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73315-0

No. 733150-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD and MARNIE FOX, husband and wife,
Appellant,

v.

SKAGIT COUNTY, a municipal corporation, SKAGIT COUNTY BOARD OF HEALTH, an RCW 70.05 local board of health, DALE PERNULA, DIRECTOR of the SKAGIT COUNTY PLANNING AND DEVELOPMENT SERVICES and JENNIFER KINGSLEY, DIRECTOR of the SKAGIT COUNTY BOARD OF HEALTH AKA SKAGIT COUNTY PUBLIC HELATH DEPARTMENT,

Respondents,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY
No. 14-2-00947-2

INTERVENOR SWINOMISH INDIAN TRIBAL COMMUNITY'S RESPONSE BRIEF

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I. INTRODUCTION.

The ultimate issue in this case is whether Appellants Richard and Marnie Fox submitted a complete building permit application to Skagit County (County), so as to trigger the County's duty to issue them a permit. The County concluded their application was incomplete because they had not provided evidence of "an adequate water supply" as required by RCW 19.27.097. The trial court dismissed the Foxes' mandamus action, finding that the County did not have a duty to issue the building permit.

The Foxes' principal argument is that they have an adequate water supply because they are entitled to a permit-exempt well under RCW 90.44.050. The trial court rejected this argument because the groundwater under the Foxes' land is in hydraulic continuity with the Skagit River and their proposed withdrawal would thus be subject to the senior instream flow right established in the Skagit Instream Flow Rule, Ch. 173-503 WAC (Rule). Because the Rule's minimum flow levels are unmet on many days each year, the Foxes' junior withdrawal would be subject to frequent interruption and is therefore inadequate for a residence.

The Swinomish Indian Tribal Community (the Tribe) intervened in this case because instream flows are essential to preserve already degraded fish habitat in the Skagit basin and the Tribe's federal treaty fishing right. The Foxes' arguments would allow junior permit-exempt wells (including

an unlimited number of future wells) to further impair the senior instream flow right, upending basic principles of Washington water law, eroding senior water rights, and impairing critical instream flows, fish habitat, and fish runs. This Court should reject those arguments and affirm.

II. STATEMENT OF ISSUES.

A. Is a water supply that is subject to interruption on many days each year "adequate" for a residence under RCW 19.27.097?

B. Did the County properly consider w*hether* water was legally available to the Foxes on a year-round basis?

C. Did the County correctly conclude that water was *not* legally available to the Foxes on a year-round basis?

D. Does the Rule as applied to the Foxes violate due process?

III. STATEMENT OF THE CASE.

A. The Tribe, the River, and the Fish.

Since time immemorial, the Tribe and its ancestors have occupied lands and waters in northern Puget Sound, including the Skagit River basin. CP 474, ¶ 4. Salmon and other fish have played a central and enduring role in the Tribe's subsistence, culture and economy. CP 474-77, ¶¶ 4-8. In *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975), the court found that the Tribe's usual and accustomed fishing places included the

Skagit River and its tributaries, among others. The Tribe has a federal treaty right to take fish at these places. *Id.* at 1039.

The Skagit River is the third largest river in the western United States. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 577, 311 P.3d 6 (2013) (*Swinomish*). It is the only river in the lower 48 states that is home to all six species of Pacific salmon. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Bd.*, 161 Wn.2d 415, 425, 166 P.3d 1198 (2007) (*WWGMHB*).

Development in the Skagit basin has led to declines in salmon runs, in part due to reduced instream flows for salmon habitat. *Swinomish Indian Tribal Cmty. v. Skagit Cty.*, 138 Wn. App. 771, 773, 158 P.3d 1179 (2007) (*Skagit Cty.*). The basin is home to three species listed under the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (ESA). *See* 50 C.F.R. § 17.11, 223.102 (bull trout, steelhead and Chinook). The State considers the Skagit basin the most significant Puget Sound watershed for salmon recovery. *WWGMHB*, 161 Wn.2d at 425.

For many years, the Department of Fish and Wildlife (WDFW) recommended new appropriations from Skagit tributaries be denied or conditioned to preserve low flows for fish. This was based on studies demonstrating a strong relationship between stream flow, fish habitat, and fish production, particularly in smaller streams. In light of these studies,

WDFW was "more likely to recommend denial of a water right application [in 2005] than [it was] years ago." CP 334.

The decline in Skagit salmon runs adversely affects the Tribe's ability to harvest salmon and thus injures the Tribe's subsistence, culture and economy and undermines its federal treaty fishing right. *WWGMHB*, 161 Wn.2d at 426; CP 477-79, ¶¶ 10-13. As discussed below, the Foxes' proposed well, and their arguments that new permit-exempt wells are not subject to the Skagit senior instream flow right, would further impair instream flows, salmon runs, and important Tribal interests, giving the Tribe a direct, legally protected interest in this case. *See Postema v. PCHB*, 142 Wn.2d 68, 74, 11 P.3d 726 (2000).[1]

B. The 1996 MOA and the 2001 Rule.

In a 1996 Memorandum of Agreement (MOA), the Department of Ecology (DOE), the County, the Tribe and five other governmental entities sought to "ensure the establishment of instream flows to protect fisheries" in the Skagit basin, to provide for "mitigation of any interference with such established flows," and to "reduce the use of exempt wells in those areas of the County experiencing inadequate instream flows ...." CP 343-45; *Skagit Cty.*, 138 Wn. App. at 774.

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[1] As in *Postema*, the Tribe's arguments in this case rest solely on state law. The Tribe makes no claim based on its federal treaty right to take fish or any other federal right.

DOE developed the Rule in accordance with the MOA. CP 369. The Rule, which was "specifically intend[ed] to protect fisheries habitat," *id.*, became effective on April 14, 2001. WAC 173-503-010 Note.[2] It established minimum flow levels for the Skagit River and four tributaries. WAC 173-503-040(1)-(3). The flow levels were based on scientific studies of flows needed for spawning and rearing salmon. CP 370-74.

The Rule "did not allocate noninterruptible water for new uses." *Swinomish*, 178 Wn.2d at 577. Instead, "water for new uses is subject to being shut off when stream flows fall to or below the minimums established by rule, in accord with general water law." *Id.* This is true with respect to both surface water and groundwater:

> Future consumptive water right permits issued hereafter for diversion of surface water..., and *withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be expressly subject to [the Rule's] instream flows....*

WAC 173-503-040(5) (emphasis added). As DOE explained, when the minimum flow levels are unmet, no water may be diverted or withdrawn anywhere in the basin for "water uses, *including permit-exempt groundwater uses*, established after the [Rule]...." CP 380 (emphasis added); *see also Whatcom Cty. v. W. Wash. Growth Mgmt. Bd.*, 186 Wn.

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[2] As discussed below, the Rule was amended in 2006, but the Supreme Court invalidated the amendments in its 2013 *Swinomish* decision. The current version of the Rule is identical to the original version adopted in 2001.

App. 32, 60, 62-63, 344 P.3d 1256 (2015) (Rule governs permit-exempt wells), *rev. granted*, 183 Wn.2d 1008 (July 8, 2015).

DOE found that the Rule's minimum flow levels and restrictions were "necessary to protect and preserve wildlife, fish, scenic, aesthetic, and other environmental values." WAC 173-503-030(4). According to DOE, "[l]ess burdensome instream flow levels would not provide adequate instream resources protection." CP 430.

C. The 2006 Rule Amendments.

After the Rule was adopted, the County challenged it. The County's Petition for Review recognized that new permit-exempt wells would be subject to the Rule and acknowledged that such wells could not provide an adequate water supply 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.

The County dismissed its challenge when DOE agreed to amend the Rule. *See Swinomish*, 178 Wn.2d at 577-78. These 2006 amendments did not modify the minimum flow levels or suggest they were no longer supported by the best available science. *Compare* current WAC 173-503-

040 *with* WAC 173-503-040 (2006) (CP 434-36). To the contrary, DOE explicitly "determine[d] that, based on historical and current low flows and existing water uses, *water is not available for year-round consumptive appropriation in the Skagit River basin.*" WAC 173-503-051(1) (2006) (CP 436) (emphasis added). This was based on the fact that there are many days each year when the minimum flow levels are unmet. CP 380-81; CP 463-66, ¶¶ 15; 17. It was also based on the fact that many Skagit tributaries, including Mannser and Red Cabin Creeks, experience extreme low flow events and go dry or are "reduced to a trickle," particularly in the summer and fall. CP 445-46; CP 451.[3]

Nevertheless, DOE adopted amendments that "set aside a limited amount of water for future out-of-stream uses" that would not be subject to the Rule's minimum flow levels. WAC 173-503-051(1) (2006) (CP 436). DOE justified this by finding that "the public interest advanced by these limited reservations clearly overrides the potential for negative impacts on instream resources." WAC 173-503-073(1) (2006) (CP 438) (paraphrasing RCW 90.54.020(3)(a) (the OCPI exception)).

DOE acknowledged that the reservations would adversely impact instream flows and fish. CP 388. DOE's biologist found that the

[3] The Foxes' well would capture groundwater that would otherwise discharge to Mannser and Red Cabin Creeks and the Skagit River. *See* CP 462, ¶ 12; *see also* CP 471.

reservations "would cause a loss of 0.5% to 2% of habitat during a bad case scenario" and there is a "high correlation between stream flows, habitat and fish population." *Id.*; *see also* CP 402-03 ("[s]tudies found that the higher the … summer flow the higher the number of returning adult salmon"). Also, based on (1) WDFW's recommendations to restrict appropriations from Skagit tributaries and (2) studies of other small streams that "consistently show[ed] that surface water is generally not available much of the year (often 50% or more of the year) if flows are to be maintained at levels protective of fish," DOE concluded it was "unlikely" that Skagit tributaries such as Mannser and Red Cabin Creeks "could maintain flows protective of fish resources while also supporting reliable water supply for most purposes." CP 396-97.

DOE claimed that the use of the reservations was an "exception to this determination." *Id.* One of the "limited" reservations established by the 2006 amendments was for domestic, municipal and commercial/industrial uses of water. WAC 173-503-073(1)(b) (2006) (CP 438). This reservation was allocated among 25 Skagit mainstem reaches and tributaries. WAC 173-503-074 (2006) (CP 439-40). The reservations for Mannser and Red Cabin Creeks were for 15,511 gallons per day (gpd) and 42,653 gpd,

respectively, *id.*, which DOE believed would have been adequate to supply 88 and 243 new homes, respectively.[4]

D. The Supreme Court's 2013 *Swinomish* Decision.

The Tribe challenged the 2006 amendments. In 2013, the Supreme Court invalidated the amendments, reaffirming that minimum instream flows are appropriations with priority dates as of their establishment which cannot be impaired by subsequent appropriations unless "extraordinary circumstances" exist and the "very narrow" OCPI exception applies. *Swinomish*, 178 Wn.2d at 576; *see also id.* at 591-94. "There [was] no question that the [reservations] impair[ed] the existing minimum flow rights because the uses for which the water [was] 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. Because the very narrow OCPI exception did not justify this impairment, the 2006 amendments were invalid. *See id.* at 588.

Three justices dissented in part. Although they agreed that the vast majority of the reservations were unlawful, they would have remanded for

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[4] In the 2006 amendments, DOE assumed that a new home served by a permit-exempt well and a septic system would consumptively use 175 gpd. *See* WAC 173-503-073(7)(b)-(c) (2006) (CP 439). However, if the Foxes' arguments prevail here, there would be *no* limit on the number of new homes served by permit-exempt wells in Mannser Creek, Red Cabin Creek, and other tributaries, resulting in ***greater*** impacts to Skagit instream flows and fish than were allowed under the invalid 2006 amendments.

a determination whether a reservation of 1.5 cubic feet per second (cfs) for permit-exempt wells and rural public water systems was valid. *See id.* at 606 (Wiggins, J., dissenting in part). However, the majority found no need for a remand; among other reasons, it explained that, while "some of the water [was] reserved for exempt wells for domestic use on a noninterruptible basis," that was "a private use, generally speaking, not a public use." *Id.* at 587; *see also id.* at 598 & n.14 (DOE has no statutory authority to allow permit-exempt wells to "jump to the head of the line").

Shortly after the *Swinomish* decision, DOE advised the County that water was not available for new year-round appropriations:

> [W]ithout mitigation to offset impacts on instream flows established under the [Rule] and/or an alternative source of water that could be used during times when the flow requirements are not met, water is not available for new year-round uninterruptible appropriations in the Skagit River Basin. As such, without mitigation and/or an alternative water source, applicants for ... building permits could not meet the requirements for adequate water supply under ... RCW 19.27.097. Accordingly, the County would be out of compliance with the law if it issues such approvals and should either deny, or not act on, ... building permit applications absent the approval of a mitigation proposal and/or alternative water source by Ecology.

