FILED
Aug 25, 2015
Court of Appeals
Division I
State of Washington

73315-0

No. 733150-01

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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.

RESPONDENT SKAGIT COUNTY'S BRIEF

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

WILL HONEA, WSBA #33528
Deputy Prosecuting Attorney
Skagit County Prosecuting Attorney
605 South Third Street
Mount Vernon, WA 98273
(360) 336-9460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

The right to sufficient water to support a rural homestead has been enshrined in statute since 1945, and has always been understood as a core component of the value of real property in rural areas such as Skagit County.

In 2001, the Washington State Department of Ecology adopted an instream flow rule for the Skagit River (the "**2001 Rule**") through a notice and comment rulemaking, setting minimum flows based on arbitrarily high flow levels that the Skagit River has historically never met. The 2001 Rule says nothing whatsoever about single family domestic exempt wells. While draft versions of the 2001 Rule contemplated possible regulation of exempt wells, the final version was completely silent as to exempt wells.

Nevertheless, in 2013, some twelve years later, Ecology directed Skagit County to stop issuing building permits and subdivision approvals that rely on exempt wells, contending that the 2001 Rule's silence regarding exempt wells eliminated the right to use exempt wells by implication. Ecology never informed the public about any of this until last year (2014), and the public never had meaningful opportunity to participate at the time. As a result, Petitioner Fox and thousands of others now own nearly un-useable and unmarketable land, often encumbered by

debt greater than the land's residual value. The County has, on application from landowners, been forced to dramatically reduce the taxable value of the land.

The Skagit County Planning Department, following Ecology's directive, declined to issue Appellant Fox a building permit when he applied for one in early 2014. Appellant Fox then brought this suit against Skagit County.

Fox is correct that the court below erred in deferring to Ecology's interpretation of its 2001 Rule.

Skagit County has spent the last decade being dragged into a series of lawsuits and regulatory headaches stemming from Ecology's serial malfeasance. Ecology's intepretation of its 2001 Rule constitutes arbitrary, unreasonable, and likely unconstitutional treatment of thousands of Skagit County citizens, representing an abuse of governmental power in which Skagit County has no interest in participating.

Exempt wells have never been limited in the past, and have always been seen as a matter of right by rural landowners, the real estate industry, banks, and the community in general. Skagit County agrees that setting a limit on exempt wells in necessary and proper. Ecology and the County depart from each other in that the County believes this must be done transparently, openly, and honestly; should be supported by believable,

credible science; and should minimize the damage to those who have acted in reliance on the *status quo* – all in the interest of obtaining buy-in from the community, and a resultant practical ability to enforce the rule adopted. Ecology has totally failed in all these respects, and has abused its authority in the process.

Ecology should establish tributary-specific minimum flows for the Skagit Basin, and limit the use of future exempt wells through a clear, transparent and honest public process. Skagit County could support such a thing, but that has yet to occur.

II. ISSUES PRESENTED FOR REVIEW

1. **Ecology asserts, twelve years later, that the 2001 Rule prohibits the use of any exempt wells put into use after 2001, even though the 2001 Rule is silent on the topic of exempt wells. Is this a reasonable interpretation?**

   Short Answer: No. While Ecology has the authority to establish instream flow rules, and possibly has the right to eliminate the right to use exempt wells through adoption of an instream flow rule, it must do so transparently and openly. Ecology's interpretation claims more authority than the legislature afforded Ecology, and fails to comport with constitutional due process.

III. STATEMENT OF THE CASE

Over the past two decades, the Department of Ecology has pursued little with as much enthusiasm as its announced vision of converting the waters of the Skagit Basin into a market-based system capable of

generating governmental revenue. CP367 (2000 document describing Ecology's "Water Vision" for the Skagit Basin as the creation of a regime where "[w]ater not needed for environmental protection would be available to a market system for allocation to competing uses.")

Specifically, over the past decade and a half Ecology has overseen a scheme by which the City of Anacortes received an environmental blessing from the Swinomish Tribe for the City's massive inchoate water claims on the Skagit, i.e., water claims by the City that have not yet been put to any beneficial use. As a *quid pro quo*, Swinomish received a very large amount of guaranteed water from the City, in perpetuity, at cheap wholesale rates. CP117; 119 (1996 agreement regarding Skagit Instream Flow rulemaking, deciding in advance of 2001 rulemaking process that the purpose of the 2001 Rule will be "[t]o guarantee in perpetuity to the Swinomish Indian Tribal Community…a water quantity of 2.8 million gallons per day…", in exchange for which Swinomish promises "to not challenge any water rights claims or adjustments made by the City [of Anacortes]...within 50 years from the Effective Date of this Agreement").

