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No. 93203-4

SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD and MARNIE FOX, husband and wife,
Appellants,

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.

SWINOMISH INDIAN TRIBAL COMMUNITY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION.

The Swinomish Indian Tribal Community (Tribe) files this Answer to the Petition for Review filed by Richard and Marnie Fox (Foxes). The Foxes seek discretionary review of the Court of Appeals' decision in *Fox v. Skagit County*, No. 73315-0-I, 2016 WL 1438377 (Div. I Apr. 11, 2016).

The Foxes seek a writ of mandamus to compel Skagit County to issue them a building permit for a new residence. Under RCW 19.27.097, they must demonstrate "an adequate water supply" in order to obtain the permit. The County, the Department of Ecology (DOE), and the lower courts concluded the Foxes failed to satisfy this requirement because the Foxes' proposed water supply - a new permit-exempt well - would not be available on a year-round basis due to the senior instream flow right established in the Skagit Instream Flow Rule (Rule), ch. 173-503 WAC.

The Foxes argued below that they had met their burden under RCW 19.27.097 because permit-exempt wells are not subject to prior appropriation or the Rule's senior instream flow right. The lower courts rejected these arguments as contrary to settled law. For example, in *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 583, 311 P.3d 6 (2013) (*Swinomish*), this Court found "[t]here is no question" that new year-round appropriations in the Skagit basin, including permit-exempt appropriations, would "impair the [Rule's] existing minimum flow rights because the uses ...

are noninterruptible year-round uses and water will be withdrawn that will further reduce stream flows already at or below minimum flows."

In their Petition, the Foxes abandon the heart of the arguments presented below and instead raise three tangential issues. The Foxes argue that the County, DOE, the trial court, and the Court of Appeals violated *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), by relying on an assumption of hydraulic continuity rather than an impairment finding but, among other reasons, this argument fails because there was an *undisputed* impairment finding in this case. The Foxes argue that the County and DOE violated *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), by imposing a new requirement without undertaking rulemaking under the Administrative Procedures Act (APA), ch. 34.05 RCW, but the Foxes did not raise this claim below and the only thing the County required them to do was to comply with a *statute*, RCW 19.27.097. The Foxes argue that the Court of Appeals failed to remand this case for trial on the Foxes' claim to a senior water right under the relation-back doctrine articulated in *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 P. 41 (1926), but the Foxes have not identified *any* issue of material fact that would have changed the result in this case.

The Tribe intervened in this case because instream flows are essential to preserve fish habitat and fish runs in the Skagit basin and the Tribe's treaty

fishing right.[1] The Foxes' well would further impair the Skagit instream flow right and further degrade fish habitat and fish runs. Because the Court of Appeals applied well-settled Washington law protecting senior instream flow rights to the undisputed facts of this case, the Petition should be denied.

II. RESTATEMENT OF THE CASE.

A. The Skagit Rule.

Development in the Skagit basin has led to significant declines in salmonid populations, in part due to reduced instream flows. *Swinomish*, 178 Wn.2d at 577; *Swinomish Indian Tribal Cmty. v. Skagit Cty.*, 138 Wn.App. 771, 158 P.3d 1179 (2007). Three species (Chinook, steelhead, and bulltrout) are listed under the Endangered Species Act. 50 C.F.R. §§ 17.11, 223.102.

DOE adopted the Rule in 2001 "to protect fisheries habitat." CP 369. The Rule established minimum flow levels for the Skagit River and four tributaries, found that groundwater in the Skagit basin is in hydraulic continuity with surface flows in the basin,[2] and determined that 200 cubic feet per second (cfs) would be available for future appropriation subject to the minimum flows. *See* WAC 173-503-040(1)-(3); WAC 173-503-040(5); WAC 173-503-050.

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[1] As in *Postema*, the tribe has a direct, legally protected interest in this case and the Tribe's arguments rest solely on state law. *See* 142 Wn.2d at 74. The Tribe makes no argument based on its federal treaty right to take fish or any other federal right.