CP 273 (emphasis in original).

E. Mr. Lund's 1974 Water Right Claim and the Foxes' 2000 Subdivision and 2014 Building Permit Application.

In 1974, Oscar Lund filed a claim to use groundwater on a 10 acre parcel of land in Skagit County. CP 681. In March 2000, the Foxes

purchased the Lund property, which included a single-family residence and a barn. CP 289, ¶¶ 2-3. On November 14, 2000, the County approved the Foxes' application to subdivide the property into three lots. CP 457-58. One week later, the Foxes sold Lot 1, which contained the Lund residence, to the Moodys. CP 290, ¶ 4.

Between 2000 and 2014, the Foxes took no action to construct a residence or appropriate water for domestic supply on Lot 2. In fact, they did not even retain possession of Lot 2, choosing instead to lease Lot 2 to the Moodys. CP 290, ¶ 5. In "about 2010," the Foxes told the Moodys that their plan to build a home on Lot 2 "was coming to fruition." *Id.*, ¶ 7. In 2011, the Foxes drilled a well on Lot 2. In 2014, the lease ended and the Foxes "disconnected the power from [the Moodys] to Lot 2." *Id.*, ¶¶ 6-7.

On March 5, 2014, the Foxes submitted a building permit application to the County to construct a "garage/studio apartment" on Lot 2. CP 653. On March 7, a County official met with Mr. Fox at his request regarding the application and "B[uilding] P[ermit] and Instream," and told him that he needed a letter or email regarding water availability from DOE. CP 693-94. Mr. Fox asked the County "to hold off on written notification about the incomplete application until [he and his attorney] had a chance to meet [with the County]." CP 693. Three days later, Mr. Fox called the

County official to say that his attorney was "preparing an argument why [DOE] does not have to be contacted." *Id.*

On March 26, 2014, the County notified the Foxes that their building permit application was incomplete and that:

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

CP 666; *see also* CP 652 (noting that water review was still "pending" and there was an "incomplete file").

The Foxes responded to the notice on May 16, 2014. They acknowledged that RCW 19.27.097 required them to provide evidence of an adequate water supply that was physically and legally available, but argued on various grounds that they had done so. *See* CP 668-76.

The County forwarded the Foxes' response to DOE. *See* CP 237; *see also* CP 806 (confirming request to DOE for "advice and comment on" the response). DOE responded on June 17, 2014 (DOE Letter). It addressed each of the Foxes' arguments, CP 237-45, and recommended denial of the application because the Foxes "ha[d] not demonstrated that water is legally available..., as required by RCW 19.27.097." CP 245. DOE summarized its conclusions as follows:

> Hydrogeologic information indicates that Mr. Fox would pump groundwater that is hydraulically connected to Mannser and Red Cabin Creeks, which are tributaries to the Skagit River. The Skagit River instream flows prescribed under [the Rule] apply to Mr. Fox's proposed use of [a] permit-exempt [well], and he has not demonstrated that his proposed [well] will not impact flows in these tributaries and the Skagit River.
>
> Further, Mr. Fox has not demonstrated that he established and maintained a water right for domestic purposes to serve his proposed house that is senior in priority to the [Rule's] instream flows, which have a 2001 priority date. Consequently, it is [DOE's] position that Mr. Fox has not shown that he has access to a reliable and uninterruptible water supply to support his building permit application.

CP 245-246; *see also* CP 462, ¶ 12; CP 471.

Notwithstanding DOE's recommendation to deny the application, it remains pending. While an incomplete application would normally be deemed abandoned after 180 days, the County has extended the expiration date until September 29, 2015. *See* CP 318.

F. Proceedings Below.

The Foxes filed a Petition for Writ of Mandamus seeking an Alternative Writ directing the County "to approv[e] the building permit … [or] to show cause … why [it] should not issue." CP 648-49. The court issued the alternative writ at an ex parte hearing. *See* CP 584; CP 964-66.

The County filed an Answer, in which it asserted that it had "not issued a building permit because Fox's application is incomplete in that Fox has not supplied evidence of an adequate water source…." CP 233, ¶ 3.12.

The County attached the DOE Letter in support of its position. CP 232-34, ¶¶ 3.3, 3.12, 3.15; CP 237-46.

DOE and the Tribe filed motions to intervene, CP 836-40, 892-94, and the Foxes filed a combined response to the County's Answer, motion to "affirm" the writ of mandamus, opposition to the motions to intervene and motion to strike the DOE Letter. CP 732-60. The court granted the motions to intervene, deferred ruling on the Foxes' motion to affirm the writ pending further briefing and oral argument, and denied the Foxes' motion to strike the DOE Letter "so that [the] County's Answer can take the form of the letter." CP 583.

During briefing, the County – reprising its 2003 challenge to the Rule and effectively switching sides in this case – urged the court to invalidate the Rule or hold that it did not apply to the Foxes' proposed well. *See* CP 823-30, CP 810-22. Although the Foxes appeared to adopt the County's challenge to the Rule, CP 560-62, the court held that the Rule was "controlling law" in this case. CP 631, ¶ 2.[5]

The court heard oral argument and orally denied the Foxes' motion to affirm the writ of mandamus on December 16, 2014. CP 582. On January

[5] With the exception of their claim that the Rule as applied to them is a denial of due process, the Foxes have not challenged the validity of the Rule on appeal and the County did not appeal from the court's decision.

28, 2015, the court entered a written order confirming its decision and dismissing the case. CP 629-631.

The Foxes sought reconsideration. CP 572. After DOE and the Tribe responded to the motion, CP 859-63, 885-89, and the Foxes filed a Notice of Readiness, CP 614-18,[6] the court denied the motion. CP 640. This appeal followed.

IV. ARGUMENT.

A writ of mandamus is an extraordinary remedy and may issue only if: (1) there is a clear duty to act; (2) there is no plain, speedy and adequate remedy in the ordinary course of law; and (3) the applicant is beneficially interested in the writ. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003). Duty is a threshold element; if there is a duty, "the question becomes whether the circumstances trigger the duty." *Id.* at 404.

Under Washington law, local governments have a duty to issue a building permit in some cases. *See, e.g., State ex rel. Klappsa v. City of Enumclaw*, 73 Wn.2d 451, 453, 439 P.2d 246 (1968). The Foxes challenge the trial court's determination that the circumstances did not trigger the County's duty to issue a building permit because they had not provided evidence of an adequate water supply under RCW 19.27.097. *See* CP 632,

[6] In their Notice of Readiness, the Foxes acknowledged that it was "difficult [for them] to prevail under the shadow of the *Swinomish v. Ecology* decision," but argued that "substantial justice here requires a finding in favor of the landowner...." CP 617.

¶ 6. A "determination of whether a statute specifies a duty that the person must perform is a question of law," reviewed *de novo. Eugster*, 118 Wn. App. at 403. For reasons discussed below, the Foxes' arguments lack merit and the trial court's decision should be affirmed.

A. An Interruptible Residential Water Supply Is Not Adequate under RCW 19.27.097.

A provision of the Growth Management Act (GMA), which was enacted in 1990, provides:

> *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 [DOE], 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.... An application for a water right shall not be sufficient proof of an adequate water supply.

RCW 19.27.097(1) (emphasis added). A separate GMA provision provides that a "subdivision ... shall not be approved unless ... [a]ppropriate provisions are made for ... potable water supplies...." RCW 58.17.110(2). In *Kittitas Cty. v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 179, 256 P.3d 1193 (2011), the Supreme Court held these provisions "require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications." The Court rejected the argument that "counties must [only] assure that water is factually available underground"; instead, they must assure "that water is both factually and

legally available." *Id.* at 179-80; *see also id.* at 181 (regulations must not "permit[] subdivision applications that effectively evade compliance with water permitting requirements").

The GMA makes counties responsible for implementing these provisions, but does not displace DOE's role:

> While [DOE] is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources.... In recognizing the role of counties to plan for land use in a manner that is consistent with the laws regarding *protection of water resources* and establishing a permitting process, we do not intend to minimize the role of [DOE]. [DOE] maintains its role, as provided by statute, and ought to assist counties in their land use planning *to adequately protect water resources*.

Id. at 180 (emphasis added); *see also Whatcom Cty.*, 186 Wn. App. at 51 ("*Kittitas* anticipated ***consistent*** local regulation by counties in land use planning to protect water resources[, which] necessarily contemplates proper cooperation between [DOE] and counties regarding the protection of such resources") (emphasis in original).

Both the County and DOE have recognized that an interruptible residential water supply is not an "adequate water supply" under RCW 19.27.097(1). In its 2003 Rule challenge, the County asserted that "[i]nterruptible water sources do not meet the requirements for an adequate reliable supply of water ... under RCW 19.27.097...." CP 10, ¶ 9. In its general advice following the *Swinomish* decision, DOE stated that water

was not available for "new year-round uninterruptible appropriations in the Skagit [basin]" and "without mitigation and/or an alternative water source, applicants for ... building permits could not meet the requirements for adequate water supply under ... RCW 19.27.097." CP 273. In its specific advice on the Foxes' application, DOE adhered to this position. CP 246 ("Mr. Fox has not shown that he has access to a reliable and uninterruptible water supply to support his ... application.").

Here, the Foxes do not challenge the trial court's holding that, under RCW 19.27.097(1), "[a] water supply that is subject to interruption during many days each year is not adequate, by itself, to serve a home." CP 632. Instead, they make three main arguments: (1) the County may not consider *whether* water is legally available on a year-round basis if an applicant is relying on a permit-exempt well, Br. at 12-17; (2) water *is* legally available to them on a year-round basis, Br. at 17-46; and (3) the Rule as applied to them is a denial of due process, Br. at 47-49.

B. The County Properly Considered *Whether* Water Was Legally Available to the Foxes on a Year-Round Basis.

Because an interruptible water supply is not adequate, by itself, to serve a home, the County properly considered whether water was legally available to the Foxes on a year-round basis. The Foxes' arguments to the contrary are unavailing.

1. The Skagit County Code.

First, the Foxes argue that, under RCW 19.27.095(2), the Skagit County Code (Code or SCC) sets the requirements for a complete building permit application and does not require anything other than proof of entitlement to a permit-exempt well under RCW 90.44.050. Br. at 13-14.

However, reading "all [of the Code's] provisions in relation to each other," and interpreting them "in light of the ... underlying legislative purposes," *Eugster*, 118 Wn. App. at 406, the Code is consistent with RCW 19.27.097(1), the water codes and the Rule and authorizes the County to consider whether water is legally available on a year-round basis.[7] In particular, a water supply that is subject to interruption on many days each year is not "capable of supplying at least [350] gallons of water *per day*." SCC § 12.48.030 (emphasis added). Further, a water system's capability is not just a function of physical availability of water, since the Code explicitly provides that groundwater uses are "subject to Chapter 90.44 RCW," SCC § 12.48.100(1), and the Code is to be carried out consistently with the water codes and Rule "[w]henever possible." SCC § 12.48.010(3). These provisions authorize the County to consider whether water is available for new permit-exempt wells on a year-round basis before issuing a building

[7] *See* Fox Br. at 14 ("[o]rdinances are to be interpreted consistent with state law"); *see also Whatcom Cty.*, 186 Wn. App. at 51 (*Kittitas* anticipated consistent local land use regulations to protect water resources).

permit; any other reading would not be "consistent with" – but violate – the water codes and the Rule.

The Code does not indicate that it was intended to override the requirements of RCW 19.27.097(1), the water codes, or the Rule.[8] To the contrary, it expressly reserves the County's authority to require "[a]dditional information deemed necessary" as "evidence of an adequate water supply." SCC § 12.48.110(1)(j).[9] And although the Code provides that, "[w]hen a water right permit *is required*, a water right permit must be issued by [DOE]," SCC § 12.48.100(2) (emphasis added), it nowhere suggests that, if a permit is *not* required, there can be no further inquiry into the adequacy of a proposed water supply.

Thus, the Code does not preclude but expressly authorizes the County to determine whether water is legally available to serve a proposed permit-exempt well on a year-round basis, as required by RCW 19.27.097.

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[8] Even if the Code purported to override state law, it could not. *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 227, 351 P.3d 151, 155 (2015) ("state law preempts a local ordinance when [it] permits what state law forbids or forbids what state law permits") (quotation omitted).

[9] The County invoked this authority in this case. The County has 28 days to determine whether an application is complete. SCC § 14.06.100(2). If an application is incomplete, the County must notify the applicant of "the specific requirements or information necessary to constitute a complete application...." SCC § 14.06.100(3). The County followed these procedures, notifying the Foxes both orally and in writing within 28 days that their application was incomplete because they had failed to provide evidence of an adequate water supply, and identifying the additional information needed. *See* § III.E above.

