No. 733150-01
(Skagit County Superior Court No. 14-2-00947-2)

93203-4

SUPREME COURT 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.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Skagit County ("**County**") answers the Petition for Review of the Court of Appeals decision below, filed by Petitioners Richard and Marnie Fox ("**Fox**"). While this case began as a mandamus action by Petitioners against the County and the County remains adverse to the Petitioners, the County agrees with Petitioners on several issues of substantial public interest. This Court should accept review for the reasons discussed below.

B. STATEMENT OF THE CASE

The historical background furnished in Petitioners' Statement of the Case is generally accurate, with certain fine points of clarification required. *See*, Fox Petition for Review at 2-4.

1. The 1996 Memorandum of Agreement.

The County, Swinomish Tribe and Washington State Department of Ecology negotiated a 1996 Memorandum of Agreement (hereinafter, "**1996 MOA**"), agreeing to establish minimum instream flows for the Skagit mainstem and its tributaries, also providing that certain exempt wells would not be subject to the forthcoming Skagit Instream Flow Rule. CP125-128. Among other things, the 1996 MOA also guaranteed 2.8 million gallons per day of water from the Skagit River to the Swinomish Tribe, to be used in their "marina, gaming facilities, hotels and similar facilities." CP120.

The 1996 MOA was hailed by Ecology as a grand compromise, a durable compact that would bring peace to the Skagit Valley for the ensuing fifty years – by reasonably meeting the water needs of the people who live here. CP117.

Because Ecology failed to live up to the 1996 MOA, and is now asserting unfettered administrative discretion over water in the Skagit Basin, the 1996 MOA has instead resulted in many years of bitter litigation over water. That is the sum and substance of the conflict that has now made its way to this Court.

2. The 2001 Skagit Rule.

In 2001, through a notice and comment rulemaking, Ecology adopted Chapter 173-503 WAC, establishing the anticipated Instream Flow Rule for the Skagit River Basin (hereinafter, the "**2001 Skagit Rule**"). CP25-30.

The 2001 Skagit Rule was presented by Ecology to the people of Skagit County as a rule based on the 1996 MOA. *See*, CP033 ("The [2001 Skagit] rule is based on recommendations that were submitted to Ecology pursuant to a Memorandum of Agreement signed in 1996 by local governments in Skagit County, tribes, and the departments of Fish and Wildlife and Ecology.") Accordingly, Skagit County and its citizens

understood that the 2001 Skagit Rule would be interpreted and enforced in a manner consistent with the 1996 MOA. That has not occurred.

A brief discussion of the 2001 Skagit Rule and its operative provisions is necessary. The 2001 Skagit Rule is a rough mechanism (reflective of its incomplete nature) that divides the Skagit River into two regulatory portions: (**1**) upstream of the U.S. Geological Survey Gauge No. 12-2005-00 at Riverside Bridge between Mount Vernon and Burlington (the "**Mount Vernon Gauge**") on the one hand; and (**2**) the tidally influenced areas downstream of the Mount Vernon Gauge on the other.[1]

Upstream of the Mount Vernon Gauge, Ecology's 2001 Skagit Rule sets the minimum flow (i.e., the river flow level below which the Skagit is deemed impaired) at 10,000 cubic feet per second during the summer and fall months, as measured at the Mount Vernon Gauge. CP019. The minimum flow established by the 2001 Skagit Rule is far higher than the Skagit River's historical flows going back as far as gauge data has been kept (1940). CP266. Thus, according to Ecology's 2001 Skagit Rule, the Skagit River has always been impaired.

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[1] By its plain language, the 2001 Skagit Instream Flow Rule does not apply to the Fisher-Carpenter sub-basin, which has its confluence well downstream of the Mount Vernon Gauge. This is another function of the fact that the 2001 Skagit Rule was intended by the parties (as the 1996 MOA reflects) to address tributary minimum flows and exempt wells through a later, further process. Instead of completing the 2001 Skagit Rule, the Department of Ecology has allowed its statutory responsibility as a government of general jurisdiction to be subsumed by political considerations and threats of litigation.