[2] Hydraulic continuity is a scientific term that describes the interconnection between groundwater and surface water.

The Rule "did not allocate noninterruptible water for new uses;" instead, "water for new uses is subject to being shut off when stream flows fall to or below the minimums established by rule, in accord with general water law." *Swinomish*, 178 Wn.2d at 577. This is true with respect to both surface water and groundwater. WAC 173-503-040(5); CP 380.

The County challenged the Rule in 2003 because it did not allow for the year-round use of new permit-exempt wells. The County recognized that new permit-exempt wells would be interruptible when the Rule's minimum flows were not met and, therefore, could not satisfy the adequate water supply requirement in RCW 19.27.097. CP 10, ¶ 9; CP 11, ¶ 12.

The County dismissed its challenge when DOE agreed to amend the Rule in 2006. *See Swinomish*, 178 Wn.2d at 577-78. In the 2006 Rule, DOE determined that "water is not available for year-round consumptive appropriation in the Skagit River basin" because there are many days each year when the Rule's minimum flow levels are unmet. WAC 173-503-051(1) (2006) (CP 436); CP 380-81; CP 463-66, ¶¶ 15-17.[3] Despite this determination, DOE established reservations of water for future year-round uses, including

[3] This determination was also based on the fact that many Skagit tributaries, including the tributaries near the Foxes' property, experience extreme low flow events and go dry or are "reduced to a trickle," particularly in the summer and fall. CP 445-46; CP 451.

year-round permit-exempt uses like the one the Foxes propose here. WAC 173-503-051(1) (2006) (CP 436); *Swinomish*, 178 Wn.2d at 578; 587.

In 2013, this Court invalidated the 2006 Rule, reaffirming that minimum instream flows are water rights which may not be impaired by junior appropriations unless the "very narrow" OCPI exception in RCW 90.54.020(3)(a) applies. *Swinomish*, 178 Wn.2d at 576; 591-94. The Court found that "[t]here [was] no question" that new year-round uses of water in the Skagit basin would further impair the senior instream flow right and held that the OCPI exception did not justify this impairment. *Id.* at 583; 588.

Shortly after *Swinomish*, DOE advised the County that water was not available for new year-round use in the Skagit basin absent mitigation to offset impacts on instream flows or an alternative supply that could be used when the minimum flows are unmet. CP 273. Without this, building permit applicants could not meet the adequate water supply requirement in RCW 19.27.097. *Id.*

B. The Subdivision and Building Permit Application.

The Foxes purchased property in the Skagit basin near Mannser and Red Cabin Creeks. CP 289, ¶ 2. In November 2000, the County approved their application to subdivide the property. CP 457-58. Between 2000 and 2011, the Foxes took no action to appropriate water for or develop the property; instead, they leased it to their neighbors until 2014. CP 290, ¶¶ 5; 7. The Foxes drilled a well in 2011, but never put water from it to beneficial use. *Id.*, ¶ 6.

In March 2014, the Foxes submitted a building permit application to the County. CP 653. The County notified the Foxes that their application was incomplete for failure to demonstrate an adequate water supply:

> Building Permit water [approval] cannot be signed off until one of the following documentations of water availability is received: 1. A letter or email from [DOE] acknowledging that [the lot] has an approved water right or transfer.... 2. A letter or email from [DOE] documenting an approved mitigation proposal. 3. Submittal of an Engineered Plan for a Rainwater Catchment system....

CP 666. In response, the Foxes admitted that RCW 19.27.097 required them to demonstrate a legally adequate water supply, but argued on various grounds that the Rule's instream flow right did not apply to them. CP 668-76.