See also Skagit Cty., 138 Wn. App. at 780 ("the County is legally required to follow the dictates of [RCW 19.27.097]").

2. *Kittitas*.

Next, the Foxes argue that the County was precluded from considering whether water is legally available on a year-round basis because, under their reading of *Kittitas*, the only test for an adequate water supply under RCW 19.27.097 is whether the applicant qualifies for a permit-exempt well. Br. at 14-15. This narrow reading of *Kittitas* is inconsistent with the language of the statute and the Court's reasoning.

RCW 19.27.097 requires a building permit applicant to provide evidence of "an *adequate* water supply for the intended use of the building," and states that such evidence "may be in the *form* of a water right permit … or another *form* sufficient to verify the existence of an *adequate* water supply" (emphasis added). Thus, regardless of the "form," it must demonstrate the existence of an *adequate* water supply. As the Attorney General has explained:

> Under [the first-in-time] doctrine, [junior] water rights can be curtailed when necessary to protect more senior water rights. This doctrine applies to all water rights, including [permit-exempt rights]. Although RCW 19.27.097 states that a water right permit … may be evidence of an adequate water supply … it may not be *sufficient evidence* in cases where water is not actually available for withdrawal…. [A] local building department could require evidence in addition to the water right that a sufficient quantity of water actually would be available for the building to be constructed.

AGO 1992 No. 17 at n.5 (July 28, 1992) (emphasis added). Put another way, while either a water right permit or proof of entitlement to a permit-exempt appropriation under RCW 90.44.050 can be evidence of a water supply under RCW 19.27.097(1), it is not necessarily evidence of an *adequate* water supply. For example, if a building requires a water supply of *350* gpd, a water right permit for *50* gpd is not evidence of an adequate water supply. Similarly, if a building requires a *year-round* water supply, a *seasonal* water right permit or a *junior* water right subject to frequent interruption (regardless of whether it is permitted or permit-exempt), is not evidence of an adequate water supply.

As to *Kittitas*, the Court's reasoning makes it clear that an entitlement to a permit-exempt well is not, by itself, sufficient to establish an adequate water supply. As the Court stated, RCW 19.27.097 "require[s] counties to assure adequate potable water is available when issuing building permits," 172 Wn.2d at 179, a requirement that cannot be met when, as a result of senior rights, water is not legally available for junior users when it is needed. *See also id.* at 180 (counties must "plan for land use in a manner that is consistent with the laws regarding protection of water resources").[10]

[10] The laws protecting minimum instream flows are "laws regarding protection of water resources." *See Swinomish*, 178 Wn.2d at 591-97 (concluding that instream flows are "water rights equivalent to other existing water rights that cannot be impaired by a subsequent appropriation").

In rejecting the argument that the GMA only required evidence of physical availability, the Court explained:

> To interpret the County's role under RCW 58.17.110 to require the County to only 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 ... if subdivisions and developments overuse the well permit exemption, contrary to the law.*

Id. (emphasis added). Allowing landowners with junior rights to withdraw water when senior rights are not being satisfied would also condone evasion of State water law and come at great cost to existing water rights.

As both the County and DOE recognize, neither RCW 19.27.097 nor *Kittitas* equate evidence of an adequate water supply with entitlement to a permit-exempt well; rather, they require that water will be legally available to the applicant when it is needed, taking into account senior rights, including senior instream flow rights. *See* § IV.A above.

3. RCW 90.44.050.

The Foxes next contend that the County's suggestion that they obtain an "approved mitigation proposal" from DOE was contrary to RCW 90.44.050. Br. at 15-16. However, nothing in RCW 90.44.050 or any other statute dictates that a permit-exempt well shall be deemed "an adequate water supply" under RCW 19.27.097 regardless of the physical or legal availability of water, and nothing in RCW 90.44.050 or any other statute

bars a county from considering the adequacy of a permit-exempt well under RCW 19.27.097. *See* DOE's Response Brief at § IV.B.

4. General Stream Adjudication Procedures.

Next, the Foxes argue that any consideration by the County of the priority of water rights under RCW 19.27.097 is inconsistent "with the general stream adjudication procedures which the legislature has vested solely in the superior courts." Br. at 16 (citing *Rettkowski v. DOE*, 122 Wn.2d 219, 228-30, 858 P.2d 232 (1993)).[11]

In *Rettkowski*, the Supreme Court held that DOE lacked statutory authority to determine the relative priorities of water right claims held by *existing* users and to issue cease and desist orders to users who were, in DOE's view, junior. 122 Wn.2d at 226-27. However, the Court noted that under RCW 90.03.290 DOE had statutory authority to make "relatively straightforward" determinations whether water is available for *proposed* uses and whether such uses conflict with existing water rights. *Id.* at 228. Here, RCW 19.27.097 provides statutory authority for the County, with DOE's assistance, to engage in a similar "relatively straightforward" inquiry. Because this inquiry was within the authority conferred under (and was *required* by) RCW 19.27.097, it did not run afoul of *Rettkowski*.

[11] This argument is contrary to the County's and DOE's interpretation of RCW 19.27.097. *See* CP 10-11, ¶¶ 9, 12; CP 240-41.

C. Water Is Not Legally Available for the Foxes on a Year-Round Basis.

In addition to arguing that the County is barred from considering *whether* water is legally available to them on a year-round basis, the Foxes argue that water *is* legally available to them on a year-round basis. These arguments also lack merit.

1. Permit-Exempt Wells Are Subject to the Prior Appropriation Doctrine.

The Foxes first argue that permit-exempt wells are not subject to the prior appropriation doctrine, under which water rights that are first in time are first in right. *See* Br. at 17-28. However, under the plain language of the statutes and numerous Supreme Court holdings, it is well-established that permit-exempt wells are subject to prior appropriation.

a. Statutory Provisions.

RCW 90.44.050 provides:

> After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun ... unless an application to appropriate such waters has been made to [DOE] and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal ... for ... single or group domestic uses in an amount not exceeding five thousand [gpd] ... *is and shall be exempt from the provisions of this section*, but, to the extent that it is regularly used beneficially, *shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter* ....

(Emphasis added.) On its face, this statute provides certain exemptions from its application and permit requirements, not from other provisions of the

water codes, including the first-in-time rule. Also, the statute states affirmatively that a perfected permit-exempt right is entitled to a right "equal to that established by a permit." *Id.* Since a right established by a permit is subject to prior appropriations, so too is a permit-exempt right.

Several other provisions in the groundwater code make it clear that permit-exempt rights are subject to the prior appropriation doctrine. First, RCW 90.44.020 provides that the groundwater code is supplemental to Ch. 90.03 RCW, the surface water code, and is intended to extend the surface water code to the "*appropriation* ... of groundwaters within the state" (emphasis added). Under the surface water code, "as between appropriations, *the first in time shall be the first in right*." RCW 90.03.010 (emphasis added); *see Rettkowski*, 122 Wn.2d at 226 (the first in time rule "is followed for appropriations of both groundwater and surface water").

Second, RCW 90.44.030 expressly provides that groundwater rights are subject to senior surface water rights:

> [Surface water rights] *shall not be affected or impaired* by any of the provisions of [the groundwater code] and, to the extent that ... withdrawal of groundwater may affect [surface flows], *the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to groundwater.*

(Emphasis added). This provision contains no exception for permit-exempt wells, but instead provides that "any" groundwater right acquired after

1945, including permit-exempt rights, are subject to senior surface water rights. *See Rettkowski*, 122 Wn.2d at 226 n.1 (RCW 90.44.030 "makes evident the Legislature's intent that ground water rights [are] part of the overall water appropriation scheme, *subject to the paramount rule of 'first in time, first in right'*") (citation omitted; emphasis added).

b. Supreme Court Holdings.

The Supreme Court has squarely held that the first-in-time rule applies to permit-exempt wells on several occasions. In *DOE v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002), the Court held:

> While the exemption in RCW 90.44.050 allows ... acquisition of a groundwater right without [a permit], once the 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.* "[T]he first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants...."

(Citations omitted; emphasis added); *see also id.* at 17 n.8 ("RCW 90.44.050 itself provides that a right acquired under the exemption is to be treated as all other rights, and thus *is subject to the prior appropriation doctrine's first in time first in right principle*") (emphasis added).

More recently, the *Swinomish* Court considered the relationship between permit-exempt wells and the Skagit senior instream flow right in particular. The Court reaffirmed its earlier holdings that, under RCW

90.03.345, "'[o]nce established, a minimum flow constitutes an appropriation with a priority date as of [its] effective date... which *may not be impaired by subsequent groundwater withdrawals*,'" and that "'[a] minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights....'" 178 Wn.2d at 584-85 (quoting *Postema*, 142 Wn.2d at 81-82). The Court took particular note of the reservations for permit-exempt wells in the 2006 Rule amendments. *See, e.g.*, *id.* at 587 ("some of the water is reserved for exempt wells for domestic use on a noninterruptible basis"). It held that these reservations were invalid because they would alter the priority date of exempt wells that would otherwise be subject to the senior instream flow right:

> [DOE] determined that noninterruptible water is needed for ... exempt wells because, *while there is a current provision for exempt wells, the appropriators' right to use the water is subject to rights with priority in time*. But exempt wells are provided for by statute and [DOE's] actions on applications for exempt wells are clearly set out in the water code – *without any provision permitting a "jump to the head of the line" in priority as a result of [the reservations] and use of the [OCPI] exception. See* RCW 90.44.050.[14]
>
> FN14. The dissent engages in a "factual analysis" intended to show that exempt well uses ... qualify under [the OCPI] exception. But the analysis simply shows what is always true – there are hardships attendant to *any* water right with a later priority date and too little water available to satisfy all rights. The dissent also claims that the *reallocations of water for exempt well users* ... should be permitted since they involve only small quantities of water and will have little impact on minimum flows. But the [OCPI] exception is not a grant of general authority *to reallocate water subject to existing water*

> *rights* regardless of whether the impact on minimum flows and instream uses would be substantial or slight.

Id. at 598 & n.14 (some emphasis added). This entire analysis was predicated on the Court's understanding that new permit-exempt wells were subject to the senior instream flow right. If they were not subject to senior rights, the reservations for new permit-exempt wells would not have altered the priority dates of such wells and would not have been invalidated by the Court. The Foxes' suggestion that *Swinomish* was limited to situations in which an applicant elected to seek a permit under RCW 90.44.050, Br. at 25, does not explain the Court's holding invalidating the reservations for new permit-exempt wells, since the reservations were *not* limited to wells for which an applicant elected to seek a permit. *See* WAC 173-503-073(3)(a) (2006) (CP 438).

The Foxes admit that it is "difficult [for them] to prevail under the shadow of the *Swinomish v. Ecology* decision," CP 617, and present no arguments that overcome the plain language of the statutes and binding Supreme Court precedent.[12] For example, their reliance on Black's Law

[12] In addition to the Supreme Court cases discussed above, the Court of Appeals, the Attorney General, DOE and the County have all recognized that permit-exempt wells are subject to senior rights (including senior instream flow rights). *See, e.g., Squaxin Island Tribe v. DOE*, 177 Wn. App. 734, 737 n.3, 312 P.3d 766 (2013) ("Permit-exempt wells are [exempt from permitting b]ut ... are subject to the priority system; thus, permit-exempt wells may not impair senior surface water rights such as instream flows"); AGO 2009 No. 6 at 11, 13 (Sept. 21, 2009) (RCW 90.44.050 "merely exempts certain uses of groundwater from the *permitting* requirement," not from other provisions in the groundwater code)

Dictionary to suggest that RCW 90.44.050's permit exemption also creates an exemption from other provisions in the water codes, Br. at 19-20, is directly contrary to the *Campbell & Gwinn* Court's holding regarding the proper interpretation of the exemption. *See* 146 Wn.2d at 9. Similarly, their suggestion that RCW 90.44.050's statement that permit-exempt rights are equal to permitted rights means that permit-exempt rights get the *benefits* of appropriative rights but are not subject to the *burdens* of the prior-appropriation doctrine, Br. at 23, is inconsistent with the plain meaning of "equal" and the Supreme Court's interpretation of it in *Campbell & Gwinn*. *See* 146 Wn.2d at 17 n.8.[13]

2. The Groundwater Code Did Not Preserve Unused Riparian or Correlative Rights.

(emphasis in original); AGO No. 17 at n. 5 (July 28, 1992) (prior appropriation "doctrine applies to all water rights, including those for which a permit is not required"); CP 238 ("Permit-exempt groundwater uses are only exempt from permitting requirements, and are not exempt from other aspects of law including the priority system which disallows impairment of water rights with senior priority"); CP 10 ("Though exempt from [permitting], 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").

