NO. 733150-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD A. FOX and MARNIE B. 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,

Respondent-Intervenors.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S BRIEF IN RESPONSE TO RESPONDENT SKAGIT COUNTY'S BRIEF

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I. INTRODUCTION

Even though it is a respondent in this case, Skagit County now sides with Appellants Richard and Marnie Fox (the Foxes). The County's brief, although denominated a response, supports the Appellants in requesting the Court to reverse the superior court's denial of a mandamus order compelling Skagit County to issue a building permit to the Foxes. In essence, after correctly following the law in declining to issue a building permit because the Foxes failed to demonstrate access to an adequate water supply, the County is now attacking the law.

The County is now attempting to challenge the validity of the water management rule for the Skagit River Basin, WAC 173-503 (the Skagit Rule), and asserts that it was unfairly adopted (possibly for ulterior motives) and set minimum instream flows which are unreasonably high. However, this appeal presents neither of those two issues to this Court and the County cannot challenge the underlying validity of the Rule through the Foxes' mandamus action against the County.

The County earlier challenged the Skagit Rule after it was adopted pursuant to the Administrative Procedure Act (APA), and then settled its case against the Department of Ecology after the agency agreed to adopt the 2006 Rule Amendment that was later overturned by the Supreme Court in *Swinomish Indian Tribal Community v. Department of Ecology*,

178 Wn.2d 571, 311 P.3d 6 (2013). When the Supreme Court invalidated the Rule Amendment, the Rule reverted back to its original 2001 version. If the County believes that the Skagit Rule is unlawful or unconstitutional, it could re-file its rule challenge. But, as the superior court correctly concluded: "[t]he instream flow rule for the Skagit River Basin . . . and the Supreme Court's decision in [*Swinomish*], are controlling law in this case. This Court lacks authority to rule on the underlying validity of WAC 173-503 in this case." CP 631.

The County is also wrong in contending that the application of the Skagit Rule's instream flows to permit-exempt wells was not contemplated at the time the Rule was adopted in 2001. Ironically, the County's understanding that the Rule governs permit-exempt wells was exactly what caused the County to challenge the Rule in the first place. As the County stated in its own rule challenge petition, permit-exempt wells that are junior to the Rule can be interrupted if the Rule's instream flow levels are not met. CP 10 ¶ 9.

The County, therefore, provides no reasons to reverse the superior court's denial of a writ of mandamus. The County followed the law in determining that the Foxes cannot qualify for a building permit without an alternative source of water, approved mitigation, or a water storage system. Under RCW 19.27.097, the Skagit Rule, and *Swinomish*, the

Foxes failed to demonstrate that their proposed permit-exempt well, by itself, will provide access to an uninterruptable, and therefore adequate, supply of water for their proposed residence.

II. COUNTERSTATEMENT OF THE CASE

In its attack on Ecology's rulemaking, the County omits certain facts and mischaracterizes the relevant factual background. Significantly, the County provides no basis in law or fact to support its assertion that Ecology created a water shortage for the purpose of "converting the waters of the Skagit Basin into a market-based system capable of generating governmental revenue." County's Br. at 6–7, 9. There is no statutory authority for Ecology to collect revenue related to private water transactions in a market system, and, as a regulatory agency, Ecology has no pecuniary interest in any water market. In the same vein, the County criticizes the Memorandum of Agreement relating to Skagit Basin water management (MOA) with respect to the interplay between the City of Anacortes and the Swinomish Indian Tribal Community (Tribe) and its recognition of water rights held by the City of Anacortes, but neglects to mention that the County is a party to the MOA that agreed to its terms. County's Br. at 7, 9.

With regard to the Skagit Rule, the County claims it is "ludicrous" for Ecology to contend that it intended for the Rule to govern permit-

exempt groundwater use and that the "rulemaking record reflects nothing" to indicate such intent. County's Br. at 10–11. But the introductory comments to the proposed rule state that "[t]he proposed rule would affect *all future water use*, if not exempted," (CP 277 (emphasis added)), and permit-exempt wells are not listed in the Exemptions section of the proposed rule at WAC 173-503-070. CP 284. Further, in the Responsiveness Summary and Concise Explanatory Statement for the Rule, Ecology explained that "[g]roundwater withdrawals will be treated as surface water appropriations unless the applicant can demonstrate the withdrawal is not hydraulically connected to the river." CP 321. Ecology explicitly stated that a permit-exempt withdrawal "could be junior to the instream flow if put to beneficial use after the effective date of the rule. The priority date of the exempt well could become important during a time of scarcity when senior rights would have to be protected." CP 322; *see also* Tribe's Resp. Br. at 46 n.18.

The County also distorts the facts in alleging that Ecology misled the County by first informing it that the Rule applied to permit-exempt wells through a letter Ecology sent to the County after the Supreme Court's decision in *Swinomish*. After the adoption of the Rule in 2001, the County demonstrated that it understood that the Rule applied to permit-exempt groundwater use. That was exactly what caused the County to sue

Ecology to challenge the Rule's validity. The County's Petition for Review, filed in 2003, recognized that new permit-exempt wells would be subject to the Rule and acknowledged that they could not provide adequate water supply for homes under RCW 19.27.097:

> Though exempt from [permitting under] RCW 90.44.050, exempt wells, like any other water use, exist within Washington's prior appropriation scheme. This means that exempt wells that are junior to the [Rule] can be interrupted if the [Rule's] instream flow level ... is not being met. Interruptible water sources do not meet the requirements for an adequate reliable supply of water needed to authorize issuance of a building permit under RCW 19.27.097 . . . .

