FILED
Aug 24, 2015
Court of Appeals
Division I
State of Washington

73315-0

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 RESPONSE BRIEF

ROBERT W. FERGUSON
Attorney General
ALAN M. REICHMAN, WSBA #23874
Senior Counsel
DAVID F. STEARNS, WSBA #45257
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
OID No. 91024
(360) 586-6770

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

I. INTRODUCTION

Appellants Richard and Marnie Fox (the Foxes) are appealing the superior court's denial of their request for a mandamus order that would compel Skagit County to issue them a building permit for the construction of a new house in the Skagit River Basin. The Foxes' proposed water supply for the home is a new well that would tap groundwater that is hydraulically connected to the Skagit River. Thus, pumping the well would result in the reduction of stream flows on the Skagit River, in violation of the water management rule for the Skagit River Basin, WAC 173-503 (the Skagit Rule).

This well is exempt from the requirement to apply to the Department of Ecology (Ecology) for a water permit, but any withdrawal would still be junior in priority to the instream flows on the Skagit River. In substance, the Foxes ask this Court to award them a "super-priority" water right regardless of its depletion of the senior priority river flows. The Court should reject this request because such a right is contrary to the fundamental principles of Washington water law, under which water rights that are established first are senior to rights established later in time, and where all purposes of water use (whether for instream flows, irrigation, domestic, or other types of use) are on an equal footing in the priority system.

In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011), the Supreme Court held that, under RCW 19.27.097, counties must determine that sufficient water is legally, and not just physically, available before building permit applications can be approved. The superior court's decision should be affirmed because the County correctly refrained from issuing a building permit when the Foxes failed to demonstrate a reliable supply of water for their proposed residence.

To side-step the Skagit Rule's minimum stream flow requirements, the Foxes advance two primary arguments. First, they contend that the exemption from permitting requirements for domestic water use under RCW 90.44.050 provides an exemption from all oversight and regulation pertaining to the use of water, including the land use requirement to demonstrate an adequate water supply for approval of a building permit. This argument fails because permit-exempt groundwater use is subject to the water rights priority system and must be curtailed if such use would cause injury to senior water rights, including the minimum instream flows established under the Skagit Rule. And, independent of the Water Code, RCW 19.27.097 requires a building permit applicant to demonstrate they have access to a reliable source of water for their proposed building. A water supply that is subject to interruption during times when flows drop

below the minimum levels required under the Skagit Rule would not provide adequate water for a year-round residence.

Second, the Foxes contend that even if the permit exemption statute does not provide a free pass from the requirement to not impair senior water rights, their proposed water use is not actually subject to the minimum instream flows established under the Skagit Rule. This argument fails under the Supreme Court's decision in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 598, 311 P.3d 6 (2013), and this Court's recent decision in *Whatcom County v. Western Washington Growth Management Hearing Board*, 186 Wn. App. 32, 46, 344 P.3d 1256 (2015). The applicability of the Skagit Rule to permit-exempt groundwater use was central to the Supreme Court's holding in *Swinomish* that Ecology violated the law by creating reservations of water to allow permit-exempt uses that would cause reductions in Skagit River flows. The Skagit Rule's plain language states that the "withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River" is subject to the instream flows and, unlike water management rules for other basins, it does not include any exemption for permit-exempt wells. WAC 173-503-040(5).

II. COUNTERSTATEMENT OF ISSUES

1. May an applicant for a building permit meet their burden to show they have an "adequate water supply" for a home under RCW 19.27.097 through a bare showing that the water use falls within a water permit exemption under RCW 90.44.050, regardless of whether the water use would impair senior water rights?

2. Is the Foxes' proposed use of groundwater subject to the Skagit River Basin Instream Flow Rule, WAC 173-503?

3. Did the superior court err in denying the Foxes' Motion for Reconsideration of the Order Denying Motion to Affirm Writ of Mandamus?

4. Did application of the Skagit River Basin Instream Flow Rule in this case violate the Foxes' constitutional right to due process?

III. COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

On March 5, 2014, the Foxes filed an application with the County requesting a building permit to construct a house near Sedro-Woolley, Washington. The County determined that the building permit application is "incomplete" because the Foxes have not demonstrated that they have access to an adequate and reliable source of water for their proposed home. The Foxes do not hold a water right permit for this property and no

connection to public water is available. However, they proposed to use groundwater, citing an exemption from water right permitting requirements for "single or group domestic uses in an amount not exceeding five thousand gallons a day" under RCW 90.44.050.[1]

The Foxes' proposed home site is located in the Skagit River Basin. On March 14, 2001, Ecology adopted the Skagit Rule, which is the water management rule (also known as an "instream flow rule") for the Skagit River Basin. The Skagit Rule became effective April 14, 2001, and established minimum instream flow requirements for the Skagit River with a priority date of April 14, 2001. At times when these minimum flow levels are not met, the exercise of water rights that have priority dates after that date must be curtailed (i.e., shut off) if water use would reduce the senior instream flows.

The connection between the proposed well and the Skagit River is not disputed. The Foxes did not provide any information to the County in association with their building permit application to demonstrate that the groundwater they propose to pump is not in hydraulic continuity[2] with the Skagit River, and that their proposed use of groundwater would not cause

---

[1] Ecology does not dispute that the Foxes' proposed water use could qualify as a permit-exempt single domestic use under RCW 90.44.050, because they would need no more than five-thousand gallons per day of water to supply their proposed home.

[2] "Hydraulic continuity" is a scientific term that describes the interconnection between groundwater (aquifers) and surface water bodies (such as rivers and lakes).

the reduction of stream flows on the Skagit River. Current best available science indicates that the general geology of the region is that of glacial deposits either overlain or truncated by later fluvial deposits created by the Skagit River. CP 460–461. The Foxes' property is located in historic abandoned channel and flood deposits known as alluvium. The Foxes' property lies in close proximity to Mannser Creek and Red Cabin Creek, which are tributaries to the Skagit River. CP 461.

The Foxes have a well on their property, which was installed to a depth of 31 feet into alluvial sand and gravel. The alluvial aquifer tapped by the well is a water table aquifer which is "unconfined," meaning that water is free to rise and decline. Such aquifers are, as a general rule, directly connected to nearby streams. CP 461–462. Because of the local topography, pumping a well on the Foxes' property will intercept groundwater that would otherwise discharge to the tributaries. For these reasons, the groundwater under the Foxes' property is in hydraulic continuity with the tributaries and the Skagit River, and pumping a well on the Foxes' property will cause the reduction of instream flows on the Skagit River. CP 462–463.

Historically, Skagit River flows have dropped below the minimum instream flow levels on a regular basis. CP 463. For example, last year, through September 30, 2014, there were 64 days when instream flows

were not met. For the twenty-year period between 1995 to 2014, there were days when flows were not met during each year, ranging from a high figure of 181 days when flows were not met during 2009, to a low figure of 29 days when flows were not met during 2013.[3] CP 464–466.

B. Procedure Below

After the County determined that their building permit application is "incomplete," the Foxes filed a Petition for Writ of Mandamus in Skagit County Superior Court on May 23, 2014. CP 643–730.

On June 6, 2014, the superior court issued an Alternative Writ of Mandamus, which required the County to either issue a building permit or appear and show cause as to why they should not be mandated to do so. CP 964–966. On June 26, 2014, the County filed an Answer which requested the superior court to dismiss the petition on grounds that mandamus was not warranted because the Foxes' building permit application was incomplete as a result of failure to demonstrate an adequate supply of water. CP 231–247.

In July 2014, the Swinomish Indian Tribal Community (Tribe) and Ecology filed motions for intervention. CP 892–894; CP 836–840. The superior court then conducted a hearing to consider the County's request to show cause in opposition to mandamus, and the Tribe's and Ecology's

[3] During five of the twenty years from 1995 to 2014, flows were not met during more than 100 days of the year (2005, 2006, 2009, 2010, and 2011). CP 463–466.

motions to intervene. The superior court granted the motions for intervention, and decided to hold off from ruling on the Foxes' request for mandamus. CP 638–639; CP 641–642. Instead, the court set a schedule for briefing and oral argument on the merits of the Foxes' mandamus petition.

After hearing oral argument, the superior court ruled against the Foxes and denied their request for a mandamus order. On February 2, 2015, the superior court entered its Order Denying Motion to Affirm Writ of Mandamus, which dismissed the case. CP 629–632 (copy attached as Appendix 1). The court subsequently denied the Foxes' Motion for Reconsideration. CP 640. On April 2, 2015, the Foxes filed an appeal of the Order Denying Motion to Affirm Writ of Mandamus, and the Order on Plaintiff's Motion for Reconsideration, to this Court. CP 599–607.