[13] The Foxes cite two PCHB cases for the proposition that permit-exempt wells are "'entitlements' ... not subject to basin closures and hydraulic connectivity." Br. at 27 (citing *Green v. DOE*, 1992 WL 425155 (PCHB 1992) (attached as Appendix A); *Schrum v. DOE*, 1996 WL 752124 (PCHB 1996) (attached as Appendix B)). However, neither case determined that the prior appropriation doctrine does not apply to permit-exempt wells, and one of them stated explicitly that "[n]othing herein shall abridge the rule that first in time is first in right." *Green*, Order Denying Reconsideration at 3 (PCHB Feb. 5, 1993) (attached as Appendix C). Moreover, these cases were decided *before* the Supreme Court's 2002 decision in *Campbell & Gwinn* and its 2013 decision in *Swinomish*, and cannot abridge the Court's explicit holdings that permit-exempt wells are subject to the first-in-time rule.

The Foxes next argue that water is legally available because the groundwater code was intended to preserve unused riparian or "correlative" groundwater rights. Br. at 21-27. This is not only inconsistent with the plain language of the statutes and Supreme Court holdings discussed above, but also contrary to fundamental principles of Washington water law.

In *DOE v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985), the Supreme Court held that riparian surface water rights that were not put to use within a reasonable period of time following enactment of the 1917 surface water code were forfeited. The *Abbott* Court's reasoning applies with equal, if not greater, force to riparian or correlative groundwater rights following enactment of the 1945 groundwater code and forecloses the Foxes' attempt to invoke such rights nearly 70 years later to trump senior water rights, including the Skagit instream flow right.

a. *Abbott* and the Erosion of Riparian Rights.

As the *Abbott* Court explained, "[r]iparian rights, where they exist, derive from the ownership of land contiguous to or traversed by a watercourse." 103 Wn.2d at 689. At common law, riparians each had an equal right to make reasonable use of adjacent surface waters. *Id.*

However, Washington began moving away from the riparian doctrine and toward the prior appropriation doctrine immediately after statehood. *Id.* at 689-91. In 1891, the Legislature stipulated that "as between

appropriations the first in time is the first in right." Laws of 1891, ch. 142, §1, p. 327. The result was a dual system of riparian and appropriative rights, which "led to problems [because it] prevented appropriative or riparian development by others, even if the riparian rights had never been exercised." *Abbott*, 103 Wn.2d at 691.

As a result of this conflict, the Supreme Court began limiting riparian rights. In two 1907 cases, the Supreme Court held that such rights could be lost through failure to use them within a reasonable time. *See id.* (citing *State ex rel. Kettle Falls Power & Irrig. Co. v. Superior Court*, 46 Wash. 500, 90 P. 650 (1907) (upholding statute that provided for condemnation of riparian rights); *State ex rel. Liberty Lake Irrig. Co. v. Superior Court*, 47 Wash. 310, 313-14, 91 P. 968 (1907) (holding that an exception in the condemnation statute for riparian irrigation rights only protected water use on lands currently irrigated or lands which the riparian "intends to, and will, place under irrigation *within a reasonable time*") (emphasis in original)). If the riparian was "'not using the water and [did] not propose to use it as soon as practicable'" there was "'no reason why the water should be withheld from others who need and will promptly use it if permitted.'" *Id.*

The "[e]rosion of riparian rights as the dominant force in Washington water law continued with the enactment of the water code of

1917" and Supreme Court cases interpreting it. *Id.* at 691. The code declared that, "subject to existing rights, '*all* waters within the state belong to the public, and any right thereto ... shall be hereafter acquired ... in the manner provided and not otherwise.'" *Id.* at 692 (quoting RCW 90.03.010) (emphasis added). The code "enlarged condemnation rights by giving any person the power to condemn an inferior use for a superior beneficial use." *Id.* (citing RCW 90.03.040).

Although landowners continued to assert unused riparian rights, the Supreme Court rejected these arguments. In a series of cases, the Court held that a provision stating that nothing in the surface water code "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, did not apply to unused riparian rights. *See Abbott*, 103 Wn.2d at 693-95 (citing *Brown v. Chase*, 125 Wash. 542, 553, 217 P. 23 (1923) (holding that waters in excess of those riparians could use *within a reasonable time* were subject to appropriation by nonriparians); *Proctor v. Sim*, 134 Wash. 606, 615-16, 236 P. 114 (1925) (holding that the statute protected only those riparian rights that would be used *within a reasonable time*); *In re Sinlahekin Creek*, 162 Wash. 635, 299 P. 649 (1931) (holding that a claim to riparian rights which had not and would not be exercised *within a reasonable time* was properly rejected)). As the *Abbott* Court

explained, unlike at common law, "[i]n a dual [riparian-appropriative] system, nonuse of *any* riparian rights results in their forfeiture." *Id.* at 695 (citation omitted; emphasis in original).

Thus, by 1985, when the Supreme Court decided *Abbott*, the question was not *whether*, but *when*, unused riparian rights were extinguished under the 1917 code. *Id.*; *see also Swinomish*, 178 Wn.2d at 588 ("[w]hen the 1917 surface water code was enacted, the prior appropriation doctrine was adopted as the sole method for obtaining new water rights...."). The *Abbott* Court adopted DOE's suggestion of "1932 as the date by which unused riparian rights must have been put to use or forfeited" and held that "15 years after enactment of the water code, ... as a matter of law, constitutes adequate notice" of extinguishment of unused riparian rights. *Id.* at 695.

b. Abbott's Application to Groundwater.

The Court's reasoning in *Abbott* is fully applicable to riparian or correlative rights to groundwater. By the time the groundwater code was enacted in 1945, the "steady and gradual evolution toward prior appropriation" had long since "culminat[ed] in the 1917 water code and the cases following from it." 103 Wn. 2d at 697. Against that backdrop, the groundwater code adopted the prior appropriation system in language nearly identical to that used in the surface water code:

> Subject to existing rights, *all* natural groundwaters of the state as defined in RCW 90.44.035 ... 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). As the Supreme Court has explained, the purpose and effect of the groundwater code was the same as the surface water code, namely, to adopt the prior appropriation doctrine and make it applicable to all groundwater:

> [T]he groundwater code, is supplemental to the surface water code ... and was enacted in 1945 to extend surface water statutes to the appropriation and beneficial use of groundwater.... *Both the surface water code and the ground water code are premised on the doctrine of prior appropriation, which applies when an applicant seeks to obtain a water right in this state*.... Under the prior appropriation doctrine, a water right may be acquired where available public water is appropriated for beneficial use, subject to existing rights.... The same is true of groundwater.

Campbell & Gwinn, 146 Wn.2d at 7-8 (emphasis added).[14] Given the similar language and purpose of the groundwater and surface water codes, the groundwater code must also have provided for the forfeiture of unused riparian rights that were not put to use within a reasonable time.

If anything, this proposition is stronger in the context of the groundwater code than the surface water code. Unlike the surface water

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[14] The Foxes cite Tarlock, *Law of Water Rights and Resources* § 4.8 (2014) for a general description of groundwater rights under the reasonable use doctrine. Br. at 23. However, Tarlock points out that Washington is among the states that "apply the doctrine of prior appropriation to groundwater," not the reasonable use doctrine. *Id.*, § 6.4 & n.10 (updated July 2015) (citing RCW § 90.44.020 *et seq.*).

code, the groundwater code does *not* contain a provision specifically protecting "the existing rights of any riparian owner." *Compare* RCW 90.44.040 *with* RCW 90.03.010. Contrary to the Foxes' argument, *e.g.* Br. at 26-27, the more general "[s]ubject to existing rights" language in RCW 90.44.040 cannot reasonably be read to provide *greater* protection for unused riparian or correlative groundwater rights than was provided by the more specific language in the surface water code. *See Abbott*, 103 Wn.2d at 693-96 (protection for "existing rights" in surface water code protected only those rights that were put to beneficial use within 15 years). *At most*, like the surface water code, the groundwater code might have provided a 15 year period from its enactment in 1945 during "which unused riparian [or correlative] rights must have been put to use or forfeited." *Id.* at 695.[15]

Nonetheless, the Foxes argue that the groundwater code preserved certain unused correlative rights for all time because of the permit-exemption in RCW 90.44.050. *E.g.* Br. at 21-22. It is true that the *Abbott* Court noted that recognition of unused riparian rights for domestic supply would create a "domestic use exemption from the permit system," and that,

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[15] The Foxes cite WAC 173-503-070(1) in support of their argument that the Skagit senior instream flow right is subject to unused riparian rights. Br. at 37-39. However, that section states that "[n]othing in [the Rule] shall affect existing water rights, including *perfected* riparian rights ... existing on the effective date of this chapter" (emphasis added). DOE's recognition that the Rule could not affect senior water rights, including *perfected* riparian rights that had been put to beneficial use prior to the Rule, provides no support for the Foxes' claims that *unperfected* riparian rights can be asserted now to override the senior instream flow right established by Rule.

while "[t]he Legislature did expressly create a domestic exemption in the groundwater code ... it has never seen fit to create such an exemption for surface water." 103 Wn.2d at 693. However, as discussed above, RCW 90.44.050 is an exemption from the permitting process only, *not* from the prior appropriation doctrine. *See* § IV.C.1 above. Thus, far from indicating an intent to preserve riparian or correlative rights outside of the prior appropriation system, the permit exemption clearly manifests an intent to bring all groundwater rights within that system.

c. State Highway Comm'n v. Ponten and Welch v. DOE.

The Foxes argue that *State Highway Comm'n v. Ponten*, 77 Wn.2d 463, 463 P.2d 150 (1969), recognized correlative rights to groundwater after the adoption of the groundwater code. Br. at 26-27. This argument is misplaced. When the groundwater code was enacted in 1945, it provided:

> All bodies of water that exist beneath the land surface and that there saturate the interstices of rock or other materials – that is, the waters of *underground streams or channels*, artesian basins, underground reservoirs, lakes, or basins, *whose existence or whose boundaries may be reasonably established or ascertained* – are defined for the purposes of this chapter as "ground waters."

1945 Wash. Laws ch. 263 § 3 (emphasis added). As a result of this definition, the Supreme Court continued to apply the correlative rights doctrine in certain disputes involving percolating groundwater.[16]

At issue in *Ponten* was whether the State was liable to adjacent landowners whose domestic wells had dried up following excavation for a highway. Based on the trial court's finding that the "ground water ... did not flow in a confined channel ... stream but ... flowed intersticially [sic] through the porous ground," the majority held that "the law applicable to [the] case is that relative to the diversion or loss of percolating waters," 77 Wn.2d at 467, and did not discuss the groundwater code.

The dissent highlighted the significance of this factual finding. It argued that the waters in question were *non*-percolating and, therefore, were "'ground waters' within the meaning of the [groundwater code]." *Id.* at 477 (Neill, J., dissenting in part). Justice Neill asserted that as to non-percolating water, the correlative rights doctrine had been superseded by the code and "no longer applie[d]." *Id.* He reasoned that the groundwater code was "comprehensive in scope," made the prior appropriation doctrine applicable

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[16] The common law governing groundwater depended on whether the water was "percolating" or part of a "well-defined underground stream." *See Evans v. City of Seattle*, 182 Wash. 450, 452-53, 47 P.2d 984 (1935). All groundwater was presumed to be percolating. *Id.* Percolating waters were subject to the correlative rights doctrine, which, as modified in Washington, allowed each landowner to take as much water as was necessary to make reasonable use of their property, provided they did not waste it to the detriment of their neighbors. *See id.* at 457-59. In contrast, water in an underground stream was governed by the same rules that applied to riparian owners on surface streams. *Id.* at 453.

to groundwater, and "protect[ed] beneficial use ... as against subsequent competing appropriations." *Id.* at 476-78.

In 1973, the Legislature amended the groundwater code to make it clear that it applied (and had always applied) to *all* groundwater:

> "Groundwaters" means *all* waters that exist beneath the land surface or beneath the bed of [a] body of surface water within the boundaries of this state, *whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves.*

RCW 90.44.035(3) (emphasis added). This amendment was intended to:

> State as well as *reaffirm the intent of the legislature that "ground waters," as defined in [the groundwater code] means all waters within the state existing beneath the land surface*, and to remove any possible ambiguity which may exist as a result of the dissenting opinion in [*Ponten*] or otherwise with regard to the meaning of "ground waters" in the present wording....

1973 Wash. Laws ch. 94 § 1 (emphasis added). In light of this history, *Ponten*'s pre-1973 use of the correlative rights doctrine to resolve a dispute regarding percolating waters is not controlling here, where the issue is the priority of a proposed groundwater appropriation some 70 years after enactment of the groundwater code and some 40 years after the 1973 amendment confirming its application to all groundwater. Nothing in *Ponten* undermines application to the groundwater code of the Supreme Court's later holding in *Abbott* that the surface water code extinguished unused riparian rights that were not put to use within a reasonable period of time after its enactment. *See supra*, § IV.C.2.b.