On March 14, 2001, Ecology published WAC 173-503, the Skagit River Instream Flow Rule ("**2001 Rule**"). CP25-30. In the 2001 Rule, Ecology established 10,000 cubic feet per second in the Lower Skagit River mainstem as the minimum flow baseline during low flow months, based on a point of measurement at Mount Vernon. When the Skagit River falls below this level – which it always has, as long as data has been kept – the Skagit Basin and all of its tributaries are to be deemed impaired,

and, therefore, closed to further appropriation. CP00266. This is described by the Declaration of Jerry Liszak, an Ecology employee, submitted in this action:

> The Skagit River Basin Water Management Rule, WAC 173-503, went into effect on April 14, 2001. After this date, any new consumptive withdrawals of groundwater in hydraulic continuity with the Skagit River will cause impairment to instream flows when they are below the minimum instream flows (MIFs) prescribed in the rule. Historically, there have been a number of days every year when the MIFs are not met, as depicted in the following Graph 1 and Table 1.

CP463. Dealing in half-truth, what Mr. Liszak and Ecology fail to explain is that the Skagit River has *never* met Ecology's MIFs, ever, as long as records have been kept. It is undisputed that the Skagit River mainstem has never met the 10,000 cfs minimum instream flow threshold set by the 2001 Rule, as reflected by river gage data kept by the U.S. Geological Survey starting in 1940. CP251. For example, from 1941-1952, USGS records reflect that the Skagit River's monthly mean flow fell below 10,000 cfs in the month of August in seven of those twelve years. *Id.*

More recently, Ecology has been surprisingly open about its scheme to establish arbitrarily high minimum instream flow levels, set well above the historical flows of the river systems they regulate, on the theory that more water for salmon is always ideologically better -- even if

the water in question has never existed – arguing that it "**would** be beneficial for fish **if** those flows were present in the stream."[1]

Both by stated intent and effect, Ecology set out to fabricate an immediate regulatory water shortage in the Skagit River Basin – the West Coast's third largest river, with one of the smallest human populations of any county in the Puget Sound Basin.

In other words, Ecology endorsed a plan for a massive quantity of unused water to go the City of Anacortes and Swinomish Tribe, simultaneously manufacturing a state of scarcity with respect to Skagit County's rural citizens, for the stated purpose of creating a "market system" for the waters of the Skagit.

In 1945, the state legislature codified the right of rural landowners to use enough water to support a single-family homestead (i.e., no more than 5,000 gallons per day), without the requirement to obtain a permit from the State. Before and since, the notion of access to sufficient water to support a single family homestead – an "exempt" well – has been a fundamental property right underpinning the value and useability of rural land. RCW 90.44.050. This is because without a water supply that the County (and banks, insurance companies and the like) will recognize, virtually nothing can be built on one's land per state law and county code,

[1] Washington State Department of Ecology, "Introduction to Instream Flows and Instream Flow Rules," http://www.ecy.wa.gov/programs/wr/instream-flows/isf101.html, last visited August 3, 2015. Stripped of Orwellian doublespeak and placed into plain language, Ecology is saying that there never was enough water in the Skagit River to meet minimum flows, and no human civilization should have ever occurred in the Skagit River Basin.

and, as the pleadings in this matter reflect, Petitioner Fox, like thousands of Skagit Valley landowners, has been acting for decades in reliance on the idea that he would be able to use a *de minimis* quantity of water from the ground beneath his land in order to support his homestead. CP288-291.

Ecology talked about regulating exempt wells in the 2001 Rule, but didn't actually do so. There is no question: early ***draft*** versions of Ecology's 2001 Rule *contemplated* regulating single family domestic exempt wells in various ways. *See, e.g.,* Second Draft WAC 173-503-090 dated September 9, 1999, which would have provided, if adopted, that exempt single family domestic users "shall hook up to a public water system when connection to such a system is practical..." CP715.

However, no restrictions on exempt wells were included in the final, published 2001 Rule, which was completely silent as to exempt single family domestic wells, making no mention of them whatsoever. CP25-30. Ecology did not discuss that exempt wells would be eliminated at any of the decision documents and public hearings leading to the 2001 Rule.