IV. ARGUMENT

A writ of mandamus "compel[s] the performance of an act that the law clearly requires of a government official." *State v. G.A.H.*, 133 Wn. App. 567, 576, 137 P.3d 66 (2006). Here, the trial court correctly found that the County had no legal duty to issue the Foxes a building permit because they had not demonstrated an adequate supply of water for their proposed building as required by RCW 19.27.097.

A. Standard of Review

Mandamus requires showing that a government official has a clear duty to act. *Brown v. Owen*, 165 Wn.2d 706, 724, 206 P.3d 310 (2009). Ecology agrees with the Foxes that the standard of review in this case is de novo because the Foxes have raised issues that are legal in nature. *See Cost Mgmt. Serv., Inc. v. City of Lakewood*, 178 Wn.2d 635, 649, 310 P.3d 804 (2013).

B. Permit-Exempt Groundwater Uses Are Not Exempt From the Water Rights Priority System and the Requirement to Demonstrate an Adequate Water Supply for Issuance of a Building Permit (Issue No. 1)

The Foxes wrongly assert that, "without more" a use of water that falls under a permit exemption in RCW 90.44.050 automatically constitutes "another form sufficient to verify the existence of an adequate water supply" under RCW 19.27.097. *See* Fox Opening Br. at 12. They contend that the groundwater permit exemption for domestic use under RCW 90.44.050 guarantees their proposed water source because they are not required to file a water right permit application with Ecology. But the law is well established that permit-exempt groundwater uses are exempt only from water right permitting requirements, and are subject to the water right priority system which disallows impairment of senior rights. As such, they are interruptible in favor of senior instream flows. For this

reason, a permit exemption does not guarantee that the water source proposed by the Foxes is an adequate and reliable water supply, which, under RCW 19.27.097, is a prerequisite to issuance of a building permit.

Single-home domestic use is one of four categories of water use "exempt from the provisions" of RCW 90.44.050 establishing a permit system for groundwater rights. After listing the exempt uses, RCW 90.44.050 states that "to the extent [water] is regularly used beneficially," a permit-exempt user "shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter." The Supreme Court has held that:

> [O]nce the [permit-exempt groundwater] appropriator perfects the right by actual application of the water to beneficial use, *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.*

Dep't of Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (emphasis added) (citation omitted). Thus, groundwater uses that are exempt from permitting are still subject to the "first in time shall be the first in right" priority system. *See* RCW 90.03.010; RCW 90.44.020.

The Supreme Court made this clear in *Swinomish* by elaborating on the principle that permit-exempt groundwater uses are subject to the priority system and cannot be exercised in a manner that will cause injury

to senior water rights. The Court, in discussing the very Skagit Rule at issue here, made clear that "exempt wells are provided for by statute . . . without any provision permitting a 'jump to the head of the line' in priority . . . ." *Swinomish*, 178 Wn.2d at 598.

Moreover, the well permit exemption of RCW 90.44 is not an exemption from the state's land use laws. The Groundwater Code, and its permit exemption provision, was enacted in 1945. Later, in 1990, as part of the Growth Management Act (GMA), the Legislature enacted a statute requiring applicants for building permits to demonstrate that they have an adequate water supply to support their proposed building.[4] Laws of 1990, 1st Ex. Sess., ch. 17. This statute provides, in relevant part, that:

> Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply.

RCW 19.27.097(1).

Counties are required to determine that sufficient water is *legally*, and not just physically, available to applicants before land use applications

[4] The legislative intent of the GMA is to coordinate and plan growth so as to balance environmental, economic development, health, safety, and quality of life concerns in the use of the lands within the state. RCW 36.70A.010; Op. Att'y Gen. 17 (1992). From a public policy perspective, it makes total sense to ensure that homes and other buildings are constructed only where there is an adequate water supply to support their occupancy.

can be approved. *Kittitas*, 172 Wn.2d at 180. In *Kittitas*, the Supreme Court rejected a county's argument that it lacked statutory authority to take land use actions that would ensure that water is legally available to support land use proposals:

> In fact, several relevant statutes indicate that the County *must* regulate to some extent to assure that land use is not inconsistent with available water resources. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources. RCW 36.70A.070(1), (5)(c)(iv). Additional GMA provisions, codified *at RCW 19.27.097 and 58.17.110*, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.

Kittitas, 172 Wn.2d at 178–179 (second emphasis added). The Court emphasized that a purpose of the GMA is to prevent new development from injuring existing water rights:

> To interpret the County's role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the County to condone the evasion of our state's water permitting laws. This could come at a great cost to the existing water rights of nearby property owners, even those in adjoining counties, if subdivisions and developments *overuse the well permit exemption*, contrary to the law.

Kittitas, 172 Wn.2d at 180 (emphasis added).

And the same logic is applicable to RCW 19.27.097 and the building permit application process. Even though the Foxes are not required to file a water permit application with Ecology, under

RCW 19.27.097 they must verify to the County that they have access to an adequate water supply before their building permit application can be approved. RCW 19.27.097 was enacted over four decades after RCW 90.44.050, and provided a requirement for counties to verify access to a legally available and reliable source of water supply that is independent of Ecology's water right permitting function and the groundwater permit exemptions. It requires building permit applicants to "provide evidence of an adequate water supply for the intended use of the building," which "may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, *or another form sufficient to verify the existence of an adequate water supply.*" RCW 19.27.097(1) (emphasis added). RCW 19.27.097 does not include an exception for building permits relying upon permit-exempt wells for water sources. Thus, the Foxes bear the burden to demonstrate "another form sufficient to verify the existence of an adequate water supply" since they cannot connect to a public water system and do not hold a water permit.[5]

---

[5] This is true even though, as the Foxes point out, the Skagit County Code allows issuance of a building permit for a home if a water source is capable of supplying at least 350 gallons per day of water. Ecology incorporates by reference the Tribe's argument relating to the meaning and effect of Skagit County Code Chapter 12.48, Intervenor Swinomish Indian Tribal Community's Response Brief (Tribe's Brief), Section IV.B.1, and offers the following additional argument. If the Skagit County Code is misread to require the County to only ascertain if water is physically (and not legally)

The Foxes argue that *Kittitas* is distinguishable because in that case the county allowed "overuse of the well permit exemption." Fox Opening Br. at 15. But this argument fails because *Kittitas* did not only address permit-exempt water uses in the context of related subdivisions. The Court held that both RCW 58.17.110 *and* RCW 19.27.097 require counties to verify that adequate potable water is legally available before subdivisions *and* building permits can be approved. *Kittitas*, 172 Wn.2d at 178–179. And permit-exempt wells are "overused" when they are used illegally in a manner that impairs senior water rights.

The Foxes mistakenly argue that the Supreme Court's decision in *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993), regarding unauthorized adjudications of water rights, applies here. Fox Opening Br. at 16, 28. But the *Rettkowski* holding relates solely to Ecology's authority in the context of enforcement to prioritize between

---

available to support a building permit, it does not override the County's obligation under RCW 19.27.097 to verify that adequate water supply is legally available because a local ordinance cannot supersede state law. *Cannibas Action Coalition v. City of Kent*, 183 Wn.2d. 219, 351 P.3d 151 (2015).

The Tribe's interpretation is also supported by the Department of Commerce's rules administering the GMA. Those rules require county building permit application procedures to consider the legal availability of water under Ecology water management rules and other factors:

> Each applicant for a building permit of a building needing potable water shall provide evidence of an adequate water supply for the intended use of the building. . . If the department of ecology has adopted rules on this subject, or any part of it, local regulations should be consistent with those rules. Such rules may include instream flow rules, which may limit the availability of additional ground or surface water within a specific geographic area.

WAC 365-196-825.

competing water right holders where one group of water right holders has rights based on statements of claims for rights that predated the permit system and the other group has rights that were granted under the post-1917 permit system. This has no bearing on the legal issue here. There is a priority date for the Skagit minimum instream flows that is senior to later-established water rights, whether permit-exempt or not. An adjudication of water rights in superior court is not required to conclude that the Foxes have not shown that sufficient water is legally available. *Rettkowski* does not bar counties from determining whether a permit-exempt well is insufficient because it would be interruptible to prevent impairment of senior water rights. Instead, this case is controlled by the more recent decision in *Kittitas*, which is directly on point and makes clear that counties are *required* to ascertain that water is *legally* available before they can approve land use applications that propose to use groundwater under a permit exemption. *Kittitas*, 172 Wn.2d at 178–180.

