement to perform corrective action ordered by the Health Officer, except when:

(a) The requirement for immediate compliance is issued as an emergency order; or

(b) When an imminent public health threat exists. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.300 Severability.
Provisions of these rules and regulations are hereby declared to be separable, and if any section, subsection, sentence, clause, phrase, or portion of these rules and regulations is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of these rules and regulations. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.310 Liability.
(1) Nothing in this Chapter or the rules adopted under this Chapter creates or forms the basis for any liability on the part of the State and local health jurisdictions, or their officers, employees, or agents, for any injury or damage resulting from the failure of the owner or operator of any water system to comply with this Chapter or the rules adopted under this Chapter; or by reason or in consequence of any act or omission in connection with the implementation or enforcement of this Chapter or the rules adopted under this Chapter on the part of the State and local health jurisdictions, or by their officers, employees, or agents;

(2) All actions of local Health Officers and the secretary shall be deemed an exercise of the State's police power. The Health Officer's responsibility includes reviewing data provided by the applicant. The applicant bears any liability for compliance with all statutes, codes and regulations. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.320 Effective date.
This chapter shall be in full force and effect June 14, 2007, after its passage and approval as provided by law. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

APPENDIX B

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern
with
Guide to Pronunciation

By

HENRY CAMPBELL BLACK, M. A.
Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors, Bankruptcy, Mortgages, Constitutional Law, Interpretation of Laws, Rescission and Cancellation of Contracts, Etc.

FOURTH EDITION

By
THE PUBLISHER'S EDITORIAL STAFF

ST. PAUL, MINN.
WEST PUBLISHING CO.
1951

The words "exemption from seizure" in statute providing that a pension or other reward granted by the United States for military service is exempt from seizure in legal proceeding meant "not subject to debts." In re McCormick's Estate, 169 Misc. 672, 8 N.Y.S.2d 179, 188.

EXEMPTION LAWS. Laws which provide that a certain amount or proportion of a debtor's property shall be exempt from execution.

EXEMPTION, WORDS OF. It is a maxim of law that words of exemption are not to be construed to import any liability; the maxim *expressio unius exclusio alterius*, or its converse, *exclusio unius inclusio alterius*, not applying to such a case. For example, an exemption of the crown from the bankruptcy act 1869, in one specified particular, would not inferentially subject the crown to that act in any other particular. Brown.

EXEMPTS. Persons who are not bound by law, but excused from the performance of duties imposed upon others.

EXENNIUM. In old English law. A gift; a new year's gift. Cowell.

EXEQUATUR. Lat. Let it be executed.

In French practice, this term is subscribed by judicial authority upon a transcript of a judgment from a foreign country, or from another part of France, and authorizes the execution of the judgment within the jurisdiction where it is so indorsed.

International Law

A certificate issued by the foreign department of a state to a consul or commercial agent of another state, recognizing his official character, and authorizing him to fulfill his duties.

EXERCISE. To make use of. Thus, to exercise a right or power is to do something which it enables the holder to do. U. S. v. Souders, 27 Fed. Cas. 1267; Cleaver v. Comm., 34 Pa. 284; Snead v. Wood, 24 Ga.App. 210, 100 S.E. 714, 715.

To put in action or practice, to carry on something, to transact. Salway v. Multnomah Lumber & Box Co., 134 Or. 428, 293 P. 420, 421.

The "exercise" of an option to purchase is merely the election of optionee to purchase. Floyd v. Morgan, 60 Ga. App. 496, 4 S.E.2d 91, 97.

EXERCISE OF JUDGMENT. Exercise of sound discretion, that is, discretion exercised, not arbitrarily or willfully, but with regard to what is right and equitable. United States v. Beckman, C.C.A.Pa., 104 F.2d 260, 262.

EXERCISE OF JUDICIAL DISCRETION. In practical effect, "exercise of judicial discretion" by trial judge means doing as he pleases, unguided by law. Borger v. Mineral Wells Clay Products Co., Tex.Civ.App., 80 S.W.2d 333, 334.

EXERCISED DOMINION. Open acts and conduct relative to land as evidence claim of the right of absolute possession, use, and ownership. Whelan v. Henderson, Tex.Civ.App., 137 S.W.2d 150, 153.

EXERCISING AN OPTION. Elements are decision of optionee to purchase property under terms of option and communication of decision to optionor within life of option. Floyd v. Morgan, 60 Ga.App. 496, 4 S.E.2d 91, 95.

EXERCITALIS. A soldier; a vassal. Spelman.

EXERCITOR NAVIS. Lat. The temporary owner or charterer of a ship. Mackeld. Rom. Law, § 512; The Phebe, 19 Fed.Cas. 418.

EXERCITORIA ACTIO. In the civil law. An action which lay against the employer of a vessel *(exercitor navis)* for the contracts made by the master. Inst. 4, 7, 2; 3 Kent, Comm. 161; Mackeld. Rom. Law, § 512.

EXERCITORIAL POWER. The trust given to a ship-master.

EXERCITUAL. In old English law. A herio paid only in arms, horses, or military accoutrements.

EXERCITUS. In old European law. An army; an armed force. The term was absolutely indefinite as to number. It was applied, on various occasions, to a gathering of forty-two armed men, of thirty-five, or even of four. Spelman.

EXETER DOMESDAY. The name given to a record preserved among the muniments and charters belonging to the dean and chapter of Exeter Cathedral, which contains a description of the western parts of the kingdom, comprising the counties of Wilts, Dorset, Somerset, Devon, and Cornwall. The Exeter Domesday was published with several other surveys nearly contemporary, by order of the commissioners of the public records, under the direction of Sir Henry Ellis, in a volume supplementary to the Great Domesday, folio, London, 1816. Wharton.

EXFESTUCARE. To abdicate or resign; to resign or surrender an estate, office, or dignity, by the symbolical delivery of a staff or rod to the alienee.

EXFREDIARE. To break the peace; to commit open violence. Jacob.

EXHÆREDATIO. In the civil law. Disinheriting; disherison. The formal method of excluding an indefeasible (or forced) heir from the entire inheritance, by the testator's express declaration in the will that such person shall be *exhæres*. Mackeld. Rom. Law, § 711.

EXHÆRES. In the civil law. One disinherited. Vicat; Du Cange.

EXHAUSTION OF ADMINISTRATIVE REMEDIES. The doctrine is that, where an administrative remedy is provided by statute, relief must be sought from administrative body and such remedy exhausted before courts will act. Abelleira v. District Court of Appeal, Third Dist., 17 Cal.2d 280, 109 P.2d 942, 949, 132 A.L.R. 715; Hill v. Brisbane, 66 Cal.App.2d 15, 151 P.2d 578, 582.

EXHEREDATE. In Scotch law. To disinherit; to exclude from an inheritance.

EXECUTORY INTERESTS. A general term, comprehending all future estates and interests in land or personalty, other than reversions and remainders.

A right which is not vested in possession but lies in action which it is necessary to obtain the peculiar relief granted by courts of equity in order to invest plaintiff with the right claimed, is an "executory interest". Lang v. Texas Petroleum Corporation, Tex.Civ.App., 141 S.W.2d 1021.

EXECUTORY LIMITATION. A limitation of a future interest by deed or will; if by will, it is also called an "executory devise."

EXECUTORY PROCESS. A process which can be resorted to in the following cases, namely: (1) When the right of the creditor arises from an authentic confession of judgment, and which secures a privilege or mortgage in his favor; (2) When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. Code Prac. La. art. 732; Green v. Lalley, 17 Wall. 14, 21 L.Ed. 596.

EXECUTORY SALE. See Sale.

EXECUTORY UNILATERAL ACCORD. Nothing more than an offer to enter a contract. Boyd v. Christiansen, 229 Iowa 1, 293 N.W. 826, 828.

EXECUTORY WARRANTIES. Arise where insurer undertakes to perform some executory stipulation, as that certain acts will be done, or that certain facts will continue to exist. Procacci v. United States Fire Ins. Co., 118 N.J.L. 423, 193 A. 522.

EXECUTRESS. A female executor. Hardr. 165, 166.