The Foxes also cite *Welch v. DOE*, 2000 WL 871699 (PCHB 2000) (attached as Appendix D), for the proposition that appropriative rights remain "subject to" correlative rights in groundwater. Br. at 26, 38-39. The issue in *Welch* was whether DOE properly rejected certain claims filed under the Registration Act, RCW 90.14.010 *et seq.*[17] *Id.* at *1. A 1997 statute reopening the claim period extended to any person "claiming under state law a right to [use] groundwater under a right that was established before the effective date of the groundwater code...." RCW 90.14.068. DOE argued that, to be "established" under the statute, a right had to be perfected prior to the adoption of the groundwater code. *Welch*, 2000 WL 871699 at *2. The PCHB disagreed. *Id.* at *4-5. It noted that:

> There is no reported decision on the reasonable time period (or even if there is a reasonable time period) within which such rights must be put to beneficial use following the effective date of the Ground Water Code.

Id. at *4. However, without expressing any opinion on the existence or length of such a period, the PCHB held "that such rights may have been

[17] The Registration Act was adopted in 1967 to address the confusing patchwork of water rights and claims under Washington law. *Id.* at *1. The purpose of the Act "is to provide adequate records for efficient administration of the state's waters, and 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. To accomplish that goal, any person claiming a right to use waters of the state was required to file a statement of claim. *Welch*, 2000 WL 871699 at *1. The initial claim registration period closed on July 1, 1974, but the claims registry was re-opened in 1985 and again in 1997 (under different conditions). *Id.* at *2.

established prior to the effective date of the Ground Water Code[,]" even if water was not put to beneficial use until after the code was adopted. *Id.*

The PCHB's observation that there was no reported decision regarding the post-code time period within which correlative groundwater rights had to be used or were forfeited, without expressing any opinion on the issue, does not mean that unused correlative rights can be asserted now, *70 years* after enactment of the code. As discussed above, the reasoning in *Abbott* is fully applicable to the groundwater code, the purpose of which was to extend the prior appropriation doctrine to groundwater. This was confirmed by the Supreme Court in *Campbell & Gwinn* two years after *Welch*, and forecloses the Foxes' argument here. *See supra*, pp. 35-36.

d. Application to This Case.

In this case, it is undisputed that the groundwater the Foxes seek to appropriate was not put to beneficial use within 15 years of the adoption of the groundwater code in 1945 (*i.e.*, by 1960) or even within 15 years of 1973 (*i.e.*, by 1988), when the code was amended to make it clear that it applied to all groundwater. *See* § III.E above. Although the Foxes allege that they "have a claim registered on June 18, 1974 which includes domestic uses," Br. at 40 (citing CP 681, Mr. Lund's claim), they sold the land (Lot 1) on which the Lund's had appropriated groundwater to the Moodys and make no claim that they, the Lunds or the Moodys ever put water to

beneficial use for domestic supply on Lot 2. *See* § III.E above. The Foxes cannot now, 70 years after the code's adoption of the prior appropriation system, invoke the correlative rights doctrine to appropriate groundwater without regard to senior water rights. To hold otherwise would create an unlimited and special class of water rights that could be asserted at any time to trump senior water rights of private appropriators and municipal water systems as well as instream flow rights, in violation of the water codes and binding Supreme Court precedent.

3. The Skagit Instream Flow Right Limits Junior Permit-Exempt Domestic Appropriations.

The Foxes also argue that, even if permit-exempt wells are subject to senior water rights, they are not subject to senior instream flow rights in general and the Rule in particular. Br. at 31-37. As to instream flow rights generally, they argue that RCW 90.54.010(1)(a) and RCW 90.54.020(5) require that water be preserved for domestic needs and, therefore, no instream flow rule can limit permit-exempt domestic wells. They also argue that, because RCW 90.03.247 requires permits to be conditioned to protect instream flow rights, permit-exempt wells are not subject to such rights. Br. at 32-34.

These arguments ignore RCW 90.03.345, which expressly provides that minimum flow levels "constitute appropriations ... with priority dates

as of … their establishment." As *Swinomish* explained, under this statute, minimum flow levels "have priority over later acquired … rights." 178 Wn.2d at 595; *see also id.* at 584 ("'a minimum flow … is an existing right which may not be impaired by subsequent groundwater withdrawals'") (quoting *Postema*, 142 Wn.2d at 81). The Court specifically applied this principle to subsequent permit-exempt domestic wells in overturning DOE's 2006 reservations for such wells. *See id.* at 598 & n.14.

Swinomish also considered the effect of statutes, such as RCW 90.54.010(1)(a) and RCW 90.54.020(2), that "recognize that water is essential to the state's growing population and economy…." *Id.* at 585. It held that they were not "meant to override minimum flow rights" and do not "conflict with the statutes authorizing or mandating rules setting minimum flows" or with those "respecting priority of minimum rights." *Id.*; *see also Postema*, 142 Wn.2d at 82-83. The Foxes' reliance on these or similar statutes (such as RCW 90.54.020(5)) to create an exception to senior instream flow rights is therefore misplaced.

With respect to the Rule, the Foxes argue that WAC 173-503-040(5) and WAC 173-503-060 together mean that the instream flow right applies only to permitted wells. Br. at 31-32. However, a fair reading of the Rule demonstrates otherwise. First, WAC 173-503-040(5) provides:

> Future consumptive water right permits issued hereafter for diversion of surface water..., *and withdrawal of groundwater in hydraulic continuity with surface water* in the Skagit River and perennial tributaries, *shall be expressly subject to instream flows* established in [the Rule], and also subject to WAC 173-503-060.

(Emphasis added). In *Whatcom Cty.*, 186 Wn. App. at 60, this court found that the emphasized language "expressly indicates that [the Rule] governs permit-exempt uses of water"; *see also id.* at 62-63 (Rule "expressly prohibited permit exempt withdrawals").

Second, WAC 173-503-060 states that DOE will condition groundwater permits to protect flows, as required by RCW 90.03.247, but does not purport to limit WAC 173-503-040(5) to groundwater permits. If WAC 173-503-060 means what the Foxes suggest, surface water permits would also not be subject to the Rule, since they (like permit-exempt wells) are not mentioned in WAC 173-503-060.

Third, WAC 173-503-050(1)-(2) provides:

> [DOE] has [determined] that [200 cfs] is available to be appropriated through *groundwater withdrawal or surface water diversion* [in the Skagit basin]. *These waters are available for appropriation, subject to* existing rights, exemptions in WAC 173-503-070, and *instream flows in WAC 173-503-040(2)*.... [DOE] advises that water rights issued to appropriate these waters determined to be available by this rule *will be interruptible rights.*

(Emphasis added). This provision expressly subjects all future appropriations, including permit-exempt appropriations, to the Rule's instream flows. *See Swinomish*, 178 Wn2d. at 577 (Rule "did not allocate

noninterruptible water for new uses; rather, water for new uses is subject to being shut off when stream flows fall to or below the minimums established by [R]ule, in accord with general water law").

Thus, the plain language of the Rule makes it clear that it limits all future appropriations, including permit-exempt wells. Notably, this is how the Supreme Court, this Court, DOE and the County have all interpreted the Rule. *See id.* at 577, 598 & n.14; *Whatcom Cty.*, 186 Wn. App. at 60, 62-63; CP 238-40 (DOE Letter); CP 11, ¶ 12 (County Petition). Deference to DOE's interpretation of its own regulation is particularly appropriate. *See Postema*, 142 Wn.2d at 86.

Nevertheless, the Foxes argue that their interpretation is supported by documents in the rulemaking record. Br. at 35-37. This argument is based on cherry-picked pages from the full administrative record that was not submitted to the trial court because no party properly asserted claims challenging the Rule's validity. *See* CP 631, ¶ 2. In any event, contrary to the Foxes' argument, the excerpts from the record and other evidence filed below demonstrate that DOE intended to apply the Rule to permit-exempt wells. First, as discussed above, a "primary objective" of the 1996 MOA, which led to the development of the Rule, was to "reduce the use of exempt wells in those areas of the County experiencing inadequate instream flows ... as a result of groundwater withdrawal." CP 343-45; *Skagit Cty.*, 138 Wn.

App. at 774. Second, when asked in a public comment why centralized withdrawals from the Skagit mainstem were preferable to permit-exempt wells in tributaries, DOE explained:

> [L]arge centralized water supply systems draw from large sources. ... This appears to be an environmental benefit since [tributaries] will continue to flow during low-flow summer months and the small amount that would be diverted from the Skagit River would be relatively small. *Exempt wells are virtually everywhere, including adjacent to small tributaries that dry up in the summer. Clusters of these exempt wells could have a detrimental effect on these small streams.*

CP 35 (emphasis added). Third, during rulemaking, DOE repeatedly and expressly stated its intent to adopt instream flow levels that would constrain all future appropriations, including permit-exempt wells.[18]

4. The Foxes Do Not Have a Senior Right.

Next, the Foxes claim that they have an appropriative right to groundwater that relates back to their 2000 subdivision and, therefore, is

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[18] *See* CP 36 ("[DOE] has not proposed to limit the statutory right to develop an exempt well" but did "ma[ke] statements in the environmental documents and public hearing to clarify that *an exempt well is only exempt from permit requirements* [and] becomes a water right when it is drilled and put to beneficial use. It has a priority date ... *and could be junior to the instream flow if put to beneficial use after the effective date of the rule.* The priority date ... could become important during a time of scarcity when senior rights would have to be protected") (emphasis added); CP 63 (proposed limit on total withdrawals "would apply to all existing and future withdrawals, including ... *exempt* uses") (emphasis added); CP 64 ("*[e]xempted wells that are drilled after the* [*Rule*] *would be junior in priority to the instream flows and subject to the instream flows*") (emphasis added); CP 80 ("[w]ater supplies for single dwellings ... may also utilize ... [permit-exempt] ground water wells ... *but could be regulated as junior users to the instream flows if hydraulic continuity occurs*") (emphasis added).

senior to the Skagit instream flow right. Br. at 40-44. For the reasons set forth in the DOE Letter, *see* CP 243-45, and in DOE's Response Brief § IV.C.4, these arguments fail.[19]

5. DOE Does Not Have a Duty to Mitigate.

The Foxes also claim that water is legally available to them because DOE has a duty to mitigate for all permit-exempt well users in the Skagit basin. Br. at 44-46. For the reasons set forth in DOE's Response Brief § IV.D, this argument also fails. Moreover, even if DOE had such a duty (which it does not), the Foxes make no attempt to show that DOE has fulfilled that duty in this case. While DOE has stated that it is actively exploring mitigation options, it has not implemented *any* mitigation that

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[19] We also note that the historical relation-back doctrine on which the Foxes rely applied only to delays occasioned by factors intrinsic to the diversion or withdrawal of water (such as the physical circumstances of the locality), *State ex rel Ham, Yearsley & Ryrie v. Sup. Court,* 70 Wash. 442, 463, 126 P. 945 (1912), not by factors "personal to the appropriator, such as pecuniary inability, sickness, and the like." *Grant Realty Co. v. Ham, Yearsley & Ryrie,* 96 Wash. 616, 624, 165 P. 495 (1917). The Foxes' decision to lease Lot 2 to the Moodys from 2000 to 2014, and their failure to install a well on the property until 2011 were entirely the result of factors personal to the Foxes, which cannot trigger the relation-back doctrine. Also, when the historical relation-back doctrine was codified by the Legislature, it required that, if the use was by diversion, "'the appropriator must, *within six months* after the notice is posted, commence the excavation or construction of the works by which it is intended to divert the same; it being herein expressly provided that such works must be diligently and continuously prosecuted to completion, *unless temporarily interrupted by the elements.*'" *Grant Realty,* 96 Wash. at 624 (quoting Rem. Code § 6318) (emphasis added). It was only "'[b]y a *strict* compliance to these rules'" that an appropriator's rights related back to the time when notice was posted; "'a failure to comply therewith deprive[d] the appropriator of the right to the use of the water as against a subsequent appropriator who faithfully complied[d] with the same.'" *Id.* (quoting Rem. Code § 6319). It is apparent that the Foxes did not satisfy these "strict" statutory requirements.

would offset the impairment of the Skagit senior instream flow right associated with the Foxes' proposed well. *See* CP 88-89.