The Foxes' reliance on the Supreme Court's decision in *Campbell & Gwinn*, several other cases, and the definition of the term "words of exemption" in Black's Law Dictionary in support of their argument that permit-exempt groundwater use is exempt from all scrutiny and regulation, is similarly misplaced. Fox Opening Brief at 17–20. For instance, *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 P. 41 (1926)

and *Kim v. Pollution Control Hearings Board*, 115 Wn. App. 157, 161 n.6, 61 P.3d 1211 (2003) are both inapposite; neither case holds that permit-exempt groundwater uses are not subject to the priority system. *Hunter Land Co.* involved the use of riparian surface water and was decided well before the enactment of Washington's Groundwater Code in 1945. And *Kim* only considered the scope of the water permit exemption for industrial use.

The Foxes emphasize the Supreme Court's recognition in *Campbell & Gwinn* that RCW 90.44.050 precludes Ecology from employing the four criteria for approval of water right permits under RCW 90.03.290 for uses that qualify under the exemptions. But they fail to acknowledge that *Campbell & Gwinn* also made clear that permit-exempt groundwater rights are no better than rights authorized under the permit system (and confer no special privileges) and are subject to the water rights priority system. And *Campbell & Gwinn* did not involve any issue over a county's obligation to determine adequacy of water supply for a building permit under RCW 19.27.097, so that case has no bearing on whether permit-exempt uses are excused from county inquiry over whether water is legally available.

The Foxes also make far too much out of the language in RCW 90.44.050 stating that a use falling under one of the four exempt

categories "is and shall be" exempt from permitting requirements. Fox Opening Br. at 22. Claiming this "suggests" something about future rights, the Foxes argue that their proposed water use is exempt from the water rights priority system. This reflects an erroneous premise that the permit exemptions under RCW 90.44.050 embody "common law" groundwater rights that survived the adoption of the Groundwater Code in 1945. Fox Opening Br. at 23–27. This false premise that the statutory groundwater permit exemptions maintain unused "correlative" groundwater rights that are incident to the ownership of land under the common law is addressed in Section IV.C.3 below.

In sum, the Foxes cannot meet the requirement for an adequate water supply under RCW 19.27.097 simply because they are proposing a use of groundwater under one of RCW 90.44.050's permitting exemptions. The Court should rule in favor of Ecology on Issue No. 1.

C. WAC 173-503 Governs the Foxes' Proposed Permit-Exempt Groundwater Use in the Skagit River Basin (Issue No. 2)

1. Permit-exempt groundwater uses are subject to the Skagit Rule's instream flows

The Foxes contend that, even if the Court rules against them on Issue No. 2 by determining that RCW 90.44.050 does not provide a blanket exemption that precludes any scrutiny of their building permit application by the County, they qualify for a permit because their permit-

exempt well water use would not be subject to the Skagit Rule's flow requirements and is, therefore, a reliable, non-interruptible source of water. *See* Foxes' Opening Brief at 28–37. This contention fails. The Skagit Rule expressly states that it governs all groundwater use that is in hydraulic continuity with surface water, which includes permit-exempt use. And the Supreme Court adopted this construction of the Rule in *Swinomish*, where it held that the Skagit River instream flows established in the original 2001 version of the Rule are applicable to all water uses, including uses that are exempt from water right permitting requirements. Thus, the Foxes permit-exempt well is interruptible.

This interpretation of the Skagit Rule has not only been clearly stated by the Supreme Court, but is borne out by its language. Rules of statutory construction apply to administrative rules and regulations. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51–52, 239 P.3d 1095 (2010). If the meaning of a rule is plain and unambiguous on its face, then a court must give effect to that plain meaning. The Skagit Rule states that:

> Future consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, *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 WAC 173-503-040 (1) through (3) . . . .

WAC 173-503-040(5) (emphasis added). This subsection of the Skagit Rule governs which types of uses of water are subject to the minimum instream flow requirements established in other subsections of the Rule. Considering the placement of the commas in this provision is key to ascertaining its meaning. WAC 173-503-040(5) provides for two separate categories of water uses to be subject to the instream flows: first, future consumptive water right permits issued for diversion of surface water in the Lower and Upper Skagit and perennial tributaries; and, second, "withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries." The first category only includes water uses where surface water is directly diverted from the Skagit River and tributaries under water right permits. In contrast, the second category includes *all* withdrawals of groundwater in hydraulic continuity with surface waters and does not limit itself to withdrawals authorized by water right permits. The term "permits" qualifies only the clause before the comma, which concerns surface water use. However, "permits" does not qualify the second clause relating to groundwater use. Therefore, the Rule expressly governs all withdrawals of groundwater.[6]

[6] And, as explained by the Tribe, the Court should reject the Foxes' argument that reading WAC 173-503-040(5) in conjunction with WAC 173-503-060 leads to an interpretation that permit-exempt groundwater use is not subject to the instream flows. Tribe's Brief, Section IV.C.3.

In *Whatcom County*, this Court contrasted the language of the Skagit Rule with the water management rule that was at issue in that case, the Nooksack River Basin Instream Flow Rule, WAC 173-501, and concluded that the Skagit Rule expressly governs permit-exempt groundwater use, while the Nooksack Rule does not:

> Ecology also argues that this is clear [that the Nooksack Rule does not govern permit-exempt groundwater use] when read in contrast to water management rules for other basins which include express language indicating that they govern permit-exempt uses of water. For example, Ecology cites WAC 173-503, the rule for the Skagit River Basin. This is the basin rule in the December 2011 letter on which the [Growth Management Hearings] Board relied. The Skagit River Basin rule states that "[f]uture consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, ***and withdrawal of groundwater in hydraulic continuity with surface water*** in the Skagit River and perennial tributaries, ***shall be expressly subject to instream flows***...." As this emphasized language makes clear, in contrast to the Nooksack Rule, this rule expressly indicates that it governs permit-exempt uses of water.

Whatcom County, 186 Wn. App. at 60. This Court's interpretation in *Whatcom County* that the Skagit Rule applies to permit-exempt groundwater use was essential to and part of its resolution of *Whatcom County* and cannot be dismissed as dicta as the Foxes suggest.

The Court should also reject the Foxes' argument that *Swinomish* does not recognize that the Skagit Rule is applicable to permit-exempt

groundwater uses. *Swinomish* involved a challenge to the amendment to the Skagit Rule adopted by Ecology in 2006. Ecology adopted the Rule amendment after numerous stakeholders voiced concerns that the original 2001 Rule would prevent development in rural Skagit County because homes could not be developed with water supplies that were subject to being shut off when the instream flows were not met. To address those concerns, the 2006 amendment established "reservations" of water in various areas of the basin that would provide uninterruptible water supplies. *Swinomish*, 178 Wn.2d at 577–578. The Tribe sued, arguing that Ecology erred in creating the reservations because they would allow impairment of the instream flows and Ecology lacked statutory authority to create the reservations under the "overriding considerations of the public interest" provision of the Water Resources Act. The Supreme Court agreed and invalidated the Rule amendment.

The Court recognized that the original 2001 Skagit Rule, without the reservations established under the 2006 amendment, did not allocate any water for new uses of water in hydraulic continuity with the Skagit River—including uses under the permit exemption for domestic use—that would not be subject to interruption when the Skagit River flows fall below the required minimum levels. The Amended Rule, however, tried to establish "27 reservations for *domestic*, municipal,

commercial/industrial, agricultural irrigation, and stock watering out-of-stream uses." *Swinomish*, 178 Wn.2d at 578 (emphasis added) (citations omitted). The *Swinomish* Court squarely addressed the fact that the reservations allowed permit-exempt groundwater use that would not be interruptible when the minimum instream flows are not met. *Swinomish*, 178 Wn.2d at 587 ("Ecology's use of its balancing test to determine when the overriding-considerations exception will justify reservations of water for exempt domestic wells is not consistent with the statutory requirement of an 'overriding' consideration."). The Court invalidated the reservations on the grounds that they would allow water use—including permit-exempt domestic well use—that would impair the instream flows:

> There is no question that the 27 reservations in the Amended Rule impair the existing minimum flow rights because the uses for which the 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.

Id. at 583. Thus, the Court recognized that the Skagit Rule does indeed govern permit-exempt groundwater uses.