EXECUTRIX. A woman who has been appointed by will to execute such will or testament.

EXECUTRY. In Scotch law. The movable estate of a person dying, which goes to his nearest of kin. So called as falling under the distribution of the executor. Bell.

EJIDOS. See Ejidos.

EJIDOS. See Ejidos.

EXEMPLA ILLUSTRANT NON RESTRINGUNT LEGEM. Co. Litt. 240. Examples illustrate, but do not restrain, the law.

EXEMPLAR. A specimen which is capable of supporting both deduction and inference. In re Fisher's Estate, 47 Idaho 668, 279 P. 291, 293.

EXEMPLARY DAMAGES. See Damages.

EXEMPLI GRATIA. For the purpose of example, as for instance. Often abbreviated *"ex. gr."* or *"e. g."*

EXEMPLIFICATION. An official transcript of a document from public records, made in form to be used as evidence, and authenticated as a true copy.

EXEMPLIFICATIONE. A writ granted for the exemplification or transcript of an original record. Reg. Orig. 290.

EXEMPLUM. In the civil law. Copy; a written authorized copy. This word is also used in the modern sense of "example,"—*ad exemplum constituti singulares non trahi*, exceptional things must not be taken for examples. Calvin.

EXEMPT, *v.* To release, discharge, waive, relieve from liability. Davidow v. Jenks, Sup., 48 N.Y.S. 2d 586, 588.

To relieve, excuse, or set free from a duty or service imposed upon the general class to which the individual exempted belongs; as to exempt from militia service. Jones v. Wells Fargo Co. Express, 83 Misc. 508, 145 N.Y.S. 601, 602. See 1 St. at Large, 272.

To relieve certain classes of property from liability to sale on execution.

EXEMPT, *n.* One who is free from liability to military service; as distinguished from a *detail*, who is one belonging to the army, but detached or set apart for the time to some particular duty or service, and liable, at any time, to be recalled to his place in the ranks. In re Strawbridge, 39 Ala. 379. Relieved. In re Miller's Estate, 330 Pa. 477, 199 A. 148, 149. See Exempts.

EXEMPT FROM ALL TAXATION. In proposed constitutional amendment, exempting specified homesteads from taxation, mean exempt when not restrained by Federal Constitution. Gray v. Winthrop, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804.

EXEMPTION. Freedom from a general duty or service; immunity from a general burden, tax, or charge. Green v. State, 59 Md. 128, 43 Am.Rep. 542; Koenig v. Railroad Co., 3 Neb. 380; Long v. Converse, 91 U.S. 113, 23 L.Ed. 239; Poore v. Bowlin, 150 Tenn. 412, 265 S.W. 671.

A privilege allowed by law to a judgment debtor, by which he may hold property to a certain amount, or certain classes of property, free from all liability to levy and sale on execution or attachment. Turrill v. McCarthy, 114 Iowa, 681, 87 N.W. 667; Williams v. Smith, 117 Wis. 142, 93 N.W. 464; In re Trammell, D.C.Ga., 5 F.2d 826, 827.

A right given by law to a debtor to retain portion of his property free from claims of creditors. Pickens v. Pickens, 125 Tex. 410, 83 S.W.2d 951, 954.

An "exemption" contemplated by constitutional provision forbidding exemption of property from taxation is an exemption from all taxation in any form. Turco Paint & Varnish Co. v. Kalodner, 320 Pa. 421, 184 A. 37, 43.

An "exemption" from inheritance tax is a deduction. In re Maxson's Estate, 30 Cal.App.2d 566, 86 P.2d 922, 924.

As applied to taxation "exemption" is freedom from burden of enforced contributions to expenses and maintenance of government. Washington Chocolate Co. v. King County, 21 Wash.2d 630, 152 P.2d 981, 984.

Credit against income tax for income tax paid to other state or country is an "exemption". Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419, 424, 134 A.L.R. 1424; Keasbey & Mattison Co. v. Rothensies, C.C.A.3, 133 F.2d 894, 898.

Deduction made in determining taxable income is an "exemption." Tupelo Garment Co. of Tupelo, Miss. v. State Tax Commission, 178 Miss. 730, 173 So. 656, 660.

press" when it is literally declared by a subsequent statute. Stoker v. Police Jury of Sabine Parish, La.App., 190 So. 192, 194.

EXPRESS REPUBLICATION of will occurs where testator repeats ceremonies essential to valid execution, with avowed intention of republishing will. In re Simeone's Estate, 141 Misc. 737, 253 N.Y.S. 683, 689.

EXPRESS REQUEST. That which occurs when one person commands or asks another to do or give something, or answers affirmatively when asked whether another shall do a certain thing. Zeidler v. Goelzer, 191 Wis. 378, 211 N.W. 140, 144.

EXPRESS TERMS. Within provision that qualified acceptance, in "express terms," varies effect of draft, "express terms" means clear, unambiguous, definite, certain, and unequivocal terms. International Finance Corp. v. Philadelphia Wholesale Drug Co., 312 Pa. 280, 167 A. 790, 792.

EXPRESSA NOCENT, NON EXPRESSA NON NOCENT. Things expressed are [may be] prejudicial; things not expressed are not. Express words are sometimes prejudicial, which, if omitted, had done no harm. Dig. 35, 1, 52; Id. 50, 17, 195. See Calvin.

EXPRESSA NON PROSUNT QUÆ NON EXPRESSA PRODEBUNT. 4 Coke, 73. The expression of things of which, if unexpressed, one would have the benefit, is useless. Thing expressed may be prejudicial which when not expressed will profit.

EXPRESSED. Means stated or declared in direct terms, set forth in words; not left to inference or implication. Anderson v. Board of Ed. of School Dist. No. 91, 390 Ill. 412, 61 N.E.2d 562, 567.

EXPRESSIO EORUM QUÆ TACITE INSUNT NIHIL OPERATUR. The expression or express mention of those things which are tacitly implied avails nothing. 2 Inst. 365.

A man's own words are void, when the law speaketh as much. Finch, Law, b. 1, c. 3, no. 26. Words used to express what the law will imply without them are mere words of abundance. 5 Coke, 11; Broom, Max. 669, 753; 2 Pars.Contr. 28; 4 Co. 73; Andr.Steph.Pl. 366; Hob. 170; 3 Atk. 138; 11 M. & W. 569; 7 Exch. 28.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. Expression of one thing is the exclusion of another. Co.Litt. 210a; Burgin v. Forbes, 293 Ky. 456, 169 S.W.2d 321, 325; Newblock v. Bowles, 170 Okl. 487, 40 P.2d 1097, 1100. Mention of one thing implies exclusion of another. Fazio v. Pittsburgh Rys. Co., 321 Pa. 7, 182 A. 696, 698; Saslaw v. Weiss, 133 Ohio St. 496, 14 N.E.2d 930, 932. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Little v. Town of Conway, 171 S.C. 27, 170 S.E. 447, 448.

Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded, People v. One 1941 Ford 8 Stake Truck, Engine No. 99T370053, License No. P.8410, Cal., 159 P.2d 641, 642.

EXPRESSIO UNIUS PERSONÆ EST EXCLUSIO ALTERIUS. Co.Litt. 210. The mention of one person is the exclusion of another. See Broom, Max. 651.

EXPRESSLY. In an express manner; in direct or unmistakable terms; explicitly; definitely; directly. Le Ballister v. Redwood Theatres, 1 Cal.App.2d 447, 36 P.2d 827; St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W.2d 685, 689. In an express manner; in direct terms; with distinct purpose; particularly. Hawkins v. Mattes, 171 Okl. 186, 41 P.2d 880, 891; the opposite of impliedly. Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381, 396.

EXPRESSUM FACIT CESSARE TACITUM. That which is expressed makes that which is implied to cease, [that is, supersedes it, or controls its effect.] Thus, an implied covenant in a deed is in all cases controlled by an express covenant. 4 Coke, 80; Broom, Max. 651; 5 Bingh.N.C. 185; 7 B. & C. 609; 2 C. & M. 459; 2 E. & B. 856; Aston over & Medford Turnpike Corp. v. Hay, 7 Mass. 106; Galloway v. Holmes, 1 Doug., Mich., 330.