The County sought DOE's advice. CP 237; 806. DOE addressed each of the Foxes' arguments and concluded that the Foxes "ha[d] not demonstrated that water is legally available..., as required by RCW 19.27.097." CP 245. DOE analyzed hydrogeologic information regarding the Skagit basin generally and the Foxes' property in particular and concluded that the Foxes' well would reduce flows in Mannser and Red Cabin Creeks and the Skagit mainstem. CP 239. As a result, DOE concluded that the Rule precluded year-round use of the Foxes' well. CP 238-40. DOE also analyzed the Foxes' claim to a senior water right and concluded that: (1) their 2000 subdivision was not a sufficient manifestation of intent to establish a water right; and (2) even if it had been, they had not acted with reasonable diligence to perfect the right. CP 243-44.

C. Proceedings Below.

The Foxes sought a Writ of Mandamus directing the County to issue the building permit. CP 648-49. The County answered, asserting it relied on DOE's advice and did not approve the Foxes' application for lack of an adequate water supply. *See, e.g.*, CP 232, ¶ 3.3.[4] DOE and the Tribe intervened to defend the County's decision not to issue the permit. CP 836-40; 892-94. DOE filed a declaration from its expert hydrogeologist demonstrating that the Foxes' well would capture groundwater that would otherwise discharge to Mannser and Red Cabin Creeks and the Skagit River and would therefore impair the senior instream flow right on the many days it is unmet. *See* CP 462, ¶¶ 10; 12. The Foxes made no attempt to refute this evidence of impairment.

The court orally denied the writ on December 16, 2014, CP 582, and entered a written order confirming its decision and dismissing the case on January 28, 2015, CP 629-631. It found no issues of material fact precluded a decision on the merits and held the writ could not issue because the Rule, and this Court's interpretation of it in *Swinomish*, were "controlling law" which precluded year-round use of the Foxes' well. CP 631, ¶¶ 1-2.

The Foxes appealed, arguing that this case should be decided as a matter of law because permit-exempt wells are always adequate within the

[4] Later, the County effectively switched sides in this case, urging the court to invalidate the Rule or hold that it did not apply to the Foxes' well. *See* CP 823-30; CP 810-22.

meaning of RCW 19.27.097. In their view, permit-exempt wells are absolute entitlements not subject to prior appropriation or senior water rights.

The Court of Appeals rejected the Foxes' claims. It found that the "main facts are undisputed" and held that:

> [A] permit-exempt well ... is subject to the prior appropriation doctrine and therefore may be limited by senior water rights, including the [Rule]. Accordingly, because the Foxes' well may be interrupted, water is not legally available for purposes of their building permit application."

Slip. op. at 2. The Court rejected all of the Foxes' other arguments, including their claim to have established a senior water right. *Id.* at 19-20.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED.

The Court of Appeals correctly resolved all of the issues on appeal. The Foxes claim that review is warranted by RAP 13.4(b)(1) and (4), but they have not shown that the Court of Appeals' decision conflicts with this Court's precedent or that this case involves an issue of substantial public interest. To the contrary, this Court's cases interpreting RCW 19.27.097 and Washington law prohibiting impairment of senior water rights, including senior instream flow rights, compelled the Court of Appeals' decision. Moreover, this case presents no new issue of law at all, let alone one of substantial public interest.

A. The Court of Appeals Decision Complies With *Postema* and Other Decisions Protecting Senior Instream Flow Rights.

The Foxes argue that the Court of Appeals' decision conflicts with *Postema*, 142 Wn.2d 68. Pet. at 6-11. The Foxes believe the County, DOE, the trial court, and the Court of Appeals all improperly relied upon a "blanket assumption" that groundwater and surface water in the Skagit basin are hydraulically connected rather than "impairment findings" to deny the Foxes' building permit application. *See* Pet. at iii; 6; 8-9.