Since, under its plain meaning, all withdrawals of groundwater are subject to the Skagit River instream flows if they would pump water that is hydraulically connected to the River, there is no need to resort to further regulatory construction. However, if this Court wants to look further, in

addition to the Rule's plain language and the holdings in *Swinomish*, this interpretation is supported by its drafting history and Ecology's practice.[7]

The rulemaking record for the Skagit Rule shows that it applies to *all* new appropriative rights, including rights established under RCW 90.44.050's permit exemptions. In the Responsiveness Summary and Concise Explanatory Statement for the initial adoption of WAC 173-503 in 2001, 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 also 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. The rulemaking record demonstrates that Ecology's intent has consistently been that all withdrawals of groundwater, whether permitted or not, fall within the Skagit Rule's scope.[8]

---

[7] If the Court finds that the Rule is ambiguous, the Court must "accord great deference to Ecology's interpretation of its own regulation, as the agency has expertise and insight gained from administering the regulation that the reviewing court does not possess." *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 754, 271 P.3d 331 (2012) (citation omitted) (internal quotation marks omitted).

[8] That understanding of the Skagit Rule's applicability to permit-exempt withdrawals was central to Ecology's ultimately unsuccessful attempt to amend the Rule in 2006 in order to reserve water for future uninterruptible uses. Among the stated purposes of the 2006 amendments to the Skagit Rule were to establish reservations of water for "new rural domestic and business potable needs." CP 325. Such reservations

The rulemaking history relied on by the Foxes does not bolster their argument that the Skagit Rule does not "expressly apply to exempt well use." *See* Fox Opening Br. at 35–37. Both draft versions of the rule they discuss included sections that expressly would have included an exemption for permit-exempt domestic uses that would have precluded such uses from being subject to the rule. One draft version of the rule included an "Exemptions" provision stating that:

> Single domestic, (including up to ½ acre lawn and garden irrigation and associated noncommercial stockwatering) shall be exempt from the provisions established in this chapter, ...

CP 301. The other draft rule they discuss included a similar "Exemptions" section.[9] CP 308. But the final adopted version of the Skagit Rule does not contain any provision exempting single domestic uses from being subject to the rule's provisions. Clearly, Ecology considered language that would exempt the type of permit-exempt use proposed by the Foxes from the instream flow requirements, but did not adopt it.

Contrary to the Foxes' position, Ecology's interpretation is also supported by RCW 90.03.247, which describes the impact of instream

---

would be entirely unnecessary under the Foxes' construction of the Skagit Rule; creating reservations to allow uses covered by RCW 90.44.050's permit exemptions would make no sense unless those uses fell within the original Rule's ambit.

[9] Unlike the Skagit Rule, numerous Ecology water management rules include "exemptions" sections that exclude permit-exempt domestic and stock water uses from being subject to instream flow requirements. *See, e.g.,* WAC 173-507-050 (Snohomish River Basin), WAC 173-508-080 (Cedar-Sammamish River Basin), and WAC 173-509-070 (Green-Duwamish River Basin).

flow requirements. While RCW 90.03.247 provides that permits shall include conditions requiring that water cannot be used at times that the flows are not met, it does not relieve permit-exempt uses from compliance. This is confirmed by RCW 90.03.345, which provides that "the establishment of . . . minimum flows or levels under RCW 90.22.010 or RCW 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment."[10] *See also Swinomish*, 178 Wn.2d at 595 ("minimum flows or levels, once established, have priority over later acquired appropriative rights").

In sum, the superior court ruled correctly that "[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 (App. 1 at 3).

---

[10] The Foxes' argument that the Skagit Rule does not govern permit-exempt groundwater use is also severely flawed as a result of two other misunderstandings of Washington water law. First, the Foxes mistakenly contend that the Skagit Rule cannot preclude permit-exempt use because RCW 90.54.020(5) provides that "[a]dequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." Fox Opening Br. at 32–33. This reading of RCW 90.54.020(5) is refuted in Section IV.E below.

Second, the Foxes are mistaken that the instream flow rights established by the Skagit Rule had to meet the four-part test under RCW 90.03.290 that governs the issuance of water right permits. Fox Opening Br. at 33–34. While instream flows are equivalent to water rights in that they cannot be impaired by the exercise of junior rights, they are established by Ecology through rulemaking under authority of provisions in RCW 90.22 and RCW 90.54, and are not subject to the four-part test for permit applications.

2. The Foxes have not provided evidence to Skagit County showing that their proposed water use would not reduce flows on the Skagit River

Because their proposed water use is subject to the Skagit Rule, to be eligible for a building permit under RCW 19.27.097 it is the Foxes' burden to demonstrate that pumping their well will not reduce instream flows of the Skagit River. But the record here shows that the Foxes' well would impact the Skagit River, and they have not shown otherwise. The Foxes did not provide any information to the County in association with their building permit application to demonstrate that the groundwater they propose to pump would not cause the reduction of Skagit River flows. As a result, their permit-exempt well would be subject to being shut off when the river's flows are not met, which has occurred frequently in the past.

The Foxes are correct that, under the Supreme Court's *Postema* decision, the fact that there is a hydraulic connection between groundwater and a regulated surface water body does not automatically mean that use of groundwater would cause impairment of instream flows. Fox Opening Br. at 31. The standard set by *Postema* is that there is impairment if groundwater pumping causes a reduction in flows. Impairment can result from de minimis reductions in flows, does not have to be discernible through standard stream measuring devices, and can be predicted based on

modeling and other scientific methodology. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 92–93, 11 P.3d 726 (2000).

This standard is met here. As described in Section III.A above, there is hydraulic continuity between the groundwater the Foxes propose to pump and the Skagit River. As a result of hydraulic continuity, pumping a well on the Foxes' property will capture groundwater that would otherwise discharge to the Skagit River and cause the reduction of instream flows. Since the Foxes are proposing a "withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River . . ." under WAC 173-503-040(5), their proposed water use is subject to the Skagit Rule's minimum instream flow requirements.

And, as also described in Section III.A, Skagit River flows have regularly dropped below the minimum instream flows prescribed under the Rule. As such, the Foxes' proposed water supply would be subject to frequent curtailment. Accordingly, the superior court ruled correctly that "The Foxes have not demonstrated that they have access to an adequate water supply for their proposed building as required by RCW 19.27.097. . . . A water supply that is subject to interruption many days each year is not adequate, by itself, to serve a home." CP 632 (App. 1 at 4).

3. The Foxes do not have a "correlative" right that is not subject to the instream flows

a. When enacted in 1945, the Groundwater Code extinguished unused correlative groundwater rights that were not perfected within a reasonable time

The Foxes also argue that they have a water right that is not subject to the Skagit Rule's instream flows because they are entitled to a "correlative" groundwater right (the analogue to a riparian surface water right), which is superior to later appropriations like the flows established under the Skagit Rule. Their argument relies on RCW 90.44.040, which provides that when the Groundwater Code became effective to make groundwater "public water" regulated by the water permit system, the new permit system was made "[s]ubject to existing rights" that were already established by that time. Fox Opening Br. at 28, 38–39. They also cite WAC 173-503-070(1), which provides that "[n]othing in this chapter shall affect existing water rights, including perfected riparian rights . . . ." *See* Fox Opening Br. at 37–40.

This argument misreads the Groundwater Code, which makes appropriation the *sole* way of establishing new groundwater rights. RCW 90.44.040. After 1945, unused common law correlative groundwater rights were forfeited unless they were perfected by actual beneficial use of water within a reasonable period of time. The Foxes'

argument based on WAC 173-503-070(1)'s exception is also misplaced because the Skagit Rule specifically refers only to "*perfected* riparian rights," meaning rights actually put to beneficial use. Because the Foxes had not actually used water for the proposed home at the time the Rule was adopted in 2001, their right was not perfected and cannot meet this exception to the Rule.

The Foxes' argument that they hold an "irreducible common law correlative water right," (Fox Opening Br. at 39), in association with their property that is senior to the Skagit Rule's instream flows fails for similar reasons. Under Washington water law, water is a public resource that is not automatically available for use as an incidence to land ownership. In Washington, the riparian or correlative water rights doctrine has been supplanted by the prior appropriation doctrine and a water right permitting system. As soon as Washington obtained statehood it began moving away from riparian rights and towards prior appropriation doctrines. The first Legislature authorized the appropriation of water for irrigation purposes. *See* Laws of 1889-90 at 706–29. In 1891, the Legislature revised the statutes to authorize appropriation of water for a wider variety of purposes of use. Laws of 1891, ch. 142 § 1.