Where a law sets down plainly its whole meaning the court is prevented from making it mean what the court pleases. Munro v. City of Albuquerque, 48 N.M. 204, 149 P.2d 733, 748.

EXPRESSUM SERVITIUM REGAT VEL EXCLARET TACITUM. Let service expressed rule or declare what is silent.

EXPROMISSIO. In the civil law. The species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. 1 Bouv.Inst. no. 802.

EXPROMISSOR. In the civil law. A person who assumes the debt of another, and becomes solidly liable for it, by a stipulation with the creditor. He differs from a surety, inasmuch as this contract is one of novation, while a surety is jointly liable with his principal. Mackeld.Rom.Law, 538; Dig. 12, 4, 4; 16, 1, 13; 24, 3, 64, 4; 38, 1, 8.

EXPROMITTERE. In the civil law. To undertake for another with the view of becoming liable in his place. Calvin.

EXPROPRIATION. This word primarily denotes a voluntary surrender of rights or claims; the act of divesting oneself of that which was previously claimed as one's own, or renouncing it. In this sense it is the opposite of "appropriation."

A meaning has been attached to the term, imported by its use in foreign jurisprudence, which makes it synonymous with the exercise of the power of eminent domain, *i. e.*, the compulsory taking from a person, on compensation made, of his private property for the use of a railroad, canal, or other public work. Brownsville v. Pavne, 1 Woods 293, Fed.Cas.No.2,043. In Louisiana expropriation is used as is taking under eminent domain in most of the other states. In England "compulsory purchase" is used. Halsbury, Laws of England.

French Law

Expropriation is the compulsory realization of a debt by the creditor out of the lands of his debtor

APPENDIX C

830 P.2d 915 (1992)

The CITY OF THORNTON, Acting By and Through its UTILITIES BOARD, Objector-Appellant/Cross-Appellee,

v.

The CITY OF FORT COLLINS, Applicant-Appellee/Cross-Appellant, and the Cache La Poudre Water Users Association, Northern Colorado Water Conservancy District, Saint Vrain and Left Hand Water Conservancy District, Colorado Water Conservation Board, the City of Greeley, the State Engineer and the Division Engineer, Water Division 1, and the Henrylyn Irrigation District, Objectors-Appellees.

No. 90SA514.

Supreme Court of Colorado, En Banc.

April 20, 1992.

919 *919 Michael D. White, Bruce D. Bernard, Teri L. Petitt, White & Jankowski, Denver, for objector-appellant/cross-appellee.

Michael D. Shimmin, Douglas A. Goulding, Vranesh and Raisch, Boulder, for applicant-appellee/cross-appellant.

Jeffrey J. Kahn, Grant, Bernard, Lyons & Gaddis, Longmont, for objector-appellee Saint Vrain and Left Hand Water Conservancy Dist.

Gregory J. Hobbs, Jr., Bennett W. Raley, Julianne M. Cruise, Davis, Graham & Stubbs, Denver, for objector-appellee Northern Colo. Water Conservancy Dist.

Linda L. Preslan, Asst. Atty. Gen., Denver, for objectors-appellees Colo. Water Conservation Bd., State Engineer and Div. Engineer.

William H. Brown, Fischer, Brown, Huddleson & Gunn, P.C., Fort Collins, for objector-appellee Cache La Poudre Water Users Ass'n.

Justice MULLARKEY delivered the Opinion of the Court.

The City of Thornton (Thornton) appeals from a judgment of the water court for Water Division 1 (water court) awarding the City of Fort Collins (Fort Collins) a conditional surface water right with a certain appropriation date. Fort Collins cross-appeals from the judgment of the water court denying Fort Collins another conditional surface water right. As to the appeal, we affirm in part and reverse in part and remand. As to the cross-appeal, we reverse and remand.

I

First, we review the applications by Fort Collins for conditional water rights and Thornton's objections. This case began when Fort Collins sought approval of conditional surface water rights along a segment of the Cache La Poudre River (Poudre River) which runs roughly from the northwest boundary diagonally toward the southeast boundary of Fort Collins. Fort Collins refers to that segment of the Poudre River as the Poudre River Recreation Corridor (Corridor). The Corridor is comprised of several parks, open space areas and trail systems. With the development of the Corridor, Fort Collins has enhanced the recreational opportunities and preserved the piscatory and wildlife resources of the Poudre River for the enjoyment of the residents of and visitors to Fort Collins.

The application for the Poudre River water rights was filed with the water court on December 31, 1986, pursuant to the Water Right Determination and Administration Act (Act), §§ 37-92-101, *et seq.*, 15 C.R.S. (1990). The 1986 application claimed 55 cubic feet per second (55 cfs) of Poudre River water for the Corridor "for municipal purposes, including recreational, piscatorial, fishery, wildlife, and other beneficial uses." The appropriation was claimed as of February 18, 1986, the date when the **Fort Collins** city council formally adopted the Poudre River Trust Land Use Policy Plan (Plan). The Plan outlines the various projects to be developed in the downtown section of the Corridor.

The Corridor was the named "diversionary structure" in the 1986 application. In addition to identifying the structure, the appropriation date and the amount and uses of water, the 1986 application also stated in relevant part:

> No diversions from the [Poudre] river are anticipated [¶ 3.A.].
>
> * * * * * *
>
> Construction and planning is underway for a system of trails along the river, development of a fishery through [the Corridor], preservation and enhancement of wildlife habitat and aquatic life, as well as other public purposes. The existence of in-stream flows of water up to the amounts specified above, undiminished in both quantity and quality, are necessary to fulfill the purposes of the Recreation Corridor [¶ 7.B.(i)].
>
> * * * * * *
>
> 920 *920 [T]he uses will take place in the streambed ... [¶ 8.B.].
>
> * * * * * *
>
> Since no diversions from the Poudre River are necessary to accomplish the actual and intended beneficial uses described above, **Fort Collins** specifically requests that the Court confirm these ... conditional water rights as in-stream rights, without the necessity for making any diversion from the river channel; [and] that the Court find that all of the uses described above are beneficial uses of water.... Additionally, **Fort Collins** requests a determination that all of these conditional rights are part of an integrated plan by the **City** to provide for ... recreational ... uses within the [Corridor], and that work on any part of this plan constitutes work on the entire plan for the purpose of subsequent diligence proceedings [¶ 9.].

A statement of opposition to this 1986 application was filed by Thornton on February 24, 1987. Other parties, including the Colorado Water Conservation Board (CWCB) and the state engineer, also filed objections. The objections were largely based on the claim or impression that **Fort Collins** was applying for minimum stream flow rights contrary to law.

After negotiations with the CWCB and the state engineer, **Fort Collins** agreed to amend its 1986 application. The settlement with the CWCB included certain stipulations and a proposed decree. The amendments were filed with the water court on June 1, 1988. According to the introductory remarks to these 1988 amendments, the amendments were generally "intended to narrow the scope of and to clarify" the 1986 application and were "consistent with and intended to relate back to the filing" of the 1986 application.

In particular, the 1988 amendments deleted the Corridor as the named diversionary structure, substituting therefor two specific diversionary structures within the Corridor, namely, the **Fort Collins** Nature Center Diversion Dam (Nature Dam) and the **Fort Collins** Power Plant Diversion Dam (Power Dam). The Nature Dam is a relatively new structure designed and built to divert the Poudre River back into its "historic" channel and away from a channel cut after heavy rains and flooding in 1983-84. Along the historic channel, Colorado State University (CSU) owns and maintains property slated for development as the Northern Colorado Nature Center. The Nature Center offers an interpretive trail system and picnic grounds for day use. Future plans include an arboretum and the relocation of the CSU raptor rehabilitation program to the Nature Center. **Fort Collins** and CSU cooperate with regard to the Nature Center and the

continued development of the historic channel. Construction of the Nature Dam began after 1986 but was completed before trial to the water court. The Power Dam is an older structure on the Poudre River owned and maintained by **Fort Collins**. The Power Dam is so named because of its proximity to a retired municipal power plant which has received local historical designation. The old plant and the Power Dam are in the midst of numerous parks, a visual arts center and a community center, all integral to the Corridor. Other, valid appropriations of Poudre River water not at issue in this case are effected by **Fort Collins** at the Power Dam. Recently, **Fort Collins** renovated the Power Dam by strengthening the structure itself and by adding a boat chute and a fish ladder designed for recreational use and piscatorial preservation respectively.