Offering after-the-fact justification, Ecology makes the ludicrous contention that it was always the case that it intended to cut off exempt wells by adoption of the 2001 Rule. CP525. Although Ecology has been directly challenged on multiple occasions to show something that would prove this contention, the rulemaking record reflects nothing explaining that the 2001 Rule would completely cut off access to exempt wells, or

that it would deal with them at all. While Ecology today says that exempt wells were at the forefront of everyone's mind in 2001, Ecology is fraudulently concealing reality from the Court. For example, here is Ecology's response to a written question from a local well drilling company, submitted just before adoption of the 2001 Rule:

> **Citizen Question: Does DOE have any solid proof that an exempt well or group of exempt wells has a negative impact on instream flow?**
>
> **Ecology Response: No information that would relate to this comment has been available for the environmental documents or public hearings. This is not to say that the information does or does not exist.**

Responsiveness Summary, Chapter 173-503 WAC, Instream Resources Protection Program, Upper and Lower Skagit Water Resources Inventory Area (WRIA 3 and 4), CP322.

Even putting aside the complete lack of reference to exempt wells in the 2001 Rule, by contemplating and then dropping reference to exempt wells, reasonable minds could further conclude that exempt wells were not contemplated by the 2001 Rule and its rulemaking process.

In reviewing Ecology's pleadings and arguments in this matter, this Court should be careful to review the date of documents that Ecology is proffering as after-the-fact agency justification for the 2001 Rule's

alleged elimination of the right to use exempt wells that Ecology now says was always the plan.

Ecology amended the 2001 Rule in 2006, establishing limited water allocations for single family domestic exempt wells in each individual stream watershed within the Skagit River Basin, allocations that would have dramatically limited landowners' access to exempt wells. CP439-40. By intent or negligence, Ecology once again bungled the job, utilizing an emergency rulemaking provision to simply announce tributary basin water allocations, relying on the statutory "Overriding Consideration of Public Interest" ("**OCPI**") mechanism codified at RCW 90.54.020(3)(a). *See*, Amendments to Chapter 173-503 WAC, adopted by Department of Ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006).

After that, the Swinomish Indian Tribal Community ("**Swinomish**") brought suit against Ecology, alleging that Ecology's use of the OCPI mechanism was improper. Following a tepid defense by Ecology that more resembled two joint litigants rather than a legitimate adversarial proceeding, the Washington Supreme Court invalidated the 2006 Amendments on narrow, technical grounds, on grounds that Ecology exceeded its authority by using the OCPI allocation mechanism rather than establishing tributary basin minimum flows for each Skagit River

tributary, as Ecology ought to have done in the first place. Holding that all reservations of water by Ecology are subject to the first-in-time, first-in-right prior appropriations doctrine, the Supreme Court ruled that Ecology cannot permissibly create new reservations of water by the OCPI mechanism while simultaneously claiming that the watershed is impaired. *Swinomish v. State*, 178 Wn.2d 571, 576-77 (2013).

Several weeks later, on October 16, 2013, the Attorney General's Office, representing Ecology, directed Skagit County, for the first time, to stop issuing building permits that rely on single family domestic exempt wells. CP273. Prior to this, in the preceding twelve years, Ecology never ordered, directed or told Skagit County to stop issuing building permits on the basis of the 2001 Rule. And far more importantly, Ecology never communicated the idea that exempt wells were precluded, in any way. Rather, Ecology has dropped this bombshell on the people of the Skagit Valley, and now acts as if it is entitled to hide behind Skagit County to do the dirty work involved in arbitrarily depriving thousands of property owners of their rights.

Ecology's 2013 interpretation of its 2001 Rule ensnared Petitioner Fox, who, along with thousands of other unwitting Skagit County landowners, now owns land, in many cases burdened by debt, that cannot

be practically used on a reasonable economic basis, for regulatory lack of access to water. CP288-291.

Petitioner Fox filed an application for a building permit on his property in the Mannser/Red Cabin Creek tributary subbasin, which Skagit County temporarily declined to act upon, in accordance with Ecology's directive. *Id.* Ecology once again weighed in, stating that Skagit County should not issue Fox's building permit, suddenly displaying a level of interest in its 2001 Rule. CR237-245. Caught between a directive from an overbearing state agency and the threat of damages litigation by thousands of aggrieved landowners, Skagit County opted to take no action.