When tensions arose from the resulting dual system in which both riparian and appropriative rights were recognized, Washington courts

began changing the nature of riparian rights. As early as 1923, the Supreme Court observed that "while [it] has recognized the common-law riparian rights, it has also modified and enlarged that doctrine by ingrafting upon it the necessity of beneficial use by the riparian owner." *Brown v. Chase*, 125 Wash. 542, 549, 217 P. 23, 25 (1923). In *Department of Ecology v. Abbott*, 103 Wn.2d 686, 695, 694 P.2d 1071 (1985), the Supreme Court noted that "[i]n a dual system, nonuse of *any* riparian rights results in their forfeiture." Therefore, the notion of riparian rights at the core of the Foxes' argument, where a water right superior to the Skagit Rule's instream flows can spring into being after decades of nonuse, has not been part of Washington's water law for nearly a century.

The Legislature adopted the current system for appropriation of rights for surface water in 1917, as follows:

> The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

RCW 90.03.010.

In *Abbott*, the Supreme Court held that "the 1917 water code established prior appropriation as the dominant water law in Washington" and that, "[a]fter 1917, new water rights may be acquired only through compliance with the permit system and existing water rights not put to beneficial use are relinquished." *Abbott,* 103 Wn.2d at 687. In particular, the Court held that the surface water code extinguished any riparian rights that remained unused fifteen years after its adoption, a date sufficient to allow riparian owners to learn about the code and take steps to protect their interests. *Id.* at 695.

In 1945, the Legislature enacted the Groundwater Code "for the purpose of extending the application of [RCW 90.03] to the appropriation and beneficial use of groundwaters in the state." RCW 90.44.020. In doing so, it used language nearly identical to that in the 1917 Water Code which related to surface water:

> Subject to existing rights, all natural groundwaters of the state as defined in RCW 90.44.035, also all artificial groundwaters that have been abandoned or forfeited, *are hereby declared to be public groundwaters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise.*

RCW 90.44.040 (emphasis added). Just as the Legislature's adoption of the Water Code in 1917 effectively extinguished unused riparian rights to surface water (subject to a reasonable grace period of fifteen years), the

adoption of the Groundwater Code in 1945 extinguished unused correlative rights to groundwater.

Abbott's holding that riparian surface water rights were extinguished if they were not perfected through actual beneficial use of water within reasonable time after the 1917 Water Code's adoption applies with equal force to correlative groundwater rights that were not perfected soon after the later enactment of the Groundwater Code. No Washington court decision has been issued that extends the fifteen-year grace period pronounced by the Supreme Court in *Abbott* to the perfection of correlative groundwater rights after the enactment of the 1945 Groundwater Code. Indeed, the fifteen-year grace period allowed for by the *Abbott* Court may be more generous than the period that would be appropriate in the context of riparian groundwater rights because in *Abbott* the Court arrived at the fifteen-year grace period because it was "adequate to allow riparian owners to learn about the code and take steps to protect their interests." *Abbott,* 103 Wn.2d at 695. Given that the 1917 Water Code had been in place for approximately twenty-eight years by the time the Groundwater Code was adopted in 1945, a reasonable amount of notice to holders of correlative groundwater rights may actually be less than fifteen years. Taking fifteen years as the outer limit of when a correlative groundwater right needed to be put to beneficial use after the

Groundwater Code's adoption, which would be 1960, the Foxes have missed their window by over a half century.

Similarly, the text of RCW 90.44.050 contradicts the Foxes' claim that its permit exemptions carve out correlative groundwater rights from the prior appropriation system. First, RCW 90.44.050 only recognizes a right to a permit-exempt use "to the extent that it is regularly used beneficially." This refers to a right that inheres in beneficial use, not as an incident of land ownership. Second, the right created by the regular beneficial use of the water is deemed "equal to that established by a permit" (without special privileges). Again, this language is inconsistent with the notion that permit-exempt groundwater uses are correlative rights that exist outside the prior appropriation system.

The Foxes' reliance on several cases to support their argument that under Washington law there are common law groundwater rights that continue to exist simply as an incidence of land ownership after the Legislature enacted the Groundwater Code in 1945 is misplaced. *See* Fox Opening Br. at 38–39. Ecology concurs with the Tribe's analysis that *State Highway Commission v. Ponten*, 77 Wn.2d 463, 469, 463 P.2d 150 (1969), does not lend support to the Foxes' position. Intervenor Swinomish Indian Tribal Community's Response Brief (Tribe's Br.), § IV.C.2.c. The Foxes also argue that *Hunter Land Co.* recognized

riparian rights for domestic purposes in Washington. But *Hunter Land Co.* concerned appropriations that were completed in the late 1800s, well before the Surface Water Code's adoption in 1917. Therefore its statements recognizing riparian water rights have no bearing on the current state of the law.

Abbott is equally unhelpful to the Foxes' claim that correlative groundwater rights have been preserved by the Groundwater Code. *Abbott* only stated that RCW 90.44.050 exempted certain uses from the *permitting* system, not from the prior appropriation system. *Abbott,* 103 Wn.2d at 693. And any implication in *Abbott* that RCW 90.44.050 did preserve riparian groundwater rights is dicta because the Court's understanding of the Groundwater Code was not necessary to its holding in a case about the 1917 Water Code.[11]

In sum, the Foxes' argument that the Skagit Rule's instream flow water rights are junior in priority to "those irreducible common law correlative water rights necessary for the reasonable development of the property for domestic purposes" fails.[12] This theory is contrary to

---

[11] Similarly, the Pollution Control Hearings Board's (PCHB) decision in *Welch v. Dep't of Ecology*, PCHB No. 98-108 (May 4, 2000) (Summary Judgment and Order of Dismissal) (consolidated with 15 other cases), which is not binding authority in any event, does not actually bolster the Foxes' argument. Ecology agrees with the Tribe's analysis of the *Welch* decision. Tribe's Br., § IV.C.2.c.

[12] In similar fashion in the context of Issue No. 1, the Foxes also wrongly argue that "common law" groundwater rights are embodied in the groundwater permit exemptions under RCW 90.44.050. *See* Fox Opening Br. at 24–28. There, the Foxes'

Washington law because, since 1945, appropriation has been the *exclusive* means of establishing a right to groundwater use in our state, and under the reasoning of *Abbott* all correlative rights to groundwater that were not put to beneficial use within a reasonable time after 1945 have long been relinquished.

b. Any common law right to groundwater held by the Foxes that survived after the adoption of RCW 90.44 has relinquished due to nonuse

Even if the Foxes were correct that an irreducible correlative right to groundwater for domestic purposes survived the enactment of the Groundwater Code in 1945, they still would have no such right today because those common law rights are subject to statutory relinquishment for nonuse. In 1967, the Legislature enacted RCW 90.14 to "cause a return to the state of *any water rights* which are no longer exercised by putting said waters to beneficial use." RCW 90.14.010 (emphasis added). To that end, RCW 90.14.170 provides:

---

reliance on the Supreme Court's decision in *Evans v. City of Seattle*, 182 Wash. 450, 47 P.2d 984 (1935), and the Pollution Control Hearings Board's decisions in *Schrum v. Dep't of Ecology*, PCHB No. P96-036 (Nov. 26, 1996) (Findings of Fact, Conclusions of Law, and Order), and *Green v. Dep't of Ecology*, PCHB Nos. 91-139, 91-141, & 91-149 (Feb. 5, 1993) (Order Denying Reconsideration), are misplaced. *Evans* supports the proposition that, under the common law, there were "correlative" groundwater rights that were incident to the ownership of land and allowed the "reasonable" use of the water underneath the land, but the common law was supplanted by statutory law when the Legislature enacted the Groundwater Code in 1945, a decade after *Evans* was decided. And Ecology agrees with the Tribe's analysis of the *Schrum* and *Green* decisions. Tribe's Br., § IV.C.1.b, n.13.

> Any person entitled to divert or withdraw waters of the state by virtue of his or her ownership of land abutting a . . . watercourse, . . . who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to withdraw or divert said water for any period of five successive years after July 1, 1967, shall relinquish such right or portion thereof, and such right or portion thereof shall revert to the state.

Thus, because correlative groundwater rights arise "by virtue of . . . ownership of land abutting a . . . watercourse,"[13] they are subject to relinquishment under RCW 90.14.170. Here, the Foxes claim that their right to water for their proposed home arises from their ownership of the land on which they want to build. But because there have been well over five years of nonuse between 1967 and now, any correlative right to groundwater that attached to their property has long been relinquished.