The relevant provisions of the 1988 amendments are the following:

> The legal description of the stream segment designated [in the 1986 application as the Corridor] has been narrowed to two individual points of diversion, ... [i.e., the Nature Dam and the Power Dam] [¶ 2.].
>
> * * * * * *
>
> **Fort Collins** has formulated the intent and taken overt action to create the ... Corridor within which **Fort Collins** will construct diversion structures and use water within the Cache La Poudre River for
> 921 municipal purposes, including recreational, piscatorial, fishery, wildlife, and *921 other beneficial uses. Construction and planning is underway for a system of trails along the river, diversion structures within the river, development of a fishery, preservation and enhancement of wildlife habitat and aquatic life, as well as other public purposes [¶ 5.A.].
>
> * * * * * *
>
> **Fort Collins** has already initiated construction of the [Power Dam,] ... which includes a boat chute for recreational use, and a fish ladder for piscatorial purposes. This diversion structure will be used to control and regulate the flow of the Poudre River to implement the intended beneficial uses of water. Additionally, **Fort Collins** is designing and plans to construct the [Nature Dam]. It will be a dam across the Poudre River which will divert water from the current river channel (carved during the 1983 and 1984 run-offs) back into the historic river channel adjacent to the dam.... This diversion structure will control and regulate the flow of the Poudre River to implement the intended beneficial uses of water [¶ 5.B.].
>
> [The 1986] Application is amended ... by withdrawing the reference to "in-stream rights," since the definition of these rights by stream segments has been narrowed to two individual points of diversion.... At all times since the date of appropriation ... [the] purpose was to divert, as defined by statute, within the river's natural course or location, or otherwise capture, possess and control water for the described beneficial uses [¶ 7].

The 1988 amendments claimed 55 cfs of Poudre River water for the Nature Dam and 55 cfs for the Power Dam, both with appropriation dates of February 18, 1986, the same appropriation date for the 55 cfs of water for the Corridor in the 1986 application.

Due to the changes made by the 1988 amendments, most of the statements of opposition to the 1986 application were withdrawn. Thornton, however, along with the Northern Colorado Water Conservancy District (NCWCD), timely filed supplemental statements of opposition, objecting to the 1988 amendments. In its supplemental statement of opposition, Thornton claimed that its water rights might be injured by granting the application. Thornton asserted that before the water court could decree a conditional water right, **Fort Collins** must prove that the waters sought to be appropriated can and will be diverted, stored, or otherwise captured, possessed, and controlled, and are not a thinly disguised minimum stream flow. Thornton further asserted that **Fort Collins** must prove that those waters will be applied to beneficial uses, that it had a fixed intent to divert and beneficially use those waters on February 18, 1986, and that it took overt acts sufficient to provide notice of that intent. Finally, Thornton asserted that **Fort Collins** must

prove that the water rights sought in the 1988 amendments can be reconciled with the water rights sought in the 1986 application. That unappropriated Poudre River water is available is not disputed.

Although the NCWCD was a party below, Thornton and **Fort Collins** were the only parties which participated at trial to the water court in August, 1990. Here, the NCWCD urges affirmance of the water court on both the appeal and the cross-appeal. In its judgment and decree, the water court determined that the 1988 amendments related back to the 1986 application. The water court also found that **Fort Collins** had provided notice of its intent conditionally to appropriate Poudre River water and that this intent was shown by overt acts, particularly by the formal adoption of the Plan by the **Fort Collins city** council. The water court found that the water appropriation at the Nature Dam was a diversion and not a minimum stream flow and decreed **Fort Collins** a conditional Poudre River water right of 55 cfs with an appropriation date of February 18, 1986. However, the water court found that the water appropriation at the Power Dam was not a diversion, but a minimum stream flow, and thus did not decree a conditional Poudre River water right for the Power Dam.

922 Thornton appeals the water court's award of a conditional water right to **Fort** *922 **Collins** for the Nature Dam, and **Fort Collins** cross-appeals the water court's denial of a decree for its claimed conditional water right for the Power Dam.

II

In its appeal, Thornton makes three basic arguments: first, that the 1988 amendments cannot relate back to the 1986 application; second, that the evidence presented by **Fort Collins** does not support an appropriation date of February 18, 1986; and third, that the Nature Dam is not a diversion within the meaning of the law. For these reasons, according to Thornton, the water court erred in awarding **Fort Collins** a conditional Poudre River water right for the Nature Dam with an appropriation date of February 18, 1986. We take each of Thornton's arguments in turn.

A

In support of its argument that the 1988 amendments cannot relate back to the 1986 application, Thornton offers two grounds. First, Thornton asserts that the 1988 amendments substantially differ from the 1986 application because the 1986 application sought a minimum stream flow with no diversions while the 1988 amendments sought the converse, namely, two precise diversions with no minimum stream flow. Because of this difference, Thornton adds, no reasonably prudent person can be charged with notice that the water rights claimed in the 1986 application were or could ever be the water rights claimed in the 1988 amendments. Second, Thornton asserts that the 1986 application was patently unlawful because it was an application for a minimum stream flow, contrary to section 37-92-102(3), 15 C.R.S. (1990). In effect, Thornton argues that an amendment cannot relate back to an unlawful application.

For its part, the water court, in deciding that the amendments related back to the original application, did note that the 1988 amendments differed from the 1986 application in that the 1986 application stated that there would be no diversions while the 1988 amendments stated that in fact there would be two discrete diversions. Nonetheless, the water court compared the amendments with the original application and found that the applicant was the same, that the source, amount and uses of the water were the same, and that the Nature and Power Dams were structures within the confines of the Corridor. The water court concluded that the 1988 amendments did not expand, but actually narrowed, the 1986 application and that therefore the amendments related back to the original application.

In *United States v. Bell*, 724 P.2d 631 (Colo.1986), we held that the issue of relation back in water adjudications is governed by the requirements of C.R.C.P. 15(c) so long as those requirements are not inconsistent with procedures provided in the Act. 724 P.2d at 635-636. The requirements of C.R.C.P. 15(c) are essentially notice requirements. Transposing the requirements to a water dispute under the Act, for an amendment to relate back to the date of an original water application, the claim(s) in the amendment must arise "out of the conduct, transaction, or occurrence set forth in the original" application. *See* C.R.C.P. 15(c). Because notice is the essential requisite for a relation back, we

hold that since the source, amount and uses of Poudre River water claimed by the 1988 amendments were the same as in the original application, the 1988 water claims are claims arising out of the conduct, transaction or occurrence set forth in the 1986 application.

In *Bell,* the dispositive factor was the source of the water claimed. We denied a relation back in that case because the water source designated in the amendment was different from the water source designated in the original application. 724 P.2d at 639. Because the source of the claimed water differed, no notice was provided by the original application to parties with interests in the water from the new source designated in the amendment. *See Park Center Water Dist. v. United States,* 781 P.2d 90, 97-98 (Colo.1989).
923 Here, in contrast, there is no significant disparity *923 between the 1986 application and the 1988 amendments as to the named source of the water. The water source named and legally described in the 1986 application was that segment of the Poudre River known as the Corridor. The water source named and legally described in the 1988 amendments was the Poudre River at specific points within the Corridor. Thus, the effect of naming the Corridor as the source of the water claimed in the 1986 application was not only to place those parties with interests or potential interests in that segment of the Poudre on notice but also to place those parties with interests or potential interests in specific points within that segment of the Poudre on notice. That the latter were placed on notice is indicated by the fact that no new parties filed statements of opposition to the 1988 amendments. All interested parties were alerted by the 1986 application, and the fact that the notice was perhaps overinclusive is not a defect.