CP 10 ¶ 9; *see also* CP 11 ¶ 12. Thus, it is disingenuous for the County to accuse Ecology of "hiding the ball" on application of the Rule to permit-exempt groundwater use in the Skagit Basin.

Next, the County complains that Ecology "bungled the job" in adopting the 2006 Rule Amendment rejected in *Swinomish*, but neglects to mention that Ecology did precisely what the County asked it to do. County's Br. at 12. The Rule Amendment was adopted under a settlement between Ecology and the County. The County agreed to voluntarily dismiss their rule challenge case in exchange for Ecology's agreement to propose the Rule Amendment, which was drafted based on input from the County. *Swinomish*, 178 Wn.2d at 577–578. Nor did Ecology mount a "tepid defense" in defending the case brought by the Tribe to challenge the

Rule Amendment. County's Br. at 12. Ecology vigorously defended the Rule Amendment in the five years of intensive litigation in that case and prevailed in Thurston County Superior Court. In contrast, the County did not even intervene nor file amicus briefs to defend the Rule Amendment.

III. ARGUMENT

The issue raised by the County is stated as follows:

> 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?

County's Br. at 6. There is no merit to the County's issue. First, it is based on the false premise that the Skagit Rule is "silent" on permit-exempt groundwater use, such that its minimum instream flow requirements cannot apply to permit-exempt wells. This premise is wrong because, as this Court held in *Whatcom County v. Western Washington Growth Management Hearings Board*, 186 Wn. App. 32, 60, 344 P.3d 1256 (2015), the Skagit Rule expressly governs permit-exempt groundwater use. Ecology's Resp. Br. at 17–25.

Moreover, even the limited rulemaking documents contained in the record below show that the Rule was adopted to apply to *all* new appropriative rights, including rights established under RCW 90.44.050's permit exemptions. The excerpts from the rulemaking record demonstrate

that Ecology's intent has consistently been that all withdrawals of groundwater, whether permitted or not, fall within the Skagit Rule's scope. Significantly, draft versions of the Rule included provisions that would have expressly exempted permit-exempt domestic water use from being subject to the rule, but those provisions were not included in the Rule that was adopted. Ecology's Resp. Brief at 23–24.

While the County purports to challenge Ecology's (and the Supreme Court's, this Court's, and the superior court's) interpretation of the Skagit Rule, its arguments are tantamount to a challenge to the validity of the Rule. For example, the County's brief alleges that the rulemaking process was not fair and transparent, that the Rule's instream flows are not based on credible science, and that the Rule's provisions do not actually support its objective to protect salmon. *See, e.g.,* County's Br. at 4–6, 7–8, 13, 18–19, 24–25. But no issues regarding the validity of the Rule are before this Court. The Foxes did not raise these issues in their assignments of error or briefing, and the County did not appeal the lower court decision.

Moreover, the County cannot bootstrap a challenge to the Skagit Rule's validity to the Foxes' mandamus action. The APA expressly provides that it is "the exclusive means of judicial review of agency action." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139

(1997); RCW 34.05.510. A party may not seek relief in the form of an extraordinary writ, such as a writ of mandamus, when the APA provides an avenue for review of the challenged agency action. *Bock v. State Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978). A rule's validity may only be challenged in a declaratory action filed pursuant to the APA, RCW 34.05.570(2), in which a full rulemaking record can be compiled (something that has not been done in this case) and the validity of the rule can be measured against the prescribed statutory standards.

Similarly, the County's due process argument is tantamount to a challenge to the constitutionality of the Rule itself. *See* County's Br. at 21–24. Again, the APA provides the exclusive remedy, through a petition for judicial review filed pursuant to RCW 34.05.570, where a court can invalidate a rule when it determines that "[t]he rule violates constitutional provisions." RCW 34.05.570(2)(c). The County appears to recognize as much by stating that "[t]his is not the place to fully brief this issue. . . ." County's Br. at 22. And, in any event the County's due process argument is patently without merit because it rests on the false premise that the Rule is "silent" with respect to permit-exempt groundwater withdrawals. Also, to the extent that the County is attempting to lend support to the Foxes' argument that their right to due

process has been violated, that position fails for the reasons explained by Ecology in its earlier brief. Ecology's Resp. Br. at 47–49.

IV. CONCLUSION

The County's brief gives the wrong answers to the wrong question. The validity of the Skagit Rule is not before the Court. This Court should affirm the superior court's decision to apply the Skagit Rule as written, which is to say as applicable to any "withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries," including the water source proposed by the Foxes in their building permit application. WAC 173-503-040(5).

RESPECTFULLY SUBMITTED this 1st day of September 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on September 1, 2015, I caused to be served a copy of State of Washington, Department of Ecology's Brief in Response to Respondent Skagit County's Brief in the above-captioned matter upon the parties herein as indicated below:

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September 01, 2015 - 3:51 PM

Transmittal Letter

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- ○ Statement of Additional Authorities
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Comments:

State of Washington, Department of Ecology's Brief in Response to Respondent Skagit County's Brief

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