With respect to areas downstream of the Mount Vernon Gauge – i.e., the tidally-influenced estuarine/delta areas of the Skagit Valley– the 2001 Skagit Rule caps total withdrawals from the Skagit River at a seasonal low point of 830 cubic feet per second (cfs). CP026. The total withdrawal of water from the Skagit envisioned by the 1996 MOA is considerably less than 830 cfs, and, accordingly, the 2001 Skagit Rule left plenty of room to afford water for rural landowners and agricultural irrigation in the Skagit Delta downstream of the Mount Vernon Gauge. Ecology has been unwilling to implement this aspect of the 2001 Skagit Rule, leaving Skagit Valley farmers to scramble to purchase contracted water from local municipal purveyors at the beginning of each summer.

Ecology admits that withdrawals downstream of the Mount Vernon Gauge are not regulated by the 10,000 cfs measurement at the Mount Vernon Gauge, which Ecology nevertheless refuses to implement. Ecology's reasoning is explained in response to an inquiry by attorney Bill Clarke, in which Ecology Director Maia Bellon wrote as follows:

> [Y]our letter requests Ecology to determine...that compliance with the [2001 Skagit] Rule will solely be based on measurement of impacts at the Skagit River mainsteam gauge in Mount Vernon. Regarding this request concerning Ecology's interpretation and implementation of the Rule, Ecology agrees that the plain language of the Rule could allow permit-exempt groundwater uses that would not interfere with instream flows as measured at the Mount Vernon

> Gauge. However, the technical application of the Rule in this manner may face substantial obstacles to providing durable solutions for people in the Skagit Basin.

Letter from Ecology Director Maia Bellon to Bill Clarke, January 15, 2015 (CP495-96). Ms. Bellon goes on to explain that Ecology's refusal to enforce the 2001 Skagit Rule as written stems from Ecology's belief that it would lead to "likely legal challenge that would result in continued uncertainty." CP497.

Furthermore, there is nothing in the 2001 Skagit Rule's rulemaking record to suggest that exempt wells would impair minimum flows, which Ecology made abundantly clear to the public at the time of the 2001 Skagit Rule's adoption:

> Comment: 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.

Ecology Response to Comments, 2001 Skagit Basin Rule (CP260).

3. Events Since The 2001 Skagit Rule's Adoption.

Because the significance of the 2001 Skagit Rule's silence regarding exempt wells was unclear, a series of appeals and lawsuits ensued between the County, Ecology and the Swinomish Indian Tribal Community.

Ecology attempted to resolve the uncertainty in 2006 by amending the 2001 Skagit Rule, creating small reservations of water in each sub-basin tributary to the Skagit River as well as the Skagit River mainstem. CP439-440 (hereinafter, the "**2006 Amendment**").

The Swinomish Tribe then challenged the 2006 Amendment, which this Court invalidated in *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), holding that the 2006 Amendment exceeded Ecology's administrative authority to use the "overriding consideration of public interest" mechanism to allocate new water absent a new rulemaking process.

The invalidation of the 2006 Amendment meant that the Instream Flow Rule reverted to the 2001 Skagit Rule's provisions, as discussed above.

Ecology has never formally closed the Skagit River Basin on the basis of the 2001 Skagit Rule, nor issued a formal interpretation explaining the impact of the *Swinomish v. State* decision on rural and agricultural water users in the Skagit Basin as a matter of general applicability. Rather, information from Ecology has come to Skagit County in the form of piecemeal, indirect statements that claim no further water is available in the Skagit Basin absent Ecology's case-by-case permission, and direct Skagit

County to withhold permits from otherwise qualified applicants on the basis of legally specious reasoning.

Several weeks after the *Swinomish v. State* decision, on October 16, 2013, the Attorney General's Office, representing Ecology, directed Skagit County to stop issuing building permits anywhere within the Skagit Basin that rely on single family domestic exempt wells:

> [W]ater is not available for new year-round uninterruptible appropriations in the Skagit River Basin. As such, without mitigation water and/or an alternative water source, applicants for subdivision approvals and building permits could not meet the requirements for adequate water supply under RCW 58.17.110 and RCW 19.27.097. Accordingly, the County would be out of compliance with the law if it issues such approvals and should either deny, or not act on, subdivision and building permit applications absent the approval of a mitigation proposal and/or alternative water source by Ecology.

Email from Allan Reichman, Attorney General's Office, dated October 16, 2013 (CP273). Prior to this, in the preceding twelve years, Ecology never once ordered, directed or otherwise told Skagit County to stop issuing building permits to its citizens on the basis of the 2001 Skagit Rule.