4. The Foxes have not demonstrated that they have an appropriative right not subject to the Skagit Instream Flow Rule

The Foxes also contend that, even if they do not have a *correlative* right to groundwater that is not subject to the Rule, they nevertheless have an inchoate *appropriative* water right which, when perfected, will provide

[13] Cases from around the time RCW 90.14.170 was enacted show that the term "watercourse" was understood to encompass groundwater. *Wilkening v. State*, 54 Wn.2d 692, 696–97, 344 P.2d 204 (1959); *State Highway Comm'n v. Ponten*, 77 Wn.2d 463, 468, 463 P.2d 150 (1969) (discussing distinction between "the law applicable to *subterranean water courses*. . . and the law applicable to underground percolating waters") (emphasis added)).

an adequate water supply for their house.[14] They contend that their appropriative right is senior to the instream flows because its priority date will relate back to the subdivision of their property in 2000. Fox Opening Br. at 40–44. This argument suffers from two fatal flaws. First, the Foxes did not develop their appropriation with the reasonable diligence necessary to entitle them to a 2000 priority date. Second, the Legislature has determined that merely making an overt public manifestation of intent to appropriate water before the adoption of an instream flow rule is insufficient to allow that right to be exercised when instream flows are not being met.

a. The Foxes did not perfect their water right with reasonable diligence

Under the common law, "[a]n appropriation of water consists of an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use." *In re Water Rights in Alpowa Creek in Garfield & Asotin Counties*, 129 Wash. 9, 13, 224 P. 29 (1924).[15] The priority date

---

[14] The Foxes suggest that this right is one "originating under the common law." Fox Opening Br. at 41. But a water right cannot originate under the common law in light of RCW 90.44.050's statement that groundwaters in Washington are "subject to appropriation for beneficial use under the terms of this chapter and not otherwise." However, because the statute is silent as to how to calculate the priority date of a permit-exempt water right, common law rules of appropriation should be used to determine the priority date of these statutorily-based rights. *In re Parentage of L.B.*, 155 Wn. 2d 679, 689, 122 P.3d 161(2005) (courts adapt "the common law to address gaps in existing statutory enactments. . .") (emphasis omitted).

[15] For the purposes of this case, Ecology does not contest the Foxes' claim that a subdivision of property could, if followed with reasonably diligent development, mark

of such an appropriation is determined according to the "relation back doctrine," in which the priority date "relates back to the beginning of the work," but "only when the work has been pursued with reasonable diligence." *Hunter Land Co.*, 140 Wash. at 565. The Supreme Court has found diligence wanting where an appropriator had not completed development of a dam within five years of beginning its appropriation. *Still v. Palouse Irrig. & Power Co.*, 64 Wash. 606, 6013–14, 117 P. 466 (1911). If a five-year delay is too long for the construction of a dam, then a decade-plus delay for the construction of a single-family residence cannot be considered reasonably diligent.

The record shows that the Foxes did nothing to perfect their appropriation from the time they subdivided in 2000 until they drilled a well in 2011, which has still never been used to produce water for domestic use. CP 290. Indeed, rather than taking active steps toward constructing a house, the Foxes rented the property to neighbors between 2000 and 2014 for horses. *Id.* Renting out property for 14 years is not part of a reasonably diligent construction schedule for a single residence

---

the first overt act of an appropriation to which the right's priority date would relate back. Fox Opening Br. at 41–42. However, as *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992) illustrates, that question involves very intricate analysis about whether an act needs to be physical in nature, or whether a more functional approach is appropriate. Because there was so plainly a lack of diligence in this case, Ecology would urge the Court to wait for a more appropriate case to resolve the question of what characteristics an act must have in order to count as "the beginning of the work" under the relation back doctrine.

and precludes the Foxes' claim to a priority date in 2000.

The Foxes offer no valid excuses for this extended delay. The only explanation put forward for the lack of development activity after 2000 was that "the economic down turn extended [their] timelines some." *Id.* But reasons for delay which are "personal to the appropriator, *such as pecuniary inability*, . . . are not circumstances excusing great delay in the construction of the works necessary to actual diversion and use of the water." *Grant Realty Co. v. Ham, Yearsley & Ryrie*, 96 Wash. 616, 624, 165 P. 495 (1917) (emphasis added). The economic downturn's impact on the Foxes' timelines does not excuse their failure to begin building their home for over 13 years after subdividing their property.

Because the priority date of their withdrawal cannot relate back to 2000, the superior court correctly held that "[a]ny water right associated with this well [on the Foxes' property] would be junior to the Instream Flows established under WAC 173-503." CP 631 (App. 1 at 3).

b. Even if the Foxes were reasonably diligent, they would still not have established an appropriative right that is not subject to the Skagit Rule's Instream Flows

The Foxes' lack of diligence is not the only reason that the relation back doctrine does not entitle them to a right that is uninterruptible when the Skagit instream flows are unmet. The Legislature also decided that an

overt act manifesting the intent to appropriate water before an instream flow rule is adopted is insufficient to secure an uninterruptible right. In order to establish that a permit-exempt right is not subject to flows, a water right holder must demonstrate that they had begun to use water, or were manifestly and actually about to use water, by the time the instream flow rule became effective.[16] Otherwise, permit-exempt water rights would enjoy a significant advantage over rights secured by permit, a result contrary to RCW 90.44.050.

The relation back doctrine is codified in the Surface Water Code at RCW 90.03.340. In contrast to the case-by-case inquiry into the overt act signifying the "beginning of work" needed to determine a water right's priority date under the common law test, the Water Code simplifies things and looks to only one overt act to determine the priority date of a water right: the filing of a permit application with Ecology. RCW 90.03.340. But the Legislature curtailed applicability of the relation back doctrine for rights that conflict with instream flows. When comparing an appropriative right to an instream flow established by rule, the law does not look to the date an application is filed:

[16] This argument only applies where the instream flow rule is silent as to when permit-exempt uses may be considered senior to the Rule. *See* WAC 173-539A-040, a provision in the Upper Kittitas Groundwater Rule, for an example where Ecology has clarified the status of permit-exempt withdrawals of groundwater in the Rule itself.

> [W]here minimum flow or levels have been adopted and are in effect when a permit to appropriate is *granted*, the permit must be conditioned to protect the flows or levels. Thus, the date of approval of the permit, not the date of application, dictates whether the water right is subject to the minimum flows or levels.

Postema, 142 Wn.2d at 80 n.2 (emphasis added); *see also* RCW 90.03.247. Thus, a water right permit issued after an instream flow is established will be interruptible in favor of instream flows, even if the permit application was filed before the flows were adopted.

A permit-exempt right is "equal to that established by a permit issued under" RCW 90.44. RCW 90.44.050. Any limitations that would have been placed on the Foxes' water right had they secured it by applying for a water right permit would, therefore, also apply to a right secured under RCW 90.44.050's permit exemption. Because merely filing an application for a water right permit does not entitle an appropriator to an uninterruptible right, neither does simply subdividing property; both merely put the world on notice of an intent to appropriate but do not constitute a physical step toward physical diversion of water.

The question remains: how far along must a permit-exempt right be in its development when an instream flow rule is adopted in order to be uninterruptible? RCW 90.44.050 provides that, for withdrawals authorized by a permit, no "well or other works for [a groundwater]

withdrawal be constructed, unless . . . a permit has been granted by [Ecology] . . . ." Thus, the point at which a construction of a "well or other works for withdrawal" is begun or is manifestly imminent most closely corresponds with the point in a permit-exempt right's life cycle that most closely corresponds to the issuance of a permit. This analogy is why Ecology believes that an actual diversion must be manifestly imminent at the time a rule is adopted in order for the permit-exempt right to be uninterruptible.[17] This ensures that the permit-exempt right is no more and no less than a right secured under a permit.

Here, the gap between the subdivision of their property in 2000 and their application for a building permit in 2014 demonstrates that the construction of works to divert water for a beneficial use was not imminent when the Foxes subdivided their property. The Foxes' permit-

[17] To understand how this would play out, consider the following example: developers Dan and Diane each own land they would like to build houses on. They both finalize their short plats with the county on the same day and they both start hiring architects and home builders to start work. Dan applies to Ecology for a water right permit at the same time he subdivides his property in order to have more certainty regarding the water right associated with his development. Diane decides to rely solely on the permit exemption for her subdivision. But while they are both finalizing the designs for the homes, and before Dan's permit application is processed or Diane begins actual construction, Ecology adopts an instream flow rule for a river in hydraulic continuity with the wells that Dan and Diane intend to drill. When Dan's application is processed, a permit is issued with a condition requiring compliance with the instream flows, as required by RCW 90.03.247. Since Dan's and Diane's rights must be equal under RCW 90.44.050, Diane's right must also be subject to the instream flows.

exempt appropriative right would, like a permitted right, be interruptible when the Skagit River's instream flows are unmet.[18]

In summary with respect to Issue No. 2, the Court should rule in Ecology's favor because none of the multiple theories advanced by the Foxes provide grounds for shielding them from the Skagit Rule's flow requirements.