D. The Application of the Skagit Instream Flow to the Foxes Does Not Deprive Them of Due Process.

For the above reasons, the Foxes did not provide evidence of an adequate water supply under RCW 19.27.097. In a final attempt to overcome that conclusion, the Foxes' argue that applying the Rule to them violates due process. Br. at 47-49. However, the Foxes fail to articulate a valid due process claim.[20]

"A threshold matter to a procedural or substantive due process claim is whether the plaintiff possessed a property interest." *Greenhalgh v. Dep't of Corr.*, 180 Wn. App. 876, 890, 324 P.3d 771 (2014). Here, the Foxes have "not identified a cognizable property right" or a "legitimate claim of entitlement" to support their due process claim. *See Durland*, 182 Wn.2d at

[20] None of the cases the Foxes rely on to support their due process claim indicate that such a claim can be redressed in a mandamus proceeding. The Foxes assert that *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958), stands for the proposition that "mandamus [is] appropriate to protect due process rights in context of building and vesting to land use codes[]." Fox Br. at 47. However, the *Hull* case was not a mandamus proceeding and did not involve due process claims; it was a dispute between private landowners regarding a building height ordinance. 53 Wn.2d at 126-28. While the Foxes cite to *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014), the due process claim in *Durland* was prosecuted pursuant to 42 U.S.C. § 1983, not the mandamus statute. 182 Wn.2d at 62. Even if due process claims could be redressed in a mandamus action, the Foxes' claim is premature because the County has not yet denied their building application. *See* § III.E above. If the County denies the application, the Foxes could assert constitutional claims under the Land Use Petition Act. *See* RCW 36.70C.130(f).

70 (quotation omitted); *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972) ("To have a property interest ... a person clearly must have more than an abstract need or desire for it [or] a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it").

The Foxes claim domestic "water rights reflected in RCW 90.44.050 ... are foundational property right[s] ...." Br. at 48. However, as discussed above, permit-exempt water rights are subject to senior appropriations, and instream flow rights are appropriations with a priority date as of their establishment. *See* §§ IV.C.1, IV.C.3 above. Accordingly, the County's recognition that the Foxes' proposed permit-exempt well would be subject to the Skagit senior instream flow right did not deprive them of any property interest to which they had a legitimate claim of entitlement.

Despite the Foxes' focus on the *Swinomish* decision, Br. at 47, these propositions, as well as RCW 19.27.097's requirement of proof of an adequate water supply, were established well before that case was decided. *See* §§ IV.C.1, IV.C.3 above. While it is true that *Swinomish* invalidated the 2006 Rule amendments, the Foxes make no claim based on the amendments. Nor could they: the amendments were not in place when they subdivided their land, and had been held invalid *before* they filed their

building permit application. The amendments could not have given rise to a legitimate claim of entitlement under these circumstances.

V. CONCLUSION.

For the reasons above, the Rule is effective as written and as interpreted by the Supreme Court in *Swinomish*, and prohibits the Foxes' proposed year-round groundwater withdrawal. Because the Foxes have not met their burden under RCW 19.27.097 to demonstrate a physically and legally adequate water supply for their planned domestic use, the trial court properly denied the writ of mandamus and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 24, 2015, I sent a copy of the foregoing Swinomish Indian Tribal Community's Response Brief, via email and U.S. Mail, postage prepaid, to:

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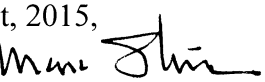

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APPENDIX A

1992 WL 425155 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

DARRELL GREEN & MITZY BUCHHOLZ, JEFF DYKES AND BRUCE A. HAHN, APPELLANTS

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

PCHB NOS. 91-139, 91-141 and 91-149

November 3, 1992

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

*1 This matter came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding. Board Members Harold S. Zimmerman, Chairman; Annette S. McGee and Robert V. Jensen have considered the record.

These matters are the appeals from denials by the Department of Ecology of applications to appropriate public groundwater.

Appearances were as follows:
1. Attorney Richard B. Price, appeared for Green and Buchholz and Dykes.
2. Kerry O'Hara. Assistant Attorney General appeared for the Department of Ecology.
3. Bruce Hahn appeared by his successor in interest, Richard Lange.
The hearing was conducted at Okanogan, Washington, April 27 and 28, 1992. Molly Roberts provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. Post-trial briefs were filed. The last of these was filed on July 31, 1992. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

These cases arise near Omak. These are appeals by Green and Buchholz, Hahn and Dykes of certain denials by the State Department of Ecology of applications to appropriate public groundwater. The appeal of Swann was continued on appellant's motion.

II

Background. The State, by its Department of Ecology ("Ecology"), has designated an area just north of Omak as the "Duck Lake Ground Water Management Subarea." WAC 173-132-010. This designation by administrative regulation occurred in 1974. The regulations note that the Duck Lake aquifer is naturally recharged primarily through groundwater migration from Johnson Creek. WAC 173-132-010(3). Also, that the aquifer is artificially recharged through waters diverted into the area by the Okanogan Irrigation District. WAC 173-132-010(4). The purpose of designating the Duck Lake Subarea was to manage groundwaters so as to provide a safe sustaining yield, as far as possible, to those with water rights in the Subarea.

III

The total natural recharge from deep percolation of precipitation and flow from Johnson Creek is 1,972 acre feet per year.

IV

An adjudication of water rights in the Duck Lake Subarea was conducted by the Okanogan County Superior Court, in 1986. The rights in the Subarea then totaled 10,662 acre feet per year (4,082 acre feet primary and 6,580 acre feet, supplemental).

V

The public ground waters of the Duck Lake Subarea are highly over-appropriated. It is probable that even existing public groundwater rights must rely on the recharge activity of the Okanogan Irrigation District.

VI

Green and Buchholz. The property involved in the Green and Buchholz appeal consists of 20 arcres. It is located north of Omak and within the Duck Lake Subarea. The initial owner, Ronald J. Fisher, applied to Ecology in 1974 to appropriate public groundwater for domestic supply and irrigation of the 20 acres. An instantaneous rate of 150 gallons per minute was requested. Mr. Fisher again applied to Ecology in 1978 to appropriate public groundwater at the same site for an 18 unit mobile home court. This was in lieu of, not in addition to, his first application. An instantaneous rate of 150 gallons per minute was requested.

VII

***2** Concerned not only with the extent of appropriation in the Subarea, but also contemplating an adjudication of the Subarea, Ecology took no action on the Fisher applications. It did, however, advise Mr. Fisher of an exemption which would allow withdrawal of 5,000 gallons per day for domestic purposes. Ecology suggested that a 10 unit mobile home court might fit within that exemption. This was in 1978. In that same year Mr. Fisher obtained County plat approval for an 18 unit mobile home court. During his ownership, Mr. Fisher developed only 9 mobile home units on the property.

VIII

In 1984 Mr. Fisher sold the property to Virgil and Lorraine Green. During the adjudication in Okanogan County Superior Court, Mrs. Green gave accurate testimony that there were yet only 9 mobile home units in place on the property. This was in 1986. The adjudication referee then recommended confirmation of a water right to Mr. and Mrs. Green under the theory of exemption stated in RCW 90.44.050. The right was delimited as 37 gallons per minute, up to 4.5 acre feet per year for group domestic supply to a 9 unit mobile home park. The priority was set by the referee as being 1974.

IX

In 1986, Mr. and Mrs. Green sold the property to their grandson, Mr. Darrell Green and his wife, Mitzy (Buchholz) Green. Mr. and Mrs. Darrell Green added 5 mobile home units in 1987, bringing the total to 14 units where matters stand at present.

X

In 1991, Ecology denied both the 1974 and 1978 applications filed by Mr. Fisher to which Mr. and Mrs. Darrell Green had succeeded. Mr. and Mrs. Green now appeal those denials. Both applications were cited in their notice of appeal.

XI

Ecology's denials of the applications were based upon its determination that public groundwater was not available, that the proposed appropriation would impair existing rights and be contrary to the public welfare.

XII

Dykes. The property involved in the Dykes appeal consists of 40 acres. It is located north of Omak and within the Duck Lake Subarea. The initial owner, Robert Hahn, applied to Ecology in 1973 seeking to appropriate public groundwater for the irrigation of 40 acres (300 gallons per minute). The property was sold to Mr. Jeff Dykes. No right was confirmed to Mr. Dykes in the adjudication in Okanogan County Superior Court.

XIII

Hahn. The property involved in the Hahn appeal consists of 20 acres. It is located north of Omak and in the Duck Lake Subarea. Mr. Bruce Hahn, in 1974, applied to Ecology seeking to appropriate public ground water for domestic supply and irrigation of 20 acres (200 gallons per minute). In the Okanogan County Superior Court adjudication, a water right was confirmed to Mr. Bruce Hahn for domestic supply at 10 gallons per minute, 3 acre feet per year. Mr. Bruce Hahn has sold the property to Mr. Richard Lange.

XIV

Ecology denied the Dykes and Hahn (Lange) applications on the same basis as the Green and Buchholz applications. Both Dykes and Hahn (Lange) appeal these denials.

XV

***3** Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter. Chapters 43.21B, 90.44 and 90.03 RCW.

II

As a threshhold matter, Ecology objects to consideration in this case of the 1978 Fisher application. The same is cited in the appeal lodged here by Green and Buchholz. Its denial is properly here for review.

III

The issues in this case are:
1. Whether there is public ground water available?

2. Whether the applicants are entitled to exemption under RCW 90.44.050 for 5,000 gallons per day?

3. Whether the state is required to issue permits to establish priority?

4. Whether the applicants (Greens) are entitled to 37 gallons per minute; 4.5 acre feet per year, for use as a group domestic water supply in accordance with the Findings in the Duck Lake Adjudication?

Ecology objects to the fourth issue which was added on the motion of Mr. and Mrs. Green. Specifically, Ecology urges that:

> The right confirmed to the Greens through the Duck Lake Adjudication, which provides the basis for these additional issues, is not properly before this Board as it is not a permit decision within the Board's jurisdiction. Respondent's Closing Argument, p. 7, lines 17-20.

There is no merit in that contention. While the meaning of the adjudication must be taken at face value, the right granted there bears upon the proper disposition of the permit dispute now pending here. The issues are therefore properly set forth. We take these up in turn.

IV

Public Groundwater Available? The first issue for consideration is whether public ground water is available. This is one of the four substantive criteria governing Ecology's decision under RCW 90.03.290: 1) beneficial use, 2) availability of public water, 3) non-impairment of existing rights, and 4) the public welfare. Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

V

In addition to the foregoing substantive criteria of RCW 90.03.290, Ecology must manage the use of ground water to maintain a "safe sustaining yield" for prior appropriators. RCW 90.44.130.

VI

The excess of water rights (10,662 acre feet per year) over natural recharge (1,972 acre feet per year) in the Duck Lake Subarea results in what is known as "water mining". This refers to the consumptive use of water beyond nature's ability to replace it. In Lamberton v. Ecology, PCHB No. 89/95 (1990) we held as follows:

> The problem in the instant case is most simply described as one of water availability, although, as often happens, there is an overlap with the existing rights and public interest categories ...

Then citing the requirement in RCW 90.44.130 for a "safe sustaining yield" we held:

> This does not mean that stored groundwater may never be taken. It means, rather, that the appropriation of waters in excess of annual recharge can be allowed only under circumstances where the ability of existing rightholders to fully satisfy their rights by reasonable means can be guaranteed.

VII

***4** In this case, appellants have not shown the existence of any stored public groundwater. To the contrary, the evidence suggests that only the artificially stored and imported waters of the Okanogan Irrigation District are absorbing the overdraft of public groundwaters. The approval of significant groundwater appropriations as requested by appellants could therefore only impair existing rightholders due to the complete appropriation, and overappropriation, of public groundwater.

VIII

Ecology was correct in concluding that there is no public groundwater available for the amounts and uses in the appellants' applications. Ecology was correct in denying those applications under RCW 90.03.290 and RCW 90.44.130.

IX

Entitlement to Exemption Under RCW 90.44.050? Ecology does not contest the Greens' right to an exemption under RCW 90.44.050. Respondent's Closing Argument, p. 21, lines 12-13. Presumably this is true for the other appellants also. The exemption provides:

> That any withdrawal of public groundwaters ... for single or group domestic uses in an amount not exceeding five thousand gallons a day, is and shall be exempt ...

X

The Greens assert entitlement, however, to one such exemption in response to the 1974 application of Mr. Fisher, another for the 1978 application of Mr. Fisher and yet another for the Greens' addition of mobile home units during their ownership. The total entitlement urged by the Greens under the exemption is therefore 15,000 gallons per day. Opening Memorandum of Appellants, p. 6, lines 7-22.

XI

The Greens' claim of exemption entitlement to 15,000 gallons per day is incorrect. The purpose of the Public Ground Water Code is to extend the application of surface water statutes to the appropriation and beneficial use of ground waters within the state. RCW 90.44.020. Under the Surface Water Code:

> The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used. RCW 90.03.380.