Thus, Thornton's argument, that the conceptual difference between a minimum stream flow with no diversions and two discrete diversions with no minimum stream flow precludes a relation back, is not persuasive. Even assuming that a minimum stream flow is of an entirely different legal character than a diversion, it is possible nonetheless that one can be put on notice of another's intent to appropriate a definite amount of water from a sufficiently definite source even when the claimed water right is artlessly or even impermissibly characterized as a minimum stream flow rather than a diversion. *Cf. Board of County Comm'rs v. Collard,* 827 P.2d 546, 552 (Colo.1992) (when published resume notice suggests that the "'applicants were seeking to appropriate substantial flows of various segments of the named streams, [such] fact alone would raise a red flag (inquiry notice) to any person interested in water in the subject streams'"); *Closed Basin Landowners Ass'n v. Rio Grande,* 734 P.2d 627, 633 (Colo.1987) ("The concept of the Closed Basin Project was not the appropriation of water from many discrete points, but a diversion of water from the entire area. The content of the published resume gave reasonable notice that the points of the proposed diversion would consist of the entire area...."); *City and County of Denver v. Colorado River Water Conservation District,* 696 P.2d 730, 751 (Colo.1985) ("an absence of a precise location [of points of diversion] does not automatically preclude a conditional decree. A would-be appropriator must give some notice to others of the claim upon the water from a particular source to establish a conditional water right; locating the diversion points with absolute specificity is not required."). Viewed as a reasonably prudent party, Thornton "'ought to have been able to anticipate or should have expected that the character of the original pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question.'" *Bell,* 724 P.2d at 638 (quoting 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1497 at 498-99 (1971)).[1]

We conclude that Thornton was on notice, as of at least December 31, 1986, that **Fort Collins** intended to appropriate 55 cfs of Poudre River water from within the established limits of the Corridor for municipal, recreational and piscatory purposes. We thus reject Thornton's second ground in support of its argument that the 1988 amendments cannot be found to relate back to the 1986 application, namely, that the 1986 application was of dubious legality. An allegation that a claim for a conditional water right is illegal because it claims a minimum stream flow speaks to the issue of whether the right claimed should be granted at all, not to the sufficiency of notice upon which depends the issue of relation back. *See* Part II C. We hold that the water court properly found that the 1988 amendments relate back to the 1986 application.

924 *924 **B**

Thornton also disputes the appropriation date of February 18, 1986, decreed by the water court for the conditional water right at the Nature Dam. The water court found that the adoption of the Plan by the city council of **Fort Collins** at a public meeting on February 18, 1986, was an act sufficiently overt to place all interested parties on notice that **Fort Collins** intended to appropriate the Poudre River water claimed by the 1986 application. The water court ruled that the Plan's adoption satisfied both prongs of the so-called "first step" test for an appropriation of a conditional water right. The water court also found that the field trips by **Fort Collins** staff to the proposed sites for the Nature Center and power plant dams in February of 1986, the publication of notice of Poudre River water rights claims in a **Fort Collins** newspaper on December 31, 1986, and the signs posted at certain locations along the corridor on December 31, 1986, satisfied the overt acts prong of the first step test.

Thornton argues that neither the adoption of the Plan by the **Fort Collins** city council on February 18, 1986, nor the staff field trip in February, nor the posting of signs along the Corridor in December of 1986, nor the notices published in the local newspaper in December of 1986, whether taken singly or cumulatively, could constitute evidence sufficient to support an appropriation date of February 18, 1986. According to Thornton, these acts did not manifest a fixed intent to appropriate water at the Nature Dam as of February 18, 1986, nor did they constitute acts sufficiently overt to qualify as the first step taken toward the appropriation of water at the Nature Dam on February 18, 1986. Rather, the earliest possible appropriation date, according to Thornton, is June 1, 1988, the date on which the 1988 amendments were filed with the water court.[2]

1. The First Step Test.

We review the principles governing the adjudication of a conditional water right. In particular, we review the principles of the "first step" test and some of the sequential and evidentiary problems encountered in applying the test. The sequential problems are generated by the division of the first step into an intent prong and an overt act(s) prong. *See* *Lionelle v. Southeastern Colorado Conservancy Dist.*, 676 P.2d 1162, 1168 (Colo.1984). Such problems are further complicated by the requirement that the overt act or acts must perform at least three functions. *See* *Bar 70 Enterprises, Inc. v. Tosco Corp.*, 703 P.2d 1297, 1307 (Colo.1985). Evidentiary problems arise over whether a relevant act can be deemed to have performed one or more of the required functions.

A conditional water right is defined by the Act as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based." § 37-92-103(6), 15 C.R.S. (1990). A conditional water right "encourage[s] development of water resources by allowing the applicant to complete financing, engineering, and construction with the certainty that if its development plan succeeds, it will be able to obtain an absolute water right." *Public Service Co. v. Blue River Irrigation Co.*, 753 P.2d 737, 739 (Colo.1988). We have held that "[c]onditional water rights decrees are designed to establish that the 'first step' toward an appropriation of a certain amount of water has been taken and to recognize the relation back of the ultimate appropriation to the date of that first step." *City of Aspen v. Colo. River Water Conservation Dist.*, 696 P.2d 758, 761
925 (Colo.1985). *See* § 37-92-305(1), 15 C.R.S. (1990).[3] To establish the date of the appropriation, the applicant *925 must show the "concurrence of the intent to appropriate water for application to beneficial use with an overt manifestation of that intent through physical acts sufficient to constitute notice to third parties." *City of Aspen*, 696 P.2d at 761.[4] The concurrence of intent and overt acts qualifies as the first step toward an appropriation of water, and the date on which the first step is taken determines the date of the appropriation.

The division of the first step into an intent prong and an overt acts prong has generated disputes over whether there is a necessary sequence of intent formation followed by overt acts. In *Bar 70,* we held that "[a]lthough the formation of the intent to appropriate water will generally precede the performance of the overt acts, the 'first step' in some cases may be completed even though the overt acts occur before the formation of the requisite intent to appropriate." 703 P.2d at 1307 (citing *Harvey Land & Cattle Co. v. Southeastern Colorado Water Conservancy Dist.*, 631 P.2d 1111 (Colo.1981); *Twin Lakes Reservoir & Canal Co. v. City of Aspen*, 192 Colo. 209, 557 P.2d 825 (1976)). This formulation requires some clarification.

In *Bar 70,* we held that no matter the sequence, the relevant act(s) "must be of such character as to perform three functions...." 703 P.2d at 1307 (citing *City of Aspen,* 696 P.2d at 762-63). The three required functions are: "(1) to manifest the necessary intent to appropriate water to beneficial use; (2) to demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) to constitute notice to interested parties of the nature and extent of the proposed demand upon the water supply." *Bar 70,* 703 P.2d at 1307. A relevant act need not perform all three functions, as long as all three functions are performed by some relevant act or acts. An act which performs one or more of these functions is thereby an overt act for purposes of the first step test. Obviously, if a relevant act is deemed to have performed the first function of manifesting the necessary intent, then the necessary intent has been formed.

Thus, if the sequence of elements in a particular case is such that a relevant act precedes the formation of the necessary intent, then that act cannot be deemed to have performed the first required function of manifesting the necessary intent. The act, therefore, which is deemed to have manifested the necessary intent is the one act which cannot precede the formation of the necessary intent. However, an act preceding both the formation of the necessary intent and the act manifesting that intent may be relevant because that act may be deemed to have performed the second and/or the third required functions. In *City and County of Denver,* we held that "formation of the necessary intent to appropriate may succeed the performance of those overt acts that serve the purposes of demonstrating that a substantial step has been taken toward application of water to beneficial use and of putting others on notice of the prospective demand upon the water supply." 696 P.2d at 748. Conversely, overt acts performing those functions may precede the formation of intent.[5] Even so, the first step can never be completed before the formation of the necessary intent, and the appropriation date of a conditional water right cannot be set earlier than the formation of the requisite intent and the act which manifests that intent.