Ecology has interpreted the post-*Swinomish* 2001 Skagit Rule as an absolute grant of discretionary administrative authority, allowing Ecology to cut off all water availability throughout the Skagit Basin, with no public

process or transparency involved, without any specific finding of impairment, without distinguishing between areas upstream of the Mount Vernon Gauge and those areas below it.

Fox's permit application is at a location upstream of the Mount Vernon Gauge, and is therefore within the ambit of the 2001 Skagit Rule's regulatory measurement at the Mount Vernon Gauge. This is not disputed before the Court.

As Petitioner correctly points out, prior to the 2013 *Swinomish v. State* decision, the County lawfully issued hundreds of building permits reliant on exempt wells. As a result, there are now many landowners living in houses in the Skagit Basin that rely on groundwater wells for their potable water source, the legal status of which is uncertain. Landowners are stuck with property on which they owe more than the property is worth as a result of the uncertainty of their access to water, unable to sell or re-finance, the direct result of Ecology's interpretation of its 2001 Skagit Rule.

It is against this background that Skagit County received Fox's building permit application in 2014.

When Petitioner Fox applied for a building permit reliant on an exempt well for a potable water source, Skagit County sought Ecology's input, and Ecology directed the County to deny Fox's permit. CP238.

Following Ecology's directive, Skagit County informed Fox that the building permit application was incomplete for apparent lack of a lawful water source. Thus, to be clear, the County has not *denied* Fox's building permit, but rather has temporarily declined to process it, entirely basing this decision on Ecology's directive not to process Fox's building permit. Put another way, were it were not for Ecology's directive to refuse Fox's building permit, Skagit County would have already issued Fox a building permit.

As discussed above, Skagit County has serious doubts about Ecology's interpretation and actions relating to the 2001 Skagit Rule, and was prepared to discuss this issue in greater detail with Fox, something that was overcome by events when Fox brought the instant action.

This Court should also appreciate that counties can be judged financially liable for wrongfully denying building permits. RCW Chapter 64.40; 42 U.S.C. § 1983. Ecology has placed Skagit County in an extremely untenable position, and that explains the unusual posture of this case. With the foregoing in mind, Skagit County believes that Fox is entitled to a building permit in this case – unless this Court agrees with Ecology and directs Skagit County to deny Fox's permit on the basis of the 2001 Skagit Rule.

Fox obtained a writ to show cause why a building permit should not issue. The Superior Court declined to order the County to issue Fox a building permit on grounds that new withdrawals of water are junior to the 2001 Skagit Rule, which the Court of Appeals upheld.

C. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Skagit County concurs with Fox: the Court should accept review of this matter. Pursuant to RAP 13.4, the Supreme Court will accept a petition for review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or...
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved, or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Decision Of The Court Of Appeals Is In Conflict With A Decision Of The Supreme Court.

Skagit County explicitly agrees with the first issue that Fox raises in seeking review: a rulemaking determination of hydraulic continuity is not enough, standing by itself, to conclude as a matter of law that a permit-exempt groundwater use is subject to the minimum instream flows, is thus interruptible under WAC 173-503-040, and is therefore an inadequate water supply under RCW 19.27.097.

Fox is entirely correct that Ecology's denial of his right to use an exempt well on this basis is not consistent with this Court's holding in *Postema v. PCHB*:

> We also reject the Board's holding that hydraulic continuity, where minimum flows are unmet a substantial part of the year, equates to impairment of existing rights as a matter of law. As the King County Superior Court noted, existing rights may or may not be impaired where there is hydraulic continuity depending upon the nature of the appropriation, the source aquifer, and whether it is upstream or downstream from or higher or lower than the surface water flow or level, and all other pertinent facts.
> ...
> We hold that hydraulic continuity of an aquifer with a stream having unmet minimum flows is not, in and of itself, a basis for denial of a groundwater application.

142 Wn.2d 68, 93, 11 P.3d 726 (2011); s*ee*, Petition for Review at 8-11.

Ecology has set an instream flow far higher than the historical flow of the Skagit River, as measured by one stream gauge, and now interprets this to mean that no further water is available anywhere in the Skagit Basin, based on silence in the Rule incorrectly interpreted twelve years after the Rule's adoption. Another step is required, one that must done with transparency and process afforded to the public.