This provision ties the water right to the parcel of property in question. It cannot be multiplied either by the filing of successive applications nor by transferring the property and water right to another. Each of the Green, Dykes and Hahn properties in these appeals is therefore entitled to one 5,000 gallon per day appropriation of public ground water under the exemption of RCW 90.44.050.

XII

Exemptions to the water code, which is an environmental statute, are to be narrowly construed. See Stempel, above and English Bay v. Island County, 89 Wn.2d 16, 20, 68 P.2d 783 (1977).

XIII

State Required to Issue Permits to Establish Priority? The exemption language of RCW 90.44.050 goes on to provide that:

> ... at the option of the party making withdrawals of ground waters of the state not exceeding five thousand gallons per day, applications ... may be filed and permits and certificates obtained in the same manner and under the same requirements as in the case of withdrawals in excess of five thousand gallons a day.

*5 Therefore, at their option, appellants are entitled to state permits and certificates memorializing the entitlement of their exempt appropriation. The same, however, must be requested with reasonable clarity. The application now on appeal, each

seeking amounts far in excess of the exempt entitlement, lack the clarity necessary to inform Ecology that only an exemption permit is sought. Therefore, if appellants elect to request an exemption permit, that request must be made specifically.

XIV

Whether the Applicants (Greens) Are Entitled to 37 Gallons Per Minute; 4.5 Acre Feet Per Year for Use as a Group Domestic Water Supply per the Duck Lake Adjudication? The Duck Lake Adjudication has confirmed 37 gallons per minute, 4.5 acre feet per year to the Greens based upon the development of 9 mobile home units at the time of adjudication. The Greens now assert this right in addition to rights afforded by the exemption of RCW 90.44.050 relating to 5,000 gallons per day. The adjudicated right and the exemption right are not additive, however. In his report, the Referee of the Duck Lake Adjudication cites the 5,000 gallon per day exemption of RCW 90.44.050 as the basis for the right confirmed by him to the Greens. Report of Referee, p. 178, lines 22-26. (Exhibit R-31 of this record). Indeed, it could hardly be otherwise as new appropriation of public ground waters have been allowed only by written permit since 1945. RCW 90.44.050. The Greens' well was developed after 1945 while there is no written permit. Therefore the adjudicated right represents the Greens' appropriation to the date of adjudication under the exemption of RCW 90.44.050.

XV

The adjudicated right contemplated service to 9 mobile home units in 1986. The Referee computed the right based upon 1/2 acre foot per year per mobile home. Report of Referee, p. 179, lines 4-8. By comparison, the full 5,000 gallon per day exemption to which the Greens are entitled equals 5.6 acre feet per year. This is a little more than one acre foot beyond the adjudicated 1986 usage. By the reasoning of the Referee that each mobile home needs 1/2 acre foot per year, this additional acre foot would serve 2 mobile homes for a total of 11 mobile homes. The service of 14 mobile homes at the present time may therefore result in over appropriation by the Greens of their exempt entitlement. The limit of that entitlement is 5,000 gallons per day regardless of any plat or plans for an 18 unit mobile home court.

XVI

Finally, the Greens urge that Ecology is estopped to prevent the Greens from making their desired appropriation. The essence of this claim is that Ecology advised Mr. Fisher to limit his appropriation, pending disposition of his applications. This resulted in 9 rather than 18 mobile home units being developed. Next, the Greens assert that Ecology now denies their applications because water had not been put to beneficial use for more than 9 units. Opening Memorandum of Appellants, p. 11, lines 9-11. This final assertion is erroneous. Whether the Greens had served only 9 units, or more, had no bearing on Ecology's correct conclusion that, exempt appropriations aside, public ground water is not available. It is that conclusion, and not the number of units being served, that leads to the denial of these applications. Equally erroneous is the assertion by the Greens that the Referee erred as a result of the inadvertence of Lorraine Green's testimony at the adjudication. Id. p. 7, lines 14-16. Mrs. Green's testimony regarding 9 units in use, as opposed to a plan to serve 18 units, was entirely accurate. Testimony concerning a desire to serve 18 mobile home units, whether offered during the adjudication or now, would be ineffective to advance the Greens' rights beyond the 5,000 gallons per day provided by RCW 90.44.050. Ecology is not estopped to take the action which it did in these matters.

XVII

***6** Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing, the Board issues this:

ORDER

The denial by the Department of Ecology of appellants' applications to appropriate public groundwater is affirmed; provided, however, nothing herein shall prevent, at the appellants' option, the issuance of permits for appropriation under RCW 90.44.050 in an amount not exceeding 5,000 gallons per day.

DONE this 3rd day of November, 1992.

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge
HAROLD S. ZIMMERMAN
Chairman
ANNETTE S. McGEE
Member
ROBERT V. JENSEN
Attorney Member

1992 WL 425155 (Wash.Pol.Control Bd.)

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APPENDIX B

1996 WL 752124 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

MAMELEE V. SCHRUM, APPELLANT

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

PCHB No. 96-36

November 26, 1996

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

***1** Mamelee V. Schrum filed this appeal of Department of Ecology's denial of her application for a permit to withdraw groundwater with the Pollution Control Hearings Board (Board) on January 30, 1996. The Board subsequently consolidated this appeal with other water rights appeals for purposes of partial summary judgment to determine certain legal issues that were common to all the cases consolidated. The Board issued an Order on Motions for Summary Judgment, dated July 16, 1996, (hereinafter "July 16, 1996, order") that resolved a number of the issues presented by the consolidated appeals.

On August 2, 1996, Ecology filed its Motion for Summary Judgment specific to the above-captioned case. The Board subsequently granted Ecology partial summary judgment on September 24, 1996 (hereinafter "September 24, 1996, order") by determining that WAC 173-512, which closes the Chambers-Clover watershed to further surface water appropriations, constitutes a determination by administrative rule that further appropriations would impair existing water rights and instream values protected by statute, and that the Board lacked jurisdiction to overturn that rule.

On September 25, 1996, the Board held an evidentiary hearing in Lacey, Washington, on the question of whether appellant's proposed groundwater withdrawal is in hydraulic continuity with the surface water of the Chambers-Clover watershed. The Board was comprised of Richard C. Kelley, Chair, and members Robert V. Jensen and James A. Tupper, Jr. Administrative Appeals Judge Suzanne Skinner presided. Court reporting services were provided by Gene Barker and Associates of Olympia, Washington.

Don W. Taylor of Fristoe, Taylor and Schultz, Olympia, Washington, appeared for appellant Mamelee V. Schrum. Assistant Attorneys General Maia Bellon and Jay J. Manning appeared for respondent Department of Ecology (Ecology).

The Center for Environmental Law and Policy (CELP), by its attorney Michele Lechak, moved for leave to file an amicus curaie brief at the beginning of the hearing. Both parties consented to the motion, which the presiding officer granted. CELP's brief was filed on November 1, 1996, and is part of the record.

Upon appellant's request, the presiding officer left the record open to allow her to proffer certain documents to which she had referred in her testimony but had failed to introduce at the hearing. Respondent's counsel reviewed the documents after the hearing, and did not object to the proffer. The documents were admitted.

Based upon the sworn testimony, the exhibits admitted during and after the hearing and record in this appeal, the Board enters the following:

FINDINGS OF FACT

I.

Mamelee Schrum and her now-deceased husband, Lloyd Scrum, purchased approximately fifteen acres at 8317-170th Street East in Puyallup, Washington, in 1979. They subsequently subdivided the property into eight one and one-quarter acre lots and one five acre lot, called the L&R Ranch. The property is located approximately 4600 feet east of the spring which is the source of Clover Creek.

II.

*2 In 1981, the Schrum's hired Tacoma Pump and Drilling Co., Inc. to drill a well for multiple- domestic use. The well log shows that the drillers bored through a five foot layer of topsoil, a fifteen foot layer of gravel and soil, a fifteen foot layer of brown hardpan, a twenty-five foot layer of gray hardpan, a fifty foot layer of loose gravel and clay, a forty foot layer of hardpan and a ten foot layer of sand, gravel and water. The well was completed to 169 feet below the surface in this latter layer of sand, water and gravel.

III.

In 1985, the Schrums began to install the services necessary to develop the lots as a mobile home park. The Schrums hired Jon Hansen to develop plans for a Class 4 Water System with nine service connections. By letter dated June 10, 1986, the Tacoma-Pierce County Health Department approved the Schrums' water system with all nine connections. The letter advises, however, that the system owner must submit certificate of completion within the following two years, or the approval would become null and void.

IV.

The record does not reveal whether the Schrums submitted a certificate of completion as requested. The Schrums, however, only connected the water system to eight of their lots. The ninth lot remained unconnected to the water system two years after the Health Department issued its approval; therefore, the County's approval of the hook-up of the ninth lot expired on June 10, 1990.

V.

In 1992, Ms. Schrum decided to sell her ninth lot to her daughter and installed septic, water and utility lines on the lot. Ms. Schrum also requested permission from the Tacoma-Pierce County Health Department to hook-up the ninth lot to her water system. By letter dated October 20, 1992, the Tacoma- Pierce County Health Department informed her of the following:

> The Washington State Department of Ecology (WDOE) requires that any water supply system which withdraws 5,000 gallons per day (gpd) or more, obtain a Water Right Permit. The Washington State Department of Health design standards require that each residential connection have the production capacity of 800 gpd. If your water system is designed and/or approved for seven or more connections (5,600 gpd), evidence of a Water Right Permit is required from WDOE prior to obtaining septic system or building permit approval... If your water system is approved for seven or more connections, or if you have plans to expand your water system beyond six connections, the Tacoma-Pierce County Health Department urges you to make a Water Right Application to WDOE immediately.

Appellant's Exhibit A-1.

VI.

There is no evidence as to how much water the eight mobile homes presently served by the Schrum water system actually use. Both Kenneth W. Martig, appellant's expert hydrogeologist, and Jill Walsh, an Environmental Specialist for Ecology, speculated that even if the ninth lot was hooked up to the Scrum water supply system, the daily consumption for the nine lots would probably fall below 5,000 gpd, based upon the rule of thumb applied by water planners that each resident of a household on average uses 100 gpd. Therefore, if each mobile home houses three people on average, the water consumption in the nine mobile homes in appellant's development would be about 2,700 gpd.

VII.

***3** The record is silent as to whether Ms. Schrum tried to convince the Tacoma-Pierce County Health Department that her water system used less than 5,000 gpd, and that the Department of Health's 800 gpd per residence design standards should be waived when applied to her mobile home park.

VIII.

Instead, on October 26, 1992, Ms. Schrum filed water right application number G2-28650 with Ecology to appropriate 20 gallons per minute (gpm) for multiple domestic supply from the existing well. No limit on the total number of acre-feet to be used per year was stated in the application. Ms. Schrum will use the water to service the nine proposed mobile homes in the L & R Ranch, even though eight mobile homes are already connected to the well. The well presently produces over twenty gpm.

IX.

Ecology investigated Ms. Schrum's application by reviewing the information which she has submitted, the well logs for the Schrum well and a hydrogeological report prepared by Brown and Caldwell entitled July 1985, Clover/Chambers Creek Geohydrologic Study for Tacoma-Pierce County Health Department (hereinafter the "Brown and Caldwell study").

X.

Ms. Schrum's well, from which the proposed additional appropriation would be drawn, lies within the Chambers-Clovers watershed, which the Department of Ecology manages as Water Resource Inventory Area (WRIA) 12. WAC 173-512. Chambers Creek and Clover Creek are the principal streams in the area. The Schrum well is less than one mile east of the spring which is the source of Clover Creek. Clover Creek is closed to further surface water appropriations. WAC 173-512-030 & 173-512-050. In deciding whether to grant ground water permit applications in WRIA 12, moreover, Ecology is obliged to consider the "the natural interrelationship of surface and ground waters." WAC 173-512-040. Ecology interprets this obligation to preclude it from granting ground water permit applications where hydraulic continuity exists between the groundwater and surface waters in WRIA 12.

XI.

"Hydraulic continuity" refers to the connection between ground and surface waters. An aquifer is in hydraulic continuity with surface waters, such as lakes, streams or ponds, if the aquifer discharges groundwater into any of those surface waters or if those surface waters recharge or replenish the aquifer. Pumping of a well that taps groundwater which is in hydraulic continuity with surface water has multiple effects: reduction of groundwater pressure and volume in the well; reduction of groundwater storage in the vicinity; and alteration of the rates of groundwater recharge and discharge into surface waters.

Determination of whether hydraulic continuity exists between ground and surface water depends upon the geologic characteristics of an area. The hydrogeoloic picture of WRIA 12 and the area around the Schrum well is derived largely from the Brown and Caldwell study which, in turn, is based upon Ecology water well reports, as well as reports of state, federal, and local agencies and of private and public water purveyors.

XII.