Turning to evidentiary concerns, the problem may arise as to what relevant act can be deemed to have performed the
926 function of manifesting the necessary intent. *926 In *Harvey Land & Cattle,* 631 P.2d at 1113, and in *Twin Lakes,* 557 P.2d at 828, we held that the filing of an application for a conditional water right itself may be evidence that the necessary intent to appropriate water has been formed. That filing an application for a conditional water right may constitute such evidence means that the filing also was the relevant act which performed the first required function of manifesting the necessary intent. *See City and County of Denver,* 696 P.2d at 748 n. 14.

Given that filing an application for a conditional water right may be deemed to have performed the first function, we proceed to consider whether a filing may be deemed to have performed the second and third required functions if other relevant preceding acts are lacking or fail to qualify as overt under the first step test. While filing an application for a conditional water right certainly may be deemed to have performed the third required function of providing notice, *see Collard,* at 552, it is doubtful that a filing can be deemed in and of itself to have performed the second required function (*i.e.,* taking a substantial step to put the water to beneficial use). Other overt acts normally would be required. Under section 37-92-305(9)(b), 15 C.R.S. (1990), an applicant for a conditional water right must establish that water can be and will be "diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used." Establishing that waters can be diverted or controlled would entail some showing that certain measures toward the application of waters to beneficial use either have been taken before the application was filed or at least before trial. *See Southeastern Colorado Water Conservancy Dist. v. City of Florence,* 688 P.2d 715, 718 (Colo.1984) (§ 37-92-305 (9)(b) "requires proof that water will be diverted and that the project will be completed with diligence *before* issuance of a decree for a conditional right"). The relevant measures taken and offered as evidence to make the required proof under section 37-92-305(9)(b) also may be relevant for purposes of showing that the second function under the first step test thereby has been performed.

The relevant measures need not be physical acts in the conventional sense of the term. Because the statute is cast in terms of potentiality, that is, requiring proof that waters can and will be beneficially diverted, possessed or controlled, the relevant measures taken can be either physical acts, as conventionally understood, and/or formal acts. Formal acts include planning which is focused on the appropriation of water, studies undertaken as to whether a water

diversion is feasible, specific expenditures of human and financial capital in this planning process, applying for various water permits, and other related legal or quasi-legal filings apart from the conditional water rights application itself.

We acknowledge that such formal acts hardly seem to qualify as "open and notorious physical demonstration[s]" of an intent to appropriate water to beneficial use. *Fruitland Irrigation Co. v. Kruemling*, 62 Colo. 160, 165, 162 P. 161, 163 (1916). The traditional requirement that the overt act(s) be a physical demonstration, however, may no longer fully exhaust the more modern functional approach in which the critical inquiry is whether the relevant act or acts were sufficient to have performed one or more of the three required functions of the first step. *See City of Aspen*, 696 P.2d
927 at 764.[9] Even in *Fruitland*, we recognized *927 that the first step's primary function is to provide notice to interested parties. 62 Colo. at 165, 162 P. at 163.

In applying this function-based test, we hold that formal acts may qualify as overt acts under the first step test so long as such formal acts perform one or more of the required functions. When a municipality or other public entity is the would-be appropriator, *see* § 37-92-103(8), 15 C.R.S. (1990), relevant formal acts also may include resolutions passed or other official decisions made, again so long as such formal acts are deemed to have performed one or more of the required functions. *Cf. Public Service Co. of Colorado v. Blue River Irrigation Co.*, 829 P.2d 1276, 1278-1279 (Colo.1992) (the following formal acts were evidence of due diligence: meetings with government regulatory bodies, permit applications from regulatory bodies, design and engineering studies, and financial expenditures for related administrative and legal fees).

To summarize, the division of the first step into an intent prong and an overt act(s) prong and the required concurrence of the two means that the first step may begin with either the formation of intent or an act which performs one or more of the three required functions. The first step cannot be said to have been taken or completed, however, until the intent has been formed and all three functions have been performed by one or more overt acts, either physical or formal. Thus, the formation of intent and the required overt act or acts may constitute a series of discrete events over time. However, the appropriation date cannot be set before the latest date in that series, which is the date on which it can be said that the first step has been taken to appropriate water.

To conclude the framework for our analysis, we note that whether the relevant act or acts were sufficiently overt is a "mixed question of law and fact, the resolution of which must be made by the court through the application of a legal standard to the particular facts of the case." *Bar 70*, 703 P.2d at 1306. That legal standard is of course the performance of one or more of the functions set forth above, recognizing that formal acts may qualify. However, even with the foregoing framework, the "determination whether the requisite first step has been taken [still] must be made on an *ad hoc* basis, taking into account the particular facts in each case." *City of Aspen*, 696 P.2d at 761. Finally, as always, the applicant has the burden of proving that a relevant act(s) has performed all of the required three functions and that the first step thereby has been completed on a particular date. *Bar 70*, 703 P.2d at 1306.

2. Applying the First Step Test.

With the foregoing analysis in mind, we turn to Thornton's argument that the appropriation date cannot be February 18, 1986, the date decreed by the water court and the date on which **Fort Collins** adopted the Plan. Thornton argues that filing the amendments on June 1, 1988 "was the first time that **Fort Collins** demonstrated any kind of intent to divert and appropriate a water right at the Nature Center Diversion Dam by overt acts sufficient to put interested persons on notice of its intended appropriation." Opening Brief for the Appellant at 22 n. 15. Thornton's argument here is predicated on the view that the 1986 application manifested an intent to appropriate a minimum stream flow while the 1988 amendments manifested an intent to divert water at the Nature Dam.

We have already held that Thornton was on notice of the intent by **Fort Collins** to appropriate 55 cfs of Poudre River water from some point or points within the Corridor at least as of December 31, 1986, the date on which the original
928 application was filed.[7] The first and third *928 required functions were thus performed at least as of December 31, 1986. The issues now are whether the first and third functions were performed by a relevant act earlier than December

31, 1986, and when exactly was the second required function performed by a relevant act. The earliest date on which it can be said that the three functions were performed by relevant acts determines the appropriation date.

To properly apply the first step test to these issues we begin with the appropriation date awarded by the water court and inquire whether the relevant act which was the basis of the appropriation date could have been deemed to have performed all three required functions. The relevant act was the formal adoption of the Plan by the **Fort Collins city** council on February 18, 1986. If adoption of the Plan performed none of the required functions, then it cannot be the basis for the appropriation date. The inquiry then would proceed to other relevant acts, possibly done before but most likely after February 18, 1986, to determine the earliest date on which it can be said that all three functions of the overt act(s) prong of the first step have been performed.

Reviewing the evidence, we find that nothing in the Plan as adopted by **Fort Collins** could have placed Thornton or anyone else on notice that **Fort Collins** intended to *appropriate* water from the Poudre River pursuant to the Act. *See* § 37-92-103(3)(a), 15 C.R.S. (1990). Nothing in the Plan indicates that a legal appropriation of water is required to implement the Plan. If anything, the testimonial evidence shows that an appropriation of water was not contemplated. If an appropriation of water were a condition precedent to the success of the Plan, then it surely would have received a modicum of specific discussion. Although the Plan does contemplate the enhancement of the natural environment, many land use plans implicate environmental issues, including water management and water habitat issues, without thereby constituting an intent to appropriate water under the Act. Conceding the otherwise laudable intent of the Plan, for purposes of the first step test it must fail as an act sufficiently overt as to have put interested parties on notice that a legal appropriation of Poudre River water was intended.[8] Thus, adoption of the Plan cannot be deemed to have performed either the first or the third required functions under the first step test. For the same reasons, the formal adoption of the Plan cannot be said to have performed the second required function of demonstrating that a substantial measure has been taken to apply water to beneficial use. Thus, we hold that **Fort Collins** did not take the first step toward appropriating the Poudre River water on February 18, 1986, the date on which the Plan was adopted.