D. The Superior Court's Denial of the Foxes' Motion for Reconsideration Should Be Affirmed (Issue No. 3)

To prevail on an appeal of a trial court's denial of a motion for reconsideration, one must make a "showing of manifest abuse of discretion," which occurs if the trial court's decision is "based on

---

[18] Further, the Foxes are wrong in arguing that the County's determination that there were adequate potable water supplies when the subdivision of the Foxes' property was approved obviates the need to determine whether the Foxes' proposed home will have an adequate water supply. The Foxes argue that, because neither Ecology nor the Tribe appealed the 2000 approval of their short plat application, Ecology and the Tribe are barred from mounting a "collateral attack" on that determination here. Foxes' Opening Br. at 43–44. But the Foxes have not assigned error in regard to this claim that Ecology and the Tribe were barred from pressing these issues, nor did they state an issue encompassing this supposed error as required by RAP 10.3(4), so this Court should not address the Foxes' contention on this point. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 336, 798 P.2d 1155 (1990).

But if the Court does reach this issue, the Foxes still cannot prevail because following their argument would render RCW 19.27.097 a nullity. The Legislature saw fit to require a showing of adequate water supply both upon subdivision approval (RCW 58.17.110) and, again, at the building permit application stage (RCW 19.27.097). This two-step process makes sense because, contrary to land development rights, which vest early, water rights do not vest until water is actually put to beneficial use. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998). As in this case, many years might pass between a subdivision and an actual appropriation of water, and water that was available when a property was subdivided might no longer be available when a building permit is processed. Following the Foxes' argument would frustrate the Legislature's intent of preventing buildings from being built without an adequate supply of water.

untenable grounds or reasons." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Here, the Foxes contend that the trial court abused its discretion by denying their Motion for Reconsideration. The Motion for Reconsideration was based on the argument that Ecology is obligated to provide them with water under a January 15, 2015 Ecology letter which denied a petition to repeal the Skagit Rule, and also under RCW 90.54.020(5). Fox Opening Br. at 44–46.

The Foxes' fail to present any argument about why the January 15 letter makes Ecology a guarantor of an adequate water supply for the Foxes' proposed home. They have therefore abandoned the assignment of error on that basis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6).

The trial court also correctly refused reconsideration under RCW 90.54.020(5). The Foxes' reading of the statute is contrary to its plain meaning, impossible to reconcile with the fundamental principles of Washington water law, and leads to absurd results. There is no basis to conclude that reconsideration should have been granted.

In order to discern the plain meaning of RCW 90.54.020(5), a court must look to "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Campbell & Gwinn*, 146 Wn.2d at 11. "Statutes are to be read

together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes." *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn. 2d 328, 342, 12 P.3d 134, 142 (2000) (internal quotations omitted). And "[t]he court must also avoid constructions that yield unlikely, absurd or strained consequences." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). It is impossible to adopt the Foxes' interpretation of RCW 90.54.020(5) without embracing absurd results that conflict with Washington water law.

In light of other provisions of RCW 90.54, RCW 90.54.020(5) cannot be read to create a mandatory duty on Ecology to preserve water for all future domestic uses. RCW 90.54.050 specifically states that the "department *may* . . . [r]eserve and set aside waters for beneficial utilization in the future," (emphasis added), which is clearly discretionary. The general and discretionary "declaration of fundamentals" listed in RCW 90.54.020 cannot trump the specific statute giving Ecology the discretion over whether to reserve water for particular future uses. *Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010) ("A specific statute will supersede a general one when both apply.").

Second, the Foxes' reading of RCW 90.54.020(5) upends, rather than harmonizes with, the entire prior appropriation system that governs water use. Under the Foxes' view, RCW 90.54.020(5) gives a domestic user an absolute guarantee of a water right that falls within RCW 90.44.050's permit exemption, regardless of whether exercising that water right would impair established senior users' water rights. That simply cannot be reconciled with the organizing principle of Washington water law, namely that "as between appropriations, the first in time shall be the first in right." RCW 90.03.010.

Third, the Foxes' insistence that "the duty to fully offset those permit-exempt uses related to human domestic use is on Ecology," (Fox Opening Br. at 45), leads to absurd results. RCW 19.27.097, the statutory requirement at issue in this case, requires legally available water—it does not distinguish between water that is unavailable because the new use would impair an instream flow or water that is unavailable because it would impair preexisting private appropriations. The open-ended obligation on Ecology urged by the Foxes would require Ecology to reduce current water users' rights in order to make water available for new domestic users. This would disrupt the entirety of the Water Code's system for allocating limited water resources. Water is a finite resource and whatever "powers of and skills of basin wide management," (Fox

Opening Br. at 44), Ecology has as a regulatory agency, it cannot summon more water to a basin than arrives there through natural means. Ecology must implement the prior appropriate system, even if that means water is not always available for every contemplated use of water. This Court should not interpret RCW 90.54.020(5) such that it requires Ecology to make good on potentially infinite claims to a finite resource.[19]

E. Application of the Skagit River Basin Instream Flow Rule Has Not Violated the Foxes' Right to Due Process (Issue No. 4)

At the threshold, this Court should not address the Foxes' due process challenge because it is raised for the first time on appeal and it is inadequately briefed. RAP 2.5(a). Appellate courts will not consider issues that were not, or were not adequately, argued below. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,* 146 Wn.2d 29, 36–37, 42 P.3d 1265 (2002). The Foxes did not argue to the trial court that application of the Skagit Rule in this case violates their right to due process.[20]

Moreover, the Foxes have failed to brief their due process claim adequately on appeal. They simply assert that, under *Durland v. San Juan*

---

[19] The consistent, sensible interpretation of RCW 90.54.020(5) is that it requires Ecology to incorporate water quality considerations into its water management decisions. Thus, Ecology is directed to ensure that water supplies that are "[a]dequate and safe" are "preserved and protected in potable condition," for example, by not approving withdrawals that would increase the concentration of pollution in a water body beyond what is safe for human consumption.

[20] The only reference to due process the Foxes made below was in their Response to Answer of Skagit County and Motion to Affirm Writ of Mandamus and Opposition to Intervention Motions and Motion to Strike. CP 735–736. And that argument did not address the constitutional question they have now raised on appeal.

Cty., 182 Wn.2d 55, 340 P.3d 191 (2014), they have a property right to use water that falls within RCW 90.44.050's permit exemption. But even if this were true, it would not be enough to support a due process challenge to the Rule. After concluding that a property interest is being interfered with (which is not the case here), a court must then inquire "(1) whether the regulation aims to achieve a legitimate public purpose, (2) whether the means adopted are reasonably necessary to achieve that purpose, and (3) whether the regulation is unduly oppressive on the property owner." *Robinson v. City of Seattle*, 119 Wn.2d 34, 51, 830 P.2d 318 (1992). The Foxes' briefing contains no discussion of these factors, and is therefore inadequate to merit appellate consideration.

To make their claim that WAC 173-503 violates due process protections, the Foxes argue that "[t]he water rights reflected in RCW 90.44.050 related to human domestic needs are foundational property right[s]" recognized in Washington law. Foxes' Opening Br. at 48–49. Therefore their due process claim appears to be predicated on the existence of correlative groundwater rights that arise from property ownership. But WAC 173-503 had nothing to do with the Foxes' inability to exercise the correlative rights that were at one time attached to their property—as explained above, those rights were extinguished soon after the adoption of the Groundwater Code in 1945. The only reason

WAC 173-503 prevents the Foxes from building their home is because the flows it establishes "constitute appropriations." RCW 90.03.345. The only new water right that could serve the Foxes' home would be a later appropriation subject to preexisting rights, including the flows established by WAC 173-503. This is not a deprivation of property without due process; it is just how the prior appropriation system works.

F. The Foxes Are Not Entitled to Attorney Fees

Even if the Foxes prevail in this case, their request for attorney fees must be denied. Attorney fees are awarded in Washington only on contractual, statutory, or recognized equitable grounds. *Durland*, 182 Wn.2d at 76. The Foxes erroneously base their request for attorney fees on the "private attorney general" doctrine, for which they cite *Miotke v. City of Spokane*, 101 Wn.2d 307, 340–41, 678 P.2d 803 (1984), a case in which only three justices voted for the doctrine's adoption. Far from being a "recognized equitable basis," the private attorney general doctrine has been explicitly rejected by Washington courts. A mere two years after deciding *Miotke*, the Supreme Court held unambiguously that "[t]he private attorney general doctrine does not apply in Washington." *Blue Sky Advocates v. State*, 107 Wn.2d 112, 122, 727 P.2d 644 (1986).[21]

[21] Since then, no fewer than three Supreme Court decisions have followed suit in rejecting the doctrine's application. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 401, 932 P.2d 139 (1997); *City of Seattle v. McCready*, 131 Wn.2d 266, 277, 931 P.2d 156 (1997);

IV. CONCLUSION

For the foregoing reasons, Ecology respectfully requests the Court to affirm the superior court's Order Denying Motion to Affirm Writ of Mandamus. The Foxes cannot qualify for a building permit because, under RCW 19.27.097, the Skagit River Basin water management rule, and the Supreme Court's decision in *Swinomish*, they have not demonstrated that they have lawful access to an uninterruptable, and therefore adequate, supply of water to support their proposed house.