In addition to *Postema*, Ecology misapplies this Court's *Swinomish v. State* decision. In *Swinomish*, this Court held that Ecology cannot permissibly use its "overriding consideration of public interest" administrative authority to create new water rights senior to a previously-

established instream flow rule. 178 Wn.2d 576, 77. The *Swinomish* decision was a limit on Ecology's administrative authority. Instead, Ecology is misrepresenting decisions of this Court in pursuit of a radical expansion of its own authority, which is severely damaging the ability of Skagit County to fairly and appropriately regulate land use within its jurisdictional boundaries.

2. This Case Involves A Significant Question Of Law Under The Constitutions Of The United States And State of Washington.

Fox, along with hundreds of Skagit County landowners, followed the law in buying land, improving their land, and building homes prior to this Court's 2013 *Swinomish* decision. They had no notice that Ecology's 2001 Skagit Rule would prohibit exempt wells, and, despite following the law to the letter in making their economic decisions, are now being arbitrarily punished as a regional group, without any specific evidence that doing so is even necessary.

In pleadings before the Court of Appeals, Ecology argued that Skagit landowners should have been put on notice by the 2001 Skagit Rule, yet from 2006 until 2013 these landowners were relying on water that was explicitly legal to appropriate under Ecology's 2006 Amendments. Even if Fox and those similarly situated had engaged legal counsel and researched the matter, they would have discovered that Ecology had explicitly made

water available and not made any specific impairment findings as the decisions of this Court require.

It is well-established that the statutory right to use an exempt well is inchoate until put to beneficial use. *Ecology v. Theodoratus*, 135 Wn.2d 582, 589 (1998). Therefore, administrative deprivation of the exempt well right prior to beneficial use may not invoke a property right such that it gives rise to a takings claim. But the U.S. Supreme Court has repeatedly made clear that there are property *interests* which do not rise to the level of a compensable property *right*, the deprivation of which by the State still requires procedural due process as a Constitutional matter – i.e., notice reasonably calculated under the circumstances, and opportunity to be heard – neither of which the State of Washington afforded to the citizens of Skagit County, Petitioner included. *Sniadach v. Family Finance Corp.*,395 U.S. 337 (1969)(loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was deemed a sufficient property interest to require some form of determination that the garnisher was likely to prevail); *Fuentes v. Shevin*, 407 U.S. 67 (1972)(where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process before repossession could occur); *Vitek v. Jones*, 445 U.S. 480, 491 (1980)(because "minimum

[procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse action. Indeed any other conclusion would allow the State to destroy virtually any state-created property interest at will.")

The additional step required by *Postema* is entirely consistent with the State of Washington's Constitutional due process obligations. Here, Ecology established an instream flow rule, and then announces twelve years after the fact, with no further process or opportunity to be heard, that every new drop of water used within the 2,730 square miles of the Skagit Basin, from the Cascade Crest to the Skagit River's mouth, constitutes an impairment to the Skagit's minimum flow and is thus prohibited. This does not pass Constitutional muster.

It is within the power of the State of Washington to close waters of the State to new withdrawals in order to protect senior water rights. But this must be done intentionally and transparently, based on specific findings of impairment, supported by evidence that the junior withdrawals to be prohibited will actually impact the senior right in question, with notice and opportunity to be heard afforded to the impacted public. That did not happen here at any level, and the ceaseless conflict over water in the Skagit Basin was the foreseeable and proximate result. Pursuant to RAP

13.4(b)(3), a significant question of Constitutional law warrants review by this Court.

3. The Petition Involves An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.

This case also invokes the substantial public interest test of RAP 13.4(b)(4), further warranting this Court's review.

Skagit County is one of the most environmentally progressive communities in the nation, having successfully protected both our farmland and timberland from the sprawling expanse of concrete and asphalt that has consumed estuaries, open spaces and agriculture in the counties to our south and north. The preservation of our rural land base was no accident, but rather was accomplished through open and transparent process attendant to the Growth Management Act. This has created broad acceptance within the community for the resultant restrictions on land use, which in turn has allowed their effective on-the-ground implementation.

Ecology's approach to the 2001 Skagit Rule reflects the antithesis of that model. Basing its conduct entirely on this Court's *Swinomish* decision, purporting to apply the 2001 Skagit Rule, Ecology has announced, through administrative fiat, that there is no year-round water available for either rural landowners or agriculture anywhere in the Skagit Valley – a valley that holds the smallest population of any of the Eastern Puget Sound counties, as

well as the third largest river on the U.S. West Coast after the Columbia and Sacramento.