The water court cited a field trip by **Fort Collins** staff members at which photographs of what eventually would be the site of the Nature Dam were taken as confirming evidence of the formation of **Fort Collins's** intent to appropriate water as of February 18, 1986. That field trip did occur in February of 1986, but no more specific date is found in the record. Even if we were to assign the 18th as the date of the February 1986 field trip, such an act could not be deemed to have manifested an intent to appropriate water or to have performed any other required function. *See* Bar 70, 703 P.2d at 1307-08 (a field trip in the nature of a preliminary reconnaissance neither manifested an intent to appropriate water, nor demonstrated that a substantial measure was taken to apply waters to beneficial use, nor provided notice to interested parties).

The other relevant acts which the water court found to support an appropriation date of February 18, 1986, occurred
929 after *929 February 18, 1986, and as such cannot be deemed to establish the appropriation date of February 18, 1986. These post-February 18, 1986, acts were the posting of signs along the Corridor on December 31, 1986, and the publication in a local newspaper, also on December 31, 1986, of a notice to appropriate water. The dates of both acts coincide with the date of the filing of the original application for conditional water rights, an act which we have said performed the functions of manifesting intent and of providing notice to interested parties. It thus appears unlikely that the appropriation date can be set earlier than December 31, 1986. However, we remand this issue for a conclusive determination of the date on which the performance of all three required functions by a relevant act or acts concurred. We note that the record indicates that the decision to file the original application was made "sometime in November of 1986," and that the basis for the decision may have been "some preliminary work in the river on some structures." Although we have held that formal acts may satisfy the second required function, work on the river may be evidence of course of a substantial step taken to apply waters to beneficial use for purposes of the second required function under the first step test.[9]

C

Thornton's final argument on appeal is that the Nature Dam is not a diversion within the meaning of the law. Thornton argues that because **Fort Collins's** claimed diversion at the Nature Dam is nothing more than a minimum stream flow right, the conditional decree cannot issue. Thornton again points to the "in-stream" language employed in the 1986 application and to the fact that this language precipitated objections, negotiations and finally settlement with the CWCB. The settlement resulted in the 1988 amendments. Thornton argues that even with the corrective amendments and even if those amendments were found to relate back **Fort Collins** was still seeking and therefore was in fact granted an illegal conditional decree for a minimum stream flow rather than for a legal diversion at the Nature Dam.

The water court held that the Nature Dam diverts Poudre River water from a more recent channel back into its historic channel. "[B]ut for the dam," in the water court's view, "the river would run in a different course." Thus, at the Nature Dam water from the Poudre River "is captured, it is controlled, and it is possessed" by **Fort Collins**, according to the water court. The water court concluded that the Nature Dam is a "diversion" and that the uses of the diverted water were beneficial.

We first review the relevant statutes. Under section 37-92-103(3)(a), 15 C.R.S. (1990), an "'[a]ppropriation' means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law...." Section 37-92-305(9)(b), 15 C.R.S. (1990), sets forth in part the criteria for awarding a conditional water appropriation:

> [n]o claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

Water can be appropriated either by diverting water or by otherwise controlling water. An application for a conditional water right may be adjudicated if either diversion of water or control of water is established, assuming that the resultant use is beneficial. A diversion in the conventional sense is not required. Under section 37-92-103(7), 15 C.R.S. (1990):

> "Diversion" or "divert" means removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit,
930 *930 well, pump, or other structure or device.

Thus, to effect a diversion under the statute, water either must be removed or it must be controlled. Because "the disjunctive 'or' demarcates different categories," *Bloomer v. Boulder County Bd. of Comm'rs*, 799 P.2d 942, 946 (Colo.1990), removing water cannot be the same as controlling water. Removal is taking the water *from* its natural course or location, while control is exercised over the water *in* its natural course or location. Clearly, a diversion in the conventional sense of the term, meaning removing water and carrying it away from its natural course or location, is no longer required. *See Colorado River Water Conservation Dist. v. Colorado Water Conservation Board*, 197 Colo. 469, 474, 475, 594 P.2d 570, 573, 574 (1979). We have held that "'there may be a constitutional appropriation of water without its being at the instant taken from the bed of the stream.'" *Id.* at 474, 594 P.2d at 573 (citing *Larimer Co. v. Luthe*, 8 Colo. 614, 9 P. 794 (1886) (emphasis deleted)). Controlling water within its natural course or location by some structure or device for a beneficial use thus may result in a valid appropriation.

A dam certainly qualifies as a structure or device. A dam therefore is comprehended by the provision that the requisite removal or control may be effected by some "structure or device" other than the ones listed, so long as the removal or control of the water is for a beneficial use.

A beneficial use is defined in section 37-92-103(4), 15 C.R.S. (1990), as:

> the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife. For the benefit and enjoyment of present and future generations, "beneficial

> use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

This statute provides that water appropriated for municipal, recreational, piscatorial, fishery, and wildlife purposes is water put to beneficial uses.

As to the appropriation of a minimum stream flow, in 1987 the General Assembly amended section 37-92-102(3) and vested the CWCB with "exclusive" authority to appropriate "minimum stream flows" and "natural surface water levels or volumes for natural lakes." *See* 1987 Colo.Sess.Laws, ch. 269 at 1305-06. Section 37-92-102(3) in relevant part now reads:

> Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the exclusive authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of Article XVI of the state constitution, such waters of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree. In the adjudication of water rights pursuant to this article and other applicable law, no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points, or for natural surface water levels or volumes for natural lakes, for any purpose whatsoever.

The exclusive authority vested in the CWCB to appropriate minimum stream flows does not detract from the right to divert and to put to beneficial use unappropriated waters by removal or control. *See Colo. Const.*, Art. XVI, § 6.

Thus, according to the plain language of the foregoing statutes, we hold that water may be appropriated by a structure
931 or device which either removes water *931 away from its natural course or location and towards another course or location or which controls water within its natural watercourse, assuming such action puts the water to beneficial use. The type of beneficial use to which the controlled water is put may mean that the water must remain in its natural course. This is not an appropriation of a minimum stream flow, an appropriation given exclusively to the CWCB. A minimum stream flow does not require removal or control of water by some structure or device. A minimum stream flow between two points on a stream or river usually signifies the complete absence of a structure or device. Furthermore, that an appropriation of a minimum stream flow by the CWCB must put that stream flow to the beneficial use of the preservation of nature does not mean that the beneficial uses to which waters controlled by some structure or device may not also redound to the preservation of piscatorial and other natural resources. Although controlling water within its natural course or location by some structure or device may effect a result which is similar to a minimum flow, that does not mean that the appropriation effected by the structure is invalid under the Act. When the application of water to beneficial use is effected by some structure or device, the resulting appropriation is by a diversion within the meaning of the Act.

The issue then is whether the appropriation of water effected by the Nature Dam is a removal or control of water for beneficial use within the meaning of the foregoing statutes. The water court found that the Nature Dam removes Poudre River water from its natural course or location and puts that water to a beneficial use. We agree. As on the issue of relation back of the 1988 amendments to the 1986 application, Thornton again argues that Fort Collins's persistent intent to appropriate minimum stream flows means that the appropriation at the Nature Dam is an invalid appropriation. To be sure, re-labeling what is otherwise a minimum stream flow without control by some structure or device as a diversion, that is, removal or control of water by some structure or device, does not transform the former into the latter from a legal point of view. However, it is clear that the Nature Dam is a structure which either removes water from its natural course or location or controls water within its natural course or location given that the Poudre's "historic" channel may be considered the River's natural course or location. The uses of the Poudre River water so controlled are recreational, piscatorial and wildlife uses, all valid under the Act.