Petitioner Fox then brought this suit against Skagit County, seeking to compel the County to issue Fox's building permit. Ecology intervened to oppose Fox, with Swinomish acting in lockstep. CP273.

In an effort to deny Petitioner Fox his day in court, Ecology argues that some other action and some other venue is an appropriate place for Petitioner Fox to challenge Ecology's 2001 Rule, but this is not a challenge to the 2001 Rule. The 2001 Rule is unambiguously silent on the topic of exempt wells. This action involves a challenge to Ecology's interpretation of its 2001 Rule and related arbitrary conduct, as applied to Petitioner Fox – not to mention the other landowners and lawsuits that will inevitably follow.

IV. LEGAL ANALYSIS

"[W]here the acts of public officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis, then the courts may interfere to protect the rights of individuals." *Washington State Coalition for the Homeless v. Department of Social & Health Services*, 133 Wn.2d 894, 913-14 (1997).

This case presents a matter of first impression: can Ecology eliminate the right to use exempt wells by silence in an administrative instream flow rule?

A. The Right To An Exempt Well, And Its Connection To Skagit County.

State law requires that a landowner seeking a building permit or subdivision approval from Skagit County must first demonstrate access to an adequate supply of potable water.[2] For rural landowners located outside the service areas of municipal water purveyors (such as Skagit PUD No. 1 and the City of Anacortes), this has always meant relying on a well on their own land when seeking a building permit from Skagit County.

---

[2] RCW 19.27.097(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."); RCW 58.17.110(2)(A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for...potable water supplies.")

Codifying the common law, RCW 90.44.050 (1945) provides that single family homes –i.e., rural homesteads – are not required to obtain a permit from the State (i.e., Ecology) in order to use a well withdrawing up to 5,000 gallon of water per day for domestic use. This has created a long-standing property interest on the part of landowners such as Petitioner Fox that they will be able to use this limited amount of water to support a home on their land, and it has become the basis for much of the value in their land. CP288-291.

The Skagit River is the largest river system in the Puget Sound Basin with one of the smallest human populations, which Ecology characterizes as having "abundant water and fish," CP337, and, because virtually all of the water in question returns to the underlying aquifer after passing through a septic system, CP376, overwithdrawal from groundwater tables by an excessive number of exempt wells was never seen as a major problem. But in dry areas of the state where competition between agricultural irrigators and developers over water is fierce, exempt wells have been improperly used to "end run" senior water rights. See, e.g., *Kittitas County v. E. Wa. Growth Mgt. Hearings Board*, 172 Wn.2d 144 (2011). But recognizing the challenges of a drying and warming climate that even those in Western Washington are likely to encounter,

putting a cap on the number of exempt wells has increasingly become a policy aim over the past decade for Skagit County and others.

In 2013, after being sued for several years by Swinomish, Ecology announced that no more exempt wells are available in the Skagit Basin because Ecology's 2001 Rule, which sets minimum flows above any known historical baseline, is silent on the topic of exempt wells. No actual court decision required that conclusion; it was purely Ecology's desire to reach this conclusion, which, of course, would involve dramatically expanding the scope of Ecology's authority.

The question presented to the Court is whether Skagit County is obligated to deny Petitioner Fox a building permit based on Ecology's unreasonable, *post hoc* interpretation of its 2001 Rule. It is not. Ecology's interpretation is a grotesque violation of Petitioner Fox's (and thousands of Skagit County citizens') right to due process of law.

B. The Skagit Instream Flow Rule.

Ecology's authority to create minimum instream flows stems from RCW 90.22.010, which provides that:

> The department of ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.

RCW 90.22.030 makes clear that Ecology may not issue water right permits that conflict with minimum instream flows.

> No right to divert or store public waters shall be granted by the department of ecology which shall conflict with regulations adopted pursuant to RCW 90.22.010 and 90.22.020 establishing flows or levels.

But RCW 90.44.050 provides that exempt wells are exempt from Ecology permitting, and, applying the well-established principle of *expressio unius est exclusio alterius*,[3] RCW 90.22.030, by its terms, does not apply to exempt wells.

Ecology contends that the Washington Supreme Court's *Campbell & Gwinn* and *Swinomish v. State* decisions stand for the proposition that the use of exempt wells can be eliminated by silence and implication in an administrative instream flow rule, by setting a minimum instream flow level above that which has ever been achieved and then interpreting that twelve years later to mean that exempt wells are banned in the Skagit Basin. *Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1 (2002); *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 598 (2013). Neither decision actually holds this, and Ecology is relying on pure *ipse dixit* to support a preconceived notion that Ecology wishes to be so.