RESPECTFULLY SUBMITTED this 24th day of August 2015.

ROBERT W. FERGUSON
Attorney General

ALAN M. REICHMAN, WSBA #23874
Senior Counsel
alan.reichman@atg.wa.gov
DAVID F. STEARNS, WSBA #45257
Assistant Attorney General
david.stearns@atg.wa.gov
Attorneys for Intervenor
State of Washington,
Department of Ecology
OID No. 91024
(360) 586-6770

F:\ACTIVE\Cases\Reichman\Fox v. Skagit COA 73315-0-I\Pldgs\EcyRespBr.docx

---

Allingham v. City of Seattle, 109 Wn.2d 947, 953, 749 P.2d 160 *amended,* 757 P.2d 533 (1988) *overruled on other grounds by Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 787 P.2d 907 (1990).

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on August 24, 2015, I caused to be served a copy of State of Washington, Department of Ecology's Response Brief in the above-captioned matter upon the parties herein as indicated below:

Will Honea Arne O. Denny, Civil Deputy Jill Dvorkin, Civil Deputy Skagit County Prosecuting Attorney 605 S. 3rd St. – Courthouse Annex Mount Vernon, WA 98273 *Attorneys for Respondents*	[X] U.S. Mail [ ] Overnight Express [X] By E-mail: willh@co.skagit.wa.us arned@co.skagit.wa.us jillo@co.skagit.wa.us judyk@co.skagit.wa.us
Peter C. Ojala Ojala Law Inc. PS 21 Avenue A P.O. Box 211 Snohomish, WA 98290 *Attorneys for Appellants*	[X] U.S. Mail [ ] Overnight Express [X] By E-mail: Peter@ojalalaw.com
Marc Slonim Joshua Osborne-Klien Ziontz Chestnut 2101 Fourth Ave. Suite 1230 Seattle, WA 98121 *Of Attorneys for* *Intervenor Swinomish Tribe*	[X] U.S. Mail [ ] Overnight Express [X] By E-mail: mslonim@ziontzchestnut.com joshok@ziontzchestnut.com chazzard@ziontzchestnut.com
Emily Haley 11404 Moorage Way La Conner, WA 98257 *Of Attorneys for* *Intervenor Swinomish Tribe*	[X] U.S. Mail [ ] Overnight Express [X] By E-mail: ehaley@swinomish.nsn.us aengstrom@swinomish.nsn.us

The foregoing being the last known addresses.

DATED this 24th day of August 2015, in Olympia, Washington.

JANET L. DAY, Legal Assistant

AGO Rec'd via email 1/28/15

The Hon. George F.B. Appel

SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

RICHARD A. FOX and MARNIE B. FOX, husband and wife, Petitioners, v. SKAGIT COUNTY, et al., Respondents, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and SWINOMISH INDIAN TRIBAL COMMUNITY, Respondent-Intervenors.	NO. 14-2-00947-2 ORDER DENYING MOTION TO AFFIRM WRIT OF MANDAMUS

THIS MATTER having come before the Court on Petitioners' Motion to Affirm Writ of Mandamus (Mandamus Motion) seeking an order compelling Skagit County to approve their application for a building permit, AND this Court having considered the following:

1. Petition for Writ of Mandamus, Alternative Writ of Mandamus, and Order Directing Issuance of Alternative Writ of Mandamus filed by the Foxes.

2. Answer, and Supplement to Answer, filed by the County.

3. Motion to Intervene, Memorandum in Support of Motion to Intervene, and Proposed Answer filed by the Swinomish Indian Tribal Community (Tribe).

SNOHOMISH COUNTY
SUPERIOR COURT
DEPARTMENT 1
3000 ROCKEFELLER, M/S #502
EVERETT, WASHINGTON 98201-4060
TELEPHONE: 425-388-3466

4. The CR 24 Motion to Intervene and Answer to Petition for Writ of Mandamus filed by the State of Washington, Department of Ecology (Ecology).

5. The Response to Answer of Skagit County and Motion to Affirm Writ of Mandamus and Opposition to Intervention Motions and Motion to Strike filed by the Foxes.

6. Declaration of Richard Fox in Opposition to the Answer and in Support of Writ of Mandamus.

7. The Tribe's Proposed Response to Petitioner's Motion to Affirm Writ of Mandamus.

8. The Response to Answer of Skagit County and Motion to Affirm Writ of Mandamus filed by the Foxes.

9. Declaration of Bill Clarke Re: Documents.

10. Ecology's Memorandum in Response to the Foxes' Response to Answer of Skagit County and Motion to Affirm Writ of Mandamus.

11. Declaration of Jerry Liszak in Support of Ecology's Memorandum in Response to the Foxes' Response to Answer of Skagit County and Motion to Affirm Writ of Mandamus.

12. Declaration of David Stearns in Support of Ecology's Memorandum in Response to the Foxes' Response to Answer of Skagit County and Motion to Affirm Writ of Mandamus.

13. Tribe's Response Brief.

14. Declaration of Emily Haley.

15. Declaration of M. Brian Cladoosby.

16. The County's Response to Petitioner's Motion to Affirm Writ of Mandamus.

17. Declaration of Debra Nicholson in Support of Skagit County's Response to Motion to Affirm Writ of Mandamus.

18. Ecology's Reply to Skagit County's Response to Petitioner's Motion to Affirm Writ of Mandamus.

19. Declaration of David F. Stearns in Support Ecology's Reply to Skagit County's Response to Petitioner's Motion to Affirm Writ of Mandamus.

20. Swinomish Indian Tribal Community's Reply to Skagit County's Response Brief.

21. Second Declaration of Emily Haley.

22. Fox's Reply to Responses of: Skagit County, Ecology, and the Swinomish Indian Tribal Community to Fox's Motion to Affirm Writ of Mandamus.

23. Second Declaration of Richard Fox in Opposition to Answer and in Support of Writ of Mandamus.

24. Skagit County's Consolidated Reply to Fox, Ecology and Swinomish Response Brief.

25. Fox's Surreply.

AND being fully advised in this matter, NOW THEREFORE it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. Based on the pleadings filed by the parties, including declarations, there are no issues of material fact that preclude this decision on the merits of the issues raised by the Mandamus Motion.

2. The instream flow rule for the Skagit River Basin, WAC 173-503, and the Supreme Court's decision in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 598, 311 P.3d 6 (2013), are controlling law in this case. This Court lacks authority to rule on the underlying validity of WAC 173-503 in this case.

3. The Instream Flow is a water right with an April 14, 2001 priority date under Swinomish Indian Tribal Community v. Department of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013).

4. The Foxes constructed a well on their property in 2011. Any water right associated with this well would be junior to the Instream Flows established under WAC 173-503.

5. WAC 173-503 governs permit-exempt groundwater use that is in hydraulic continuity with the Skagit River. The Foxes have not provided evidence showing that their proposed water use would not reduce flows on the Skagit River.

SNOHOMISH COUNTY
SUPERIOR COURT
DEPARTMENT 1
3000 ROCKEFELLER, M/S #502
EVERETT, WASHINGTON 98201-4060
TELEPHONE: 425-388-3466

6. The Foxes have not demonstrated that they have access to an adequate water supply for their proposed building as required by RCW 19.27.097. A building permit applicant must "provide evidence of an adequate water supply for the intended use of the building." A water supply that is subject to interruption during many days each year is not adequate, by itself, to serve a home. Because of the rule of law that binds this court, the plaintiffs do not have year round water rights.

7. For the above reasons, the Foxes' Mandamus Motion is DENIED.

8. There being no other issues to resolve in this case, this action is DISMISSED.

DATED this 18th day of January 2015.

THE HON. GEORGE F.B. APPEL

SNOHOMISH COUNTY
SUPERIOR COURT
DEPARTMENT 1
3000 ROCKEFELLER, M/S #502
EVERETT, WASHINGTON 98201-4060
TELEPHONE: 425-388-3466