The water court also found that **Fort Collins** does not claim a right to exercise dominion and control of the water after it leaves the point of the Nature Dam. Thornton argues that this means that **Fort Collins** has not appropriated the waters for the claimed beneficial uses because the water may be appropriated by others after leaving the Nature Dam thereby preventing its beneficial use by **Fort Collins**. It appears that the water court included in its decree a finding of no claim to control the water because of the negotiated settlement and stipulations made between **Fort Collins** and the CWCB. However, a "stipulation cannot be used to bind a court in the determination of questions of law or mixed questions of law and fact." *Bar 70,* at 1306 (note omitted). Whatever the reason that the CWCB insisted that **Fort Collins** so disclaim control of the water after it passed the Nature Dam, we hold that no such disclaimer is required in order to find that the appropriation is a valid diversion and/or to insure that the appropriation is not a minimum stream flow exclusively reserved to the CWCB. Under the statutes, to control water within its natural course or location means that the appropriator exercises control over the water at least to the extent that the water continues to be put to beneficial use by the appropriator, in this instance by **Fort Collins**. Thus, **Fort Collins** may validly exercise dominion over the Poudre River water once it passes the Nature Dam and continues within that segment of the river in which such water is put to beneficial use. If and when the water passes downstream from that controlled segment of the
932 Poudre it may be *932 subject to further appropriation by others. That CSU owns and operates the land along which the beneficial uses are to take place does not in and of itself mean that the beneficial uses can not or will not take place. *See FWS Land and Cattle Co. v. State of Colo. Div. of Wildlife,* 795 P.2d 837, 840 (Colo.1990). Because we have held that control of water within its natural course or location by a structure may be a valid appropriation under the Act, upon remand the water court must conclusively determine whether the agreements between **Fort Collins** and CSU are such as to show that the claimed waters can and will be put to the beneficial uses stated in the application.

III

On cross-appeal **Fort Collins** argues that the water court erred in declining to award a conditional water right for the Power Dam. The water court found that there was insufficient "evidence to show that the flow of the river at the Power Dam is controlled." Specifically, the water court held that the boat chute and the fish ladder at the Power Dam do "not add any control to the river; water is directed through the boat chute and the fish ladder only at an unspecified low flow of the river." The water court concluded that "the river continues to flow as it did prior to any construction" at the Power Dam and that therefore the effect of the Power Dam is not a "diversion" under section 37-92-103(7), 15 C.R.S. (1990). As it is not a legal diversion, the appropriation there would constitute an invalid minimum stream flow appropriation, according to the water court.

The boat chute and the fish ladder were included in the reconstruction and renovation of the Power Dam in 1987. In general, boat chutes and fish ladders, when properly designed and constructed, are structures which concentrate the flow of water to serve their intended purposes. A chute or ladder therefore may qualify as a "structure or device" which controls water in its natural course or location under section 37-92-103(7).

The water court's reasoning that the boat chute and the fish ladder at the renovated Power Dam do not add any control to the river or that the river continues to flow as it did prior to the renovation of the Power Dam suggests that the chute and the ladder in fact fail to function as designed. That is, the chute does not allow kayaks or other flotation devices to pass through the Power Dam and the ladder does not assist fish to scale the Power Dam. If this is the case, then the waters claimed at the Power Dam are not being put to beneficial use, and the claimed appropriation may be denied for this reason.

However, there was no evidence presented at trial that the chute and the ladder have failed to function as designed. Rather, there was some testimonial evidence that the chute and the ladder do function properly under low flow conditions. The record indicates that disputes remain as to whether boats (or kayaks and inner tubes) are allowed to take advantage of the chute, but that fish are using or will use the ladder was not disputed. That the chute and the ladder function as designed means that the water can be controlled such as to be put to recreational and wildlife uses, both beneficial uses under the Act. That the chute and the ladder control and direct river water *only* at unspecified low

flows in the river is not a defect since that is precisely what they are designed to do. We therefore reverse the water court's conclusion that the Power Dam does not effect a diversion within the meaning of the Act.

The water court's conclusion that the Power Dam was not a legal diversion precluded the disposition of other issues which would have been addressed had the water court found the Power Dam to be a structure which controlled water within the meaning of the Act. Thus, we remand the claim for Poudre River water at the Power Dam for a conclusive determination as to whether the boat chute and the fish ladder can and will put water to beneficial use. In addition, the water court must make a separate determination of the appropriation date for the Power Dam under the first step test
933 described in Part II B. The act(s) relevant to the determination of the appropriation *933 date for the Nature Dam may or may not be relevant to the determination of the appropriation date for the Power Dam.[10]

IV

Thornton was on notice of the intent by **Fort Collins** to appropriate a certain amount of water from a sufficiently precise location of the Poudre River by the application for conditional water rights filed by **Fort Collins** in 1986. The 1988 amendments therefore relate back. However, because passage of the Plan by the **Fort Collins city** council does not perform the functions of the first step, we reverse setting the appropriation date of February 18, 1986, for the water rights at the Nature Dam, and remand for an application of the first step test according to the principles framed in this opinion. Whatever the appropriation date, we find that the Nature Dam may effect a valid appropriation. Finally, we hold that the Power Dam qualifies as a structure which controls water and thus also may effect a valid appropriation. The appropriation date of the Power Dam diversion and related issues must be determined by the water court according to the views set forth in this opinion.

ERICKSON, J., does not participate.

[1] In *Bell*, we noted that C.R.C.P. 15(c) was identical to Fed.R.Civ.P. 15(c), making commentary on the federal rule relevant.

[2] Actually, as Thornton notes, May 27, 1988, was the date the 1988 amendments were filed. June 1, 1988, is the date cited by the water court and **Fort Collins**, and since **Fort Collins** accepts the later date on this appeal, we will employ that date for the 1988 amendments for purposes of this opinion.

[3] The relation back to the first step for purposes of determining the appropriation date is different from the relation back of amendments to an original application discussed in Part II A.

[4] The reference to physical acts, plural, when explaining the action required to satisfy the first step test does not mean that a single act may not suffice if it satisfies the purposes of the requirement for overt acts. *See City of Aspen*, 696 P.2d at 763 n. 5.

[5] Acts preceding the formation of the necessary intent and the act manifesting that intent were relevant in *Harvey Land & Cattle*, 631 P.2d at 1113 (six water wells were in existence before filing an application which manifested the necessary intent), and in *Twin Lakes*, 557 P.2d at 828 (ditches of certain capacity constructed prior to formation of the intent to appropriate the additional water allowed by the large capacity of those ditches).

[6] In *City of Aspen*, one of the parties argued that the second prong of the first step test simply requires giving "notice of the intent to apply water to beneficial use." The opposing party argued that the second prong contemplates an "'open physical act on the land sufficient to constitute notice to third parties of the intent to apply water to beneficial use.'" 696 P.2d at 761 n. 4. We held only that the overt acts necessary to satisfy the second prong need not take place "on the land." *Id.*, at 764. Due to the inadequate arguments and an insufficient record, we left unanswered whether such formal acts as permit applications filed with a regulatory body, correspondence between the applicant and another regulatory body, and especially public meetings held by a board of county commissioners and by a **city** council, performed one or more of the three required functions under the overt act(s) prong of the first step test. *Id.*, at 765.

[7] That the 1988 amendments relate back to the 1986 application does not mean that an appropriation date will automatically fall on or before the date of the original application. Relation back of amendments to original pleadings means only that the third parties were in fact on adequate notice as of the date of the original pleading. That Thornton was on notice that **Fort Collins** intended to appropriate Poudre River water as of December 31, 1986, does not mean that **Fort Collins** met all the requirements of the first step test on or before that date. *See* Part II A, *supra*.

[8] Fort Collins argues that adoption of the Plan should be taken in the context of years of environmental and land use planning. We decline to take this contextual approach because it is contrary to the first step test and the requirement that specific acts perform specific functions.

[9] This issue is important because if that preliminary work cannot be deemed to have performed the second required function, then the appropriation date may fall *after* December 31, 1986, depending on when a substantial measure was taken to apply waters to beneficial use.

[10] The question may arise as to whether an appropriation of 55 cfs of Poudre River water at the Power Dam is required at all. The Power Dam is upstream from the Nature Dam. The record indicates that water called to the Nature Dam necessarily will pass through the Power Dam. Presumably, any water called to the Power Dam will eventually pass the Nature Dam. Thus, the priority date of the downstream structure, here the Nature Dam, effectively guarantees the water use at the upstream structure, here the Power Dam. However, at some point in time the water use at the Nature Dam may be abandoned while the use at the Power Dam may not. Thus, Fort Collins may validly appropriate the same water by separate structures so long as each structure controls and puts water to beneficial use.