[3] Latin: the expression of one thing is the exclusion of the other.

In *Campbell & Gwinn*, the Washington Supreme Court held that exempt wells are subject to the same rules as other rights in a prior appropriation water rights regime. 146 Wn.2d at 9. That may be, and had Ecology honestly and openly dealt with exempt wells in the 2001 Rule, the situation might be different. But *Campbell & Gwinn* obviously did not address what transpired here: Ecology established an indefensibly high baseline below which Ecology claims the Skagit River is impaired, saying nothing about exempt wells, and, then twelve years later, after expressing fear of being sued by the Swinomish Tribe, announced that the statutory right to an exempt well no longer exists in the Skagit Basin.

Nor does *Swinomish v. State* actually support what Ecology is saying, a case that Ecology "defended" with unimpressive vigor against its litigation partner, Swinomish. In *Swinomish v. State*, the Washington Supreme Court actually held as follows:

> Ecology relies on RCW 90.54.020(3)(a) for authority to make the reservations of water despite the existing minimum flows. This statutory provision allows impairment of stream base flows when overriding considerations of public interest are served. The Swinomish Indian Tribal Community (Tribe) petitioned for review in superior court, challenging the validity of Ecology's amended rule reserving the water. The trial court upheld the amended rule and dismissed the Tribe's petition.
>
> We conclude that Ecology has erroneously interpreted the statutory exception as broad authority to reallocate water for new beneficial uses when the requirements for appropriating water for these uses otherwise cannot be met. The exception is very narrow, however,

> and requires extraordinary circumstances before the minimum flow water right can be impaired. Because the amended rule exceeds Ecology's authority under the statute, the amended rule reserving the water is invalid under the Administrative Procedure Act (APA), chapter 34.05 RCW.

178 Wn.2d 576-77. The Supreme Court did not hold that Ecology can eliminate access to exempt wells by silence and implication in an instream flow rule, interpreted as such by Ecology over a decade later. No court has dealt with this topic. It is a matter of first impression.

C. Courts Review The Interpretation Of Statutes And Administrative Rules De Novo.

When interpreting an administrative regulation, courts follow general rules of statutory construction. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 56 (2002). Strained meanings and absurd results should be avoided. *State v. Neher*, 112 Wn.2d 347, 351 (1989). While agencies are entitled to reasonable discretion when interpreting their own rules, courts are not required to abandon their common sense in deference to agency interpretation. *Allison v. Hous. Auth.*, 118 Wn.2d 79, 86 (1991) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989)). This is particularly so when the agency is offering a post-hoc interpretation intended to rationalize agency action long after the fact. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)(courts should not accept appellate counsel's post hoc rationalizations for agency action).

D. Ecology's Interpretation Of The 2001 Rule Is Grossly Unreasonable.

An administrative agency cannot amend a statute by adopting an administrative regulation. *H&H Partnership v. State*, 115 Wn. App. 164, 170 (2003)("An administrative agency cannot modify or amend statute by regulation. Indeed, a rule that conflicts with a statute is beyond an agency's authority and invalidation of the rule is proper.")

There do not appear to be any reported cases that deal with an administrative agency purporting to vitiate a statutory right by silence in an administrative rule, presumably because no one has ever tried such a thing. However, many cases make clear that "repeal by implication is strongly disfavored." *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439 (1993); *OST v. Regence BlueShield*, 181 Wn.2d 692, 701-02 (2014)("We disfavor repeals by implication..."); *No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 123(1984); *Tardiff v. Shoreline Sch. Dist.*, 68 Wn.2d 164, 166 (1966).

E. Ecology's Interpretation Of The 2001 Rule, If Upheld, Violates Fox's Due Process Rights Under The U.S. Constitution's 14th Amendment.

The reason that repeal by implication are disfavored is that the law, and, in general, our society's concept of fundamental fairness, is grounded in the idea that changes in law and policy must accommodate existing rights and expectations in property, rather than arbitrarily extinguishing

investment backed expectations on the basis of obscure post-hoc reasoning proffered by state bureaucracies.

Under the Due Process Clause of the 14th Amendment to the U.S. Constitution, no State shall "deprive any person of life, liberty, or property, without due process of law." Ecology's interpretation of its 2001 Rule, as applied to Petitioner Fox (and the thousands of other similarly situated landowners in the Skagit Valley) likely constitutes a violation of landowners' rights under the 14th Amendment.