There are a number of problems with the Foxes' position. First, the "impairment findings" the Foxes allege *Postema* requires exist in this very case. In *Swinomish*, this Court found that all new water uses in the Skagit basin, including permit-exempt uses, are subject to the Rule and are interruptible to prevent further reductions of the Rule's minimum flow levels. This was not based upon a "blanket assumption" of hydraulic continuity, but upon the Court's understanding that new year-round uses of water would impermissibly impair the senior instream flow right. *See, e.g.*, 178 Wn.2d. at 576 (DOE reserved water for "future year-round out-of-stream uses, despite the fact that in times of low stream flows these uses will *impair* established minimum instream flows"); *id.* at 583 ("[t]here is no question that [the reservations] *impair* the existing minimum flow rights because the uses for which water is

reserved are noninterruptible year-round uses and water will be withdrawn that will further reduce stream flows already at or below minimum flows").

Moreover, in DOE's advice to the County and in the expert declaration it submitted in the trial court, DOE demonstrated that: (1) the Foxes' well would withdraw groundwater in hydraulic continuity with surface flows in Mannser and Red Cabin Creeks and the Skagit River; *and* (2) the Foxes' well would *impair* the Rule's senior instream flow right by capturing groundwater that would otherwise discharge to those creeks and the Skagit River, thus reducing the River's flows on a year-round basis, including on the many days each year the minimum instream flow levels are unmet. CP 239; 462, ¶¶ 10, 12; 471. Before the County and in the trial court, the Foxes never attempted to show that their well is not in hydraulic continuity with surface flows in the Skagit basin or would not further impair the senior instream flow right on the many days it is unmet, despite the fact that it was the Foxes' burden to demonstrate an adequate water supply under RCW 19.27.097.

Second, the Foxes' position is inconsistent with the Rule's plain language and this Court's interpretation of it. The Rule provides that:

> Future [surface water rights], *and withdrawal of groundwater in hydraulic continuity with surface water* in the Skagit River and perennial tributaries, *shall be expressly subject to instream flows established in [the Rule]*....

WAC 173-503-040(5) (emphasis added). It also provides that:

> [200 cfs] is available to be appropriated through *groundwater withdrawal* or surface water diversion [in the Skagit basin]. *These waters are available for appropriation, subject to ... instream flows [established in the Rule]....* [DOE] advises that water rights issued to appropriate these waters ... *will be interruptible rights.*

WAC 173-503-050(1)-(2) (emphasis added).[5] In *Swinomish*, this Court held that Washington's statutory scheme and these Rule provisions expressly subject all future appropriations, including permit-exempt appropriations, to the Rule's senior instream flow right and make all future appropriations, including permit-exempt appropriations, interruptible on the many days each year the senior instream flow right is unmet. *See, e.g.*, 178 Wn.2d at 577 (Rule "did not allocate noninterruptible water for new uses; rather, *water for new uses is subject to being shut off when stream flows fall to or below the minimums established by [R]ule, in accord with general water law*") (emphasis added). The Court of Appeals did nothing more than follow *Swinomish* and conclude the same thing. *See, e.g.*, slip op. at 10 ("Swinomish controls here: 'the appropriators' right to use the water [from a permit-exempt well] is subject to rights with priority in time.' The Foxes' right to use their permit-exempt well is subject to the superior water rights protected by the [Rule]"); *id.* at 18

[5] The Foxes may dislike these provisions or think that the Rule should contain different or additional provisions. *See, e.g.*, Pet. at 6; 8. However, they cannot challenge the validity of the Rule in this case. A rule challenge must be brought in an APA action against DOE in Thurston County, not a mandamus action against the County in Skagit County. *See* RCW 34.05.510; RCW 7.16.360; RCW 7.16.170; *Bock v. State Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 586 P.2d 1173 (1978).

(rejecting the Foxes' claim that the Rule does not apply to permit-exempt wells because WAC 173-503-040(5) "states the exact opposite").