At present, according to Ecology's current interpretation of its 2001 Skagit Rule, there is no groundwater available for rural landowners or agriculture anywhere in the Skagit Basin. Despite a considerable number of promises, assurances, press releases, website updates, and public meetings over the past three years, Ecology has accomplished nothing substantive to correct the problem it has created, other than to employ a considerable number of state employees to study the ramifications of Ecology's unlawful expansion of its own administrative authority. *See, e.g.*, Letter from Ecology Director Bellon dated January 15, 2015 (CP494)("Since the decision in *Swinomish*, we have been analyzing potential approaches for rulemaking that would both protect instream flows and provide water supply for future community needs.") Talking about it is precisely all that has occurred. Meanwhile, one of the largest agricultural economies on the West Coast is struggling without irrigation water in a climate that increasingly demands it.

Given Ecology's demonstrated propensity to ignore its previous promises as well as the provisions of its own administrative rule, Skagit County has no trust that Ecology will make good on its latest series of promises. Ecology refuses to honor the 1996 MOA's explicit provisions for

exempt wells, a foundational part of the compromise on which the 2001 Skagit Rule is based. Ecology refuses to acknowledge the plain language of the 2001 Skagit Rule, and its facial inapplicability to rural landowners and agricultural irrigators downstream of the Mount Vernon Gauge, in the Skagit Delta. Ecology says this is warranted by a purported fear of litigation by some unnamed actor (that any reasonable mind would construe to mean Ecology's co-intervenor in this matter), an argument very difficult to take seriously given that the Skagit Valley has been mired in a near-continuous state of litigation arising from Ecology's unsuccessful water management efforts for most of the past two decades, with no sign of abatement on the horizon. The draconian restrictions that Ecology has imposed in Skagit County have not been similarly imposed on King County, or Snohomish County, or Pierce County, or Thurston County – counties with a far larger population and much less water than the Skagit Valley.

Because of the foregoing, Ecology's 2001 Skagit Rule is broadly perceived in the community as grossly unfair, arbitrary, and politically motivated. Accordingly, water and land use in the Skagit Basin will likely remain dysfunctional unless this Court corrects Ecology's expansive interpretation of its authority under *Swinomish*.

With increasing global food insecurity and a growing need for water to support the Skagit Valley's food economy in a warming and drying

climate, Skagit County sees the status quo imposed by State government as extremely problematic.

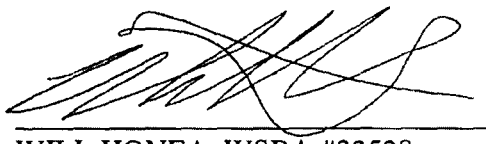
Which is to say, the petition raises an issue of substantial public interest that this Court should decide.

D. CONCLUSION

Fox is correct: the people of Skagit County deserve better from their state government. The Court should grant review.

RESPECTFULLY SUBMITTED this 7th day of June 2016.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By: 

WILL HONEA, WSBA #33528
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DECLARATION OF DELIVERY

I, Judy L. Kiesser, declare as follows:

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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. Executed at Mount Vernon, Washington this 8th day of June 2016.

Judy L. Kiesser

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Sent: Wednesday, June 08, 2016 11:09 AM
To: 'JudyKiesser'
Cc: Will W. Honea
Subject: RE: Fox v. Skagit County, et al. & State, et al.

Received 6/8/2016.

Supreme Court Clerk's Office

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Sent: Wednesday, June 08, 2016 10:41 AM
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Subject: Fox v. Skagit County, et al. & State, et al.

Attached for filing is Respondents' ANSWER TO PETITION FOR REVIEW, with attached Declaration of Delivery.

Case name: RICHARD & MARNIE FOX, Appellants v. SKAGIT COUNTY, SKAGIT COUNTY BOARD OF HEALTH, DALE PERNULA, DIRECTOR OF SKAGIT COUNTY PLANNING & DEVELOPMENT SERVICES, and JENNIFER KINGSLEY, DIRECTOR OF SKAGIT COUNTY BOARD OF HEALTH aka PUBLIC HEALTH DEPARTMENT, Respondents and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and SWINOMISH INDIAN TRIBAL COMMUNITY, Intervenors

Case number: 733150-02 (Skagit County Superior Court No. 14-2-00947-2)

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