This is not the place to fully brief this issue, because the due process required depends on the nature of the interest involved. The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council v. Millis*, 325 U.S. 697, 710 (1945). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972).

There are something on the order of 6,000 landowners in Fox's position, many of whom have already built homes that, according to Ecology, now lack valid water rights. Each of these landowners bought their property with the decades-long understanding that they would have access to enough well water to support their home, and are now told that

they do not. Banks will not refinance, land will not sell, and property owners are stuck, some of whom are facing bankruptcy. Ecology is expecting Skagit County to enforce this debacle, and bear the risk of damages litigation as well.

Washington law provides that a water right does not vest until put to beneficial use, *Ecology v. Theodoratus*, 135 Wn.2d 582 (1998), which is true as far as it goes. But the massive, statewide, commonly understood, long-standing extent to which property owners have relied on exempt wells would appear to constitutionally require something more than Ecology's announcement, twelve years after the fact, that its 2001 Rule means, by operation of silence, that exempt wells are not longer available, a position that Ecology recently adopted after announcing that it is afraid of the Swinomish Tribe. The U.S. Supreme Court's broad definition of "property interest" protecting by the 14th Amendment seems relevant:

> Certain attributes of "property" interests protected by procedural due process emerge [from the U.S. Supreme Court's prior decisions]....
> ...
> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.
> ...
> Property interests....are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – and rules or

> understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Ecology's interpretation of its 2001 Rule, seen through the prism of constitutional due process, is questionable.

In considering whether the extreme burden placed on Petitioner Fox (and thousands of others) warrants the benefit involved, it is worth mentioning that in adopting the 2001 Rule, Ecology failed to actually establish minimum instream flows for most tributary subbasins in the Skagit (other than four small tributaries near Sedro-Woolley, from which Skagit PUD No. 1 draws a portion of the supply for its Judy Reservoir). CP265-66.

This is relevant because Ecology and Swinomish continue to attempt to justify the draconian outcome reached here by the alleged needs of salmon in small salmon-spawning streams, pointing to evidence that does not begin to remotely support their arguments.

For example, Swinomish Chairman M. Brian Cladoosby testifies in this matter, as he does in all matters involving the Tribe's water-related interests, about a dramatic dropoff in salmon harvest by the Tribe over the past two decades, CP478, which fails to recognize Skagit County's large lot zoning in rural areas and inherent limit on the number of new houses

reliant on wells during that time period, i.e., there's been very little new human water usage during that time frame. A court might instead look to the number of tribal gillnets stretched across the Skagit River and increasing tribal resource self-regulation over the past two decades for a considerably more direct causation of salmonid decline, and consider, in the broader historical context, that two wrongs don't make right.

Insofar as the 2001 Rule actually fails to set minimum tributary flows for the salmon-spawning tributaries that are supposedly driving this effort, it truly has very little to do with salmon.

While Ecology's 2001 Rule (as recently interpreted) purports to cut off all new appropriations of water in the Skagit Basin (including, according to Ecology's recent 2013 interpretation, exempt wells) there is no credible evidence that this was actually necessitated by the historically-demonstrated needs of salmon, or that the *de minimis* number of exempt wells involved has harmed salmon in any way. This Court is being subjected to a greenwashing[4] exercise. It is not about salmon. This is about the money to be had from selling water to those didn't previously need it, and little else.

---

[4] Greenwashing: a form of spin which green PR or green marketing is deceptively used to promote the perception that an organization's products, aims or policies are environmentally friendly. *See*, https://en.wikipedia.org/wiki/Greenwashing (last visited August 24, 2015).

V. CONCLUSION

Ecology claims the authority to extinguish the long-standing statutory right to use enough water to support one's homestead, by (**1**) adopting an administrative rule setting the minimum flow of the river well above the historical baseline, creating an immediate regulatory shortage; while (**2**) saying nothing about exempt wells; and (**3**) twelve years later, interpreting the rule to mean that the right to use exempt wells has been flatly eliminated.

That cannot be the law in the State of Washington, and, if it is, then it is extremely bad law. Among other things, Skagit County's citizens deserve an opportunity to understand when and why their government is removing much of the value from their land, at the time it happens.