Third, the Foxes' position finds no support in *Postema*. The central holding of *Postema* is that minimum flow levels set by rule are existing water rights which may not be impaired by junior appropriators, including junior permit-exempt appropriators. 142 Wn.2d at 81.[6] While it is true that *Postema* stated that hydraulic continuity of an aquifer with a stream having unmet minimum flows is by itself insufficient to deny a groundwater right, it went on to state that "where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial is required." 142 Wn.2d at 93. It explained that impairment would depend on the nature of the appropriation, whether the aquifer is upstream or downstream from or higher or lower than the surface water flow, and the time of withdrawal. *Id.* These are precisely the factors DOE's hydrogeologist considered in reviewing the Foxes' application and concluding that their proposed year-round withdrawal would impair the senior instream flow right on the many days it is unmet.

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[6] *Accord: Foster v. Dep't of Ecology*, 184 Wn.2d 465, 471, 362 P.3d 959 (2015) (minimum flows set by rule "are not a limited water right ... [and] are generally subject to our State's long-established 'prior appropriation' and 'first in time, first in right' approach to water law, which does not permit any impairment, even a de minimis impairment, of a senior water right"); *Swinomish*, 178 Wn.2d at 585 ("a minimum flow set by rule is an existing water right that may not be impaired by subsequent [appropriations]").

Because it was undisputed that the Foxes' well would impair the senior instream flow right, the conclusion that the Foxes had failed to demonstrate an adequate water supply was consistent with, and mandated by, *Postema.*

B. The Foxes Did Not Raise Their Improper Rulemaking Claim Below and Even if They Had, the Claim Would Fail.

The Foxes argue that DOE and the County violated *Hillis*, 131 Wn.2d 373, by imposing a new rule for obtaining a building permit without undertaking APA rulemaking. Pet. at 11-15. In the Foxes' view, the County's statement that they could complete their application by submitting a plan for a rain catchment system or a letter from DOE acknowledging an approved water right, transfer, or mitigation plan "leaves in place a new requirement [for] those seeking to exercise their statutory rights under [RCW 90.44.050]." Pet. at 12.

This Court should not consider the Foxes' improper rulemaking claim because it is raised here for the first time. The Foxes did not raise this claim in the courts below and an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); RAP 12.1(a); RAP 10.3(a)(4); *Wilson v. Steinbach*, 98 Wn.2d 434, 440, 656 P.2d 1030 (1982) (the "general rule in this state is that, except as to issues of manifest error affecting a constitutional right, we will not consider an issue or theory raised for the first

time on appeal").[7] Because the Foxes did not raise their improper rulemaking claim in the trial court or Court of Appeals, it is too late to do so now.

The Foxes' improper rulemaking argument also fails on the merits. In *Hillis*, this Court held that DOE was required to undertake rulemaking before establishing prerequisites and priorities for processing water right applications. 131 Wn.2d at 399. Here, the County did not establish any prerequisites or priorities for processing building permit applications; it simply required the Foxes to comply with the *statutory* requirement in RCW 19.27.097 to demonstrate an adequate water supply. As this Court found in *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 175-81, 256 P.3d 1193 (2011), RCW 19.27.097 requires counties to determine that sufficient water is physically and legally available before they approve building permit applications. The County's recognition that the Foxes' proposed year-round groundwater withdrawal did not constitute a legally adequate water supply, and its recognition that the Foxes had three other water supply alternatives which would have constituted a legally adequate water supply, is entirely consistent with the County's duty under RCW 19.27.097 and *Kittitas*.

[7] In the courts below, the Foxes and County raised constitutional due process claims. The Court of Appeals rejected these arguments. Slip op. at 21-23. In the Petition, the Foxes have abandoned the constitutional claim they attempted to raise below.

The reason the Foxes did not get a building permit is because they made no attempt whatsoever to secure a legally adequate water supply under RCW 19.27.097, not because they failed to implement one of the three water supply options the County suggested. Nothing in the County's letter states or implies that the County will only consider those three options if the Foxes or other landowners were to submit a different, but legally adequate, water supply proposal in the future. Under these circumstances, the information contained in the County's letter is not a "rule" and APA rulemaking was not required. *See* RCW 34.05.010(16); *Hillis*, 131 Wn.2d at 399.