One must ask: why are Ecology and Swinomish so fearful of adopting a Skagit Instream Flow Rule the right way, actually establishing tributary subbasin minimum flows, and dealing explicitly and openly with exempt wells, through a legitimate public process that the public can understand and generally accept?

Both Ecology and Swinomish are acting precisely like entities with something to hide – perhaps it is the grossly arbitrary minimum flow set by the 2001 Rule, or perhaps it is the actual economic motivations driving this mess since the outset, all of it obscured by hyperbolic language about the alleged needs of salmon and tribal fishermen, which has reliably proven effective in distracting from the reality of the situation. Skagit

County believes that "sunshine is the most powerful of all disinfectants." *New York Times v. Sullivan*, 376 U.S. 254, (1964). This matter is no exception.

Moreover, Skagit County is extremely tired of being sued over Ecology's malfeasance, which includes, among other things, intentionally exposing Skagit County to potential damages claims by thousands of Skagit County landowners. To insist that Skagit County cheerfully participate in this fiasco, which is not of Skagit County's making, is simply not reasonable.

Furthermore, rural Skagit County citizens seem increasingly inclined to simply ignore what is plainly the product of abusive governmental conduct. Because water is available in some cases mere feet below the surface of the land in much of the Skagit Basin, it is virtually impossible to detect and stop those who use water without regulatory permission.

Considering Ecology's stated motivations and problematic treatment of Skagit County's citizenry, Skagit County has very little inclination to expend its dwindling resources on the enforcement of Ecology's objectives here.

Ecology announces plans to spend over a billion taxpayer dollars in 2015,[5] but unless the legislature stands ready to appropriate much more in order to hire Ecology enforcers, the fact remains that Ecology needs

[5] *See*, Ecology 2015 Budget, http://www.ecy.wa.gov/budget.html (last visited August 24, 2015).

Skagit County and the other counties of Washington in order to enforce its wishes. It is a regulatory partnership that requires good faith conduct on both sides, and to say that Ecology has been an exceedingly poor partner in this matter is an understatement.[6]

Moreover, we have bigger problems. The glaciers feeding the Skagit River have shrunk by half in the past five decades, a process that is accelerating.[7] Where this response brief is being written, in the Upper Skagit Valley, the air is filled with the smoke of climate-caused wildfires. These events presciently foretell a future of conflict over diminishing water resources, and navigating that future without a descent into chaos will require buy-in and cooperation among the locals inhabiting this ecosystem, something that Ecology has utterly failed to achieve.

---

[6] Sometimes Ecology is a good partner. But not in this matter.

[7] *See*, Time Lapse of Shrinking North Cascade Glaciers, 1956-2009, https://www.youtube.com/watch?v=XDnsPUSdXp4 (last visited August 24, 2015).

Ultimately, there is more that unites than divides. Ecology and Swinomish are entirely correct in their basic view that exempt wells need to be regulated and delimited. That should not be done via arbitrary and abusive government conduct, but rather through an open, transparent and honest public process. That has yet to happen. When it does, Skagit County will gladly support it.

RESPECTFULLY SUBMITTED this 24th day of August, 2015.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By: _____
WILL HONEA, WSBA #33528
Deputy Prosecuting Attorney

DECLARATION OF DELIVERY

I, Judy L. Kiesser, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, [X] electronic mail a true and correct copy of the document to which this declaration is attached, to: Peter Ojala (Peter@ojalalaw.com), Emily Haley (ehaley@swinomish.nsn.us), (aengstrom@swinomish.nsn.us), and to Marc Slonim (mslonim@ziontzchestnut.com), Joshua Osborn-Klein (joshok@ziontzchestnut.com), (chazzard@ziontzchestnut.com), Alan Reichman Reichman (AlanR@atg.wa.gov) and to David Stearns (DavidS9@atg.wa.gov), (Janet.Day@atg.wa.gov) .

Peter C. Ojala
Carson Law Group PS
PO Box 5292
Everett WA 98206

Emily Haley
Swinomish Indian Tribal Community
Office of the Tribal Attorney
11404 Moorage Way
LaConner, WA 98257

Marc D. Slonim
Joshua Osborne-Klein
ZIONTZ CHESTNUT
2101 Fourth Avenue, Ste 1230
Seattle WA 98121-2331

Alan Reichman, AAG
David Stearns, AAG
Office of the Attorney General
Ecology Division
PO Box 40117
Olympia WA 98504-0117

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 24th day of August 2015.

Judy L Kiesser

Judy L. Kiesser, Declarant