Moreover, the County complied with the Skagit County Code (SCC). A water supply that is subject to interruption on many days each year is not "capable of supplying at least [350] gallons of water *per day*," as the code requires. SCC § 12.48.030 (emphasis added). The code explicitly provides that groundwater uses are "subject to Chapter 90.44 RCW," and states that the code is to be carried out consistently with the water codes and Rule "[w]henever possible." SCC §§ 12.48.100(1); 12.48.010(3). Importantly, the code expressly reserves the County's authority to require "[a]dditional information deemed necessary" as "evidence of an adequate water supply," SCC § 12.48.110(1)(j), an authority the County invoked in this case when it notified the Foxes that their application was incomplete and identified additional information that would demonstrate an adequate water supply.

The Foxes' illegal rulemaking claim fails because the County did nothing more than require the Foxes demonstrate an adequate water supply in accordance with RCW 19.27.097 and the County code.

C. The Court of Appeals Properly Rejected the Foxes' Relation-Back Argument.

The Foxes argue that the Court of Appeals failed to remand this case for trial on the Foxes' claim to have a senior water right under the relation-back doctrine articulated in *Hunter Land Co.*, 140 Wash. 558. Pet. at 15-17. Under Washington law, "[a]n appropriation of water consists of an intention to appropriate followed by a reasonable diligence in applying the water to beneficial use." *In re Alpowa Creek*, 129 Wash. 9, 13, 224 P. 29 (1924). Once the right is perfected, its priority date relates back to the time work was first performed to appropriate the water. *Hunter Land Co.*, 140 Wash. at 565. The Foxes claim two factual disputes regarding the relation-back doctrine: whether their 2000 subdivision was sufficient evidence of intent to appropriate, and whether their actions in the subsequent 14 years were reasonable. Pet. at 16.

The first issue does not involve a question of fact, but a question of law regarding the legal effect of the 2000 subdivision. DOE advised the County that the subdivision did not manifest the intent necessary to establish a water right because, among other things, subdivision occurs for a number of reasons

entirely unrelated to any intent to appropriate water. CP at 244. The Court of Appeals reached the same conclusion:

> The Foxes argue that they manifested sufficient intent to appropriate the water when they subdivided their property in 2000....*This is not sufficient to prove an appropriative water right.* A water right's priority date will relate back to the first step of an appropriation, which is complete when overt acts coalesce to openly demonstrate the applicant's intent to appropriate the water for a beneficial use. Such intent must be for a fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source. *Mere subdivision of property cannot meet this level of intent.*

Slip op. at 20 (emphasis added; quotations omitted). The Foxes have not demonstrated any error in the Court of Appeals' legal conclusion.

Regarding the second issue, the Foxes make two excuses for their 14-year delay between the subdivision and building permit application: the "Great Recession of 2008" and the fact that the County issued building permits relying on permit-exempt wells despite the fact that the senior instream flow right is frequently unmet until the *Swinomish* decision. Pet. at 16. Neither of these excuses is legally valid. The relation-back doctrine only applies to delays caused by physical problems encountered while attempting to appropriate water and apply it to beneficial use, not to delays caused by the personal circumstances of the appropriator. *See, e.g., Grant Realty v. Ham, Yearsley & Ryrie*, 96 Wash. 616, 165 P. 495 (1917) ("matters ... personal to the appropriator, such as pecuniary inability, sickness, and the like, are not circumstances excusing great delay"). The Foxes' financial circumstances

during the "Great Recession" and belief that they are entitled to a building permit now because the County illegally issued permits to other landowners until 2013 are circumstances personal to the Foxes that have nothing to do with any physical problem encountered in attempting to appropriate water for domestic supply. If five years is too great a delay for the construction of a dam, 14 years is surely too great a delay for the construction of a single-family residence, regardless of the Foxes' personal circumstances or beliefs. *See Still v. Palouse Irrig. & Power Co.*, 64 Wash. 606, 117 P. 466 (1911).

Granting the Foxes a senior water right at this late date not would not only harm the senior instream flow right but also be patently unfair to senior out-of-stream rights. Under the Foxes' theory, an appropriator who installed works and applied water to beneficial use beginning in 2001 would be junior to the Foxes, a result completely at odds with Washington's prior appropriation system and the anti-speculation principle it embodies.

Having tried and failed to convince the County, the trial court, and the Court of Appeals that they were entitled to a building permit as a matter of law, the Foxes now ask this Court to remand so that they can try their case to a jury. However, the Foxes have not identified any disputed factual issue that justifies a remand or would result in a different outcome.

D. The Court of Appeals Decision Applied Well-Settled Law and Does Not Involve an Issue of Statewide Public Interest.

Finally, the Foxes argue that review should be granted because this case presents an issue of substantial public interest. Pet. at 17-19. In particular, the Foxes argue that the "broad conclusion that permit-exempt wells are subject to prior appropriation and [to] senior instream flow rights ... has the potential to be misread and misapplied to all twenty-nine basins with minimum instream flow rules...." Pet. at 18.

We note that the Foxes did not assign error to this aspect of the Court of Appeals' decision in their Petition. As discussed above, the Foxes argued below that permit-exempt wells were not subject to prior appropriation or the Rule's senior instream flow right. The lower courts rejected that argument and the Foxes have abandoned it in their Petition.

In any event, the issues raised by the Foxes are neither substantial nor worthy of review. The Court of Appeals' decision that the Foxes' well is subject to prior appropriation and the Rule's senior instream flow right follows this Court's explicit and repeated direction. *See, e.g., Swinomish*, 178 Wn.2d at 598 ("[DOE] determined that noninterruptible water is needed for ... exempt wells because, *while there is a current provision for exempt wells, the appropriators' right to use the water is subject to rights with priority in time.* But exempt wells are provided for by statute and [DOE'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....*") (some emphasis added).[8] Contrary to the Foxes' assertion, the Court of Appeals did not make new law of statewide importance which justifies review; it simply applied *existing law* to the undisputed facts of this case and concluded that the County could not be compelled to issue the Foxes a building permit in the absence of a legally adequate water supply.

IV. CONCLUSION.

For the reasons stated above, the Tribe respectfully requests that this Court deny the Foxes' Petition for Review.

Dated this 10th day of June, 2016.

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[8] *Accord*: *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) ("once the appropriator perfects [a permit-exempt right], the right is otherwise treated in the same way as other perfected water rights. Thus, it is subject to the basic principle of water rights acquired by prior appropriation that the first in time is the first in right") (citation omitted); *id.* at 17, n.8 ("RCW 90.44.050 itself provides that a [permit-exempt right] is to be treated as all other rights, and thus is subject to the prior appropriation doctrine's first in time first in right principle"); *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 226, n. 1, 858 P.2d 232 (1993) (RCW 90.44.030 "makes evident the Legislature's intent that ground water rights [are] part of the overall water appropriation scheme, subject to the paramount rule of 'first in time, first in right'") (citation omitted).

CERTIFICATE OF SERVICE

I certify that on June 10, 2015, I sent a copy of the foregoing Swinomish Indian Tribal Community's Answer to Petition for Review via email and U.S. Mail, postage prepaid, to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2016.

K George

Kelly George, Paralegal
Office of the Tribal Attorney
Swinomish Indian Tribal Community

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Subject: Case 93203-4, Fox v. Skagit County, et al.

Please file the attached **Swinomish Indian Tribal Community's Answer to Petition for Review** in the following matter:

Case Name:	Fox v. Skagit County, et al.
Case Number:	93203-4
Filed by:	Emily Haley
	(360) 466-7248
	WSBA #38284
	ehaley@swinomish.nsn.us

If you have any questions or concerns, please do not hesitate to contact me. Thank you,

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M-W 8:00 am - 6:00 pm
Th 8:00 am - 5:30 pm