*4 The central dispute between the parties is whether the Schrum well, which is completed to 169 feet below the surface, taps water from the A layer or C layer acquifers identified in the Brown and Caldwell study. The A layer aquifer discharges into Clover Creek and is in hydraulic continuity with the creek. The C layer aquifer generally discharges into Commencement Bay.

XIII.

The Clover Creek basin, in the vicinity of the Schrum well, is generally understood to be divided into several geologic strata. The surface layer or A layer aquifer is between 150-200 feet thick and comprised of recessional gravels through which water moves readily in all directions, including to Clover Creek.

Underneath the A layer is a lens of clay--the B layer--which lies between 125 and 150 feet below the surface, and extends underground from Clover Creek for approximately three miles to the east and two miles to the west. This B layer acts generally as a aquitard: it impedes water movement between the A and C acquifers.

The C layer aquifer, comprised largely of gravel and sand, lies about 150 feet below Clover Creek, but varies considerably in both depth below the surface and thickness throughout the Clover Creek watershed.

XIV.

Ecology denied appellant's application for a water right permit after concluding that the Schrum well taps the A level aquifer and is hydraulically connected to Clover Creek. Ecology found hydraulic continuity based upon evidence that groundwater flows down the hydraulic gradient from the static water level of the Schrum well, which is 131 feet below the surface or 364 feet above mean sea level, to the headwaters to Clover Creek, at approximately 340 feet above mean sea level. Based upon this twenty-four foot elevation drop, and the geologic strata of the area described in the Brown and Caldwell study, Linton Wildrick, Ecology's hydrogeologist, concludes that the Schrum well taps the A level acquifer and diverts water which would otherwise move down gradient to Clover Creek.

Mr. Wildrick further describes the A layer as heterogeneous, containing lens of clay interspersed in the sand and gravel. Mr. Wildrick believes that the Schrum well penetrates a lens of clay in the A layer which forces the static water level in the Schrum well to rise thirty-eight feet higher than the well base. This rise in static water level or artesianing is found where a confining geologic layer exerts pressure on an aquifer below.

XV.

By contrast, appellant maintains that her well penetrates both the A and B layers of geologic strata and is completed to the C layer aquifer, which generally discharges northeast to Commencement Bay. Appellant's expert, Mr. Martig, contends that the artesianing effect found in the Schrum well proves that the well draws from the C layer because the aquitard B layer exerts pressure on the C acquifer which forces the water level in the Schrum well to rise thirty-eight feet from its base. Mr. Martig deems the forty foot layer of hardpan identified in the Schrum well log, above the aquifer tapped by the Schrum well, to be the B layer aquitard described in the Brown and Caldwell study.

*5 Moreover, appellant disputes Ecology's description of the hyrdaulic gradient as sloping down from the Schrum well to Clover Creek. Appellant asserts the hydraulic gradient must be determined, not from the static water level, but from the base of the Schrum well, the source of the well water. As the well base lies about nine feet below the elevation of Clover Creek, the hydraulic gradient then would run uphill from the Schrum well to the creek, indicating that there is no hydraulic continuity between the Schrum well and the creek.

XVI.

The Board need not determine whether the Schrum well taps the A or C level aquifers because, even if the Schrum well is completed to the C layer, it is more probable than not that water from the C layer reaches Clover Creek due to fissures in the B layer. Because the Puget Sound region is an earthquake zone, fissures or cracks are present in confining geologic layers, such as the B layer. Since the water in the C layer is under hydrostatic pressure due to the confining B layer, any fissure in the B layer would cause water from the C layer to migrate upward to the A layer and eventually connect with Clover Creek.

Moreover, the likelihood of an interconnection between the A and C layers is confirmed by the Brown and Caldwell study which shows that groundwater flows upward from the C layer into the A layer, where Clover Creek emerges, less than one mile west of the Schrum well. Brown and Caldwell at 5-29, and Figure 5-22.

XVII.

Since Clover Creek, which is fed by springs, lies a mere nine feet above the base of the Schrum well, and the B layer is not a continuous impediment to upward flow in this area, it is more probable than not that even if the Schrum well taps the C level acquifer, water from that aquifer is in hydraulic continuity with Clover Creek.

XVIII.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over this matter pursuant to RCW 43.21B.110.

II.

RCW 90.03.240 governs applications for new appropriations of water and directs Ecology to investigate those applications. Ecology must issue a permit only if finds all of the following: 1) that water is available for appropriation; 2) that the appropriation is for a beneficial use; 3) that the appropriation will not impair existing rights; and 4) that the appropriation will be detrimental to the public welfare. In reviewing Ms. Schrum's application, Ecology determined that the ground water requested was not available for appropriation and that her additional appropriation would be detrimental to the public welfare.

III.

The Board reviews denials of water right permit applications de novo. Ms. Schrum bears the burden of proving that her water right application meets the four criteria of RCW 90.03.290. Ecology entirely closed Clovers Creek, and all its tributaries to further consumptive appropriations of surface water, after determining that "further consumptive appropriations would harmfully impact instream values." WAC 173-512- 030. See WAC 173-512-050. Moreover, this Board has determined that the closure of the Chambers Clover basin by WAC 173-512 constitutes a legal determination that further appropriations would impair existing rights and instream values protected by statute. [1]

IV.

*6 While WRIA 12 is only closed to further surface water appropriations, in investigating permits to appropriate groundwater, Ecology is obliged to consider the "natural interrelationships between surface and groundwater." RCW 90.54.020(8). See WAC 173-512-040. This Board has defined "hydraulic continuity" as "the natural interrelationship between ground and surface waters." July 16, 1996 order at 21. Moreover, hydraulic continuity exists if the "evidence demonstrates that any **of the water extracted from the ground at the place, and depth, in question would otherwise have contributed to a particular surface water," in this case Clover Creek. Id. at 23 (emphasis in original). Hydrogeologic modeling can suffice to establish hydraulic continuity. Jones v. Ecology, PCHB 94-63 et al., (1995). The Brown and Caldwell report, as uniformly interpreted by both parties' experts, establishes hydraulic continuity between Clover Creek and the Schrum well.**

V.

In a basin that is closed to further surface water appropriations, such as the Chambers-Clover, an application to appropriate groundwater cannot be granted if that groundwater source is in hydraulic continuity with the closed surface water. Manke Lumber Co. v. Ecology et al., PCHB Nos. 96-102 through 96-106 (1996) at 9; Sammamish Plateau Water and Sewer District v. Ecology, PCHB Nos. 96-144 and 96-154 (1996) at 11. Ms. Schrum's application must accordingly be denied as to do otherwise would impair existing rights and cause detriment to the public welfare.

VI.

In denying this application, the Board recognizes that Ms. Schrum unfortunately is caught between two agencies, Ecology and the Tacoma-Pierce County Health Department. Ms. Schrum only applied to Ecology for a permit to meet the Health Department's Class 4 water system design standards--standards which may overestimate actual water use in her mobile home park. Ms. Schrum may have been able to avoid the water rights permit process if she had instead requested Pierce County to waive its design criteria for her mobile home park.

Moreover, the Board's decision does not preclude Ms. Schrum from resubmitting a water rights application to Ecology which, by the total and instantaneous amounts of water requested, is limited to 5,000 gpd or less. The 5,000 gpd exemption for domestic use, set forth in RCW 90.44.050, allows users to apply for a permit and requires Ecology to issue such permits where the applicant establishes that the exemption fully applies. Green v. Ecology, PCHB Nos. 91-139 et al. (1993)(Order Denying Reconsideration).

VII.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

Mamelee V. Schrum's appeal of Ecology's denial of her water rights application number G2-28650 is DENIED.

DONE, this 26th day of November, 1996.

Richard C. Kelley
Chair
Robert V. Jensen
Member
*7 James A. Tupper, Jr.
Member

Footnotes

1 Due to the Board's ruling on partial summary judgment, the Board deemed irrelevant at the hearing appellant's testimony alleging that the recharge rate in WRIA 12 was six times the rate of water consumption since that evidence effectively challenges the surface water closure effected by WAC 173-512. The Board also struck from the hearing record Ecology's testimony regarding the biological effects of low flows in WRIA 12, as that testimony directly supported the surface closure of WRIA 12.

1996 WL 752124 (Wash.Pol.Control Bd.)

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APPENDIX C

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DARRELL GREEN & MITZY BUCHHOLZ, JEFF DYKES and BRUCE A HAHN, Appellants, v STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent	)	PCHB NOS. 91-139 91-141 and 91-149 ORDER DENYING RECONSIDERATION

On November 16, 1992, Ecology filed its Request for Clarification regarding the final order entered in the above matter

On December 3, 1992, Green, et. al., filed its Objection to Respondents' Motion for Clarification requesting costs on grounds that the motion is frivolous

On December 9, 1992, Ecology filed its Reply

Having considered the foregoing together with the records and file herein, and being fully advised, we rule as follows.

I

The Request for Clarification is in the nature of a motion for reconsideration and will be considered as such

II

The portion of our order at issue reads.

> provided, however, nothing herein shall prevent, at the appellants' option, the issuance of permits for appropriation

under RCW 90 44 050 in an amount not exceeding 5,000 gallons per day. (Emphasis added)

III

Ecology urges that the words "issuance of" in the order must be replaced with the words "application for" The rationale for this request, cited by Ecology, is that Ecology retains discretion to either grant or deny a permit for the right accorded by the exemption We disagree

IV

The basis cited by Ecology for its claim of discretion is this language in RCW 90 44.050:

> . Provided, further, that at the option of the party making withdrawals of groundwater of the state not exceeding five thousand gallons per day applications under this section or declarations under RCW 90.44 090 may be filed and permits and certificates obtained in the same manner and under the same requirements as in this chapter provided in the case of withdrawals in excess of five thousand gallons a day (Emphasis added)

This will be referred to as the "proviso" of RCW 90 44 050

V

Ecology contends that this proviso gives it the right and responsibility to apply the tests of 1) water availability, 2) impairment, 3) beneficial use and 4) public welfare, as set out in RCW 90 03 290, where a permit is sought for exempt appropriations of 5,000 gallons per day

VI

The meaning of the above proviso from RCW 90 44 050, however, cannot be found by reading it in isolation from the balance of that section Prior language in that section must also be considered, and it reads as follows

> That any withdrawals of public ground waters . . in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued, under the provisions of this chapter. .(Emphasis added)

This will be referred to as the "main body" of RCW 90 44 050.

VII

One holding a groundwater exemption right holds "a right equal to that established by a permit" as set forth in the main body of RCW 90.44 050 The purpose of the proviso in RCW 90 44 050 is to allow the exempt right holder to obtain a written indicia of that right in the form of a permit. It is not the purpose or meaning of the proviso that Ecology be vested with discretion to deny the indicia, i e permit, for an exemption right granted by statute The phrase of the proviso, "in the same manner and under the same requirements" refers to permit application procedures That phrase cannot be read to invoke the discretion of Ecology, appropriate to non-exempt rights, without thwarting both the exemption right established in the main body of RCW 90 44.050 and the proviso's purpose of providing for written evidence of that right That proviso exists for the benefit of exempt right holders who adhere to the adage that

"The palest ink is more powerful than the strongest memory."

Appellants are entitled to their ink from Ecology

VIII

Nothing herein shall abridge the rule that first in time is first in right

RCW 90.03 010

WHEREFORE, IT IS ORDERED that the motion and costs are each denied The final order is reaffirmed

DONE at Lacey, WA, this 5th day of February, 1993

William A. Harrison

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

POLLUTION CONTROL HEARINGS BOARD

Harold S. Zimmerman

HAROLD S ZIMMERMAN, Chairman

Annette S. McGee

ANNETTE S McGEE, Member

Robert V Jensen

ROBERT V JENSEN, Attorney Member

P91-139R

APPENDIX D

2000 WL 871699 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington
PCHB No. 98-108, 98-143, 98-144, 98-153, 98-198, 98-201, 98-232, 98-233,
98-234, 98-235, 98-236, 98-237, 98-238, 98-239, 98-240, 98-241, 98-258
May 4, 2000

ROBERT H. WELCH, DONALD F. SMITH, MARIE & BURDETTE THAYER, STONEWAY CONCRETE, JIM & STEPHNIE OBERT, PATRICIA J. OHANLEY, PATRICK & MARY BURKE, HARRY MASTERSON THEILINE SCHEUMANN, TEANAWAY RANCH, RICHARD & SHIRLEY HANCOCK, BRUCE COE, VAN DE GRAAF RANCHES, INC., ERNIE PATTY, BETHEL FUEL SALES, INC., VIC JANSEN, NEIL & JEFF HOFF, APPELLANTS

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

SUMMARY JUDGMENT AND ORDER OF DISMISSAL

***1** This matter comes before the board on motions for summary judgment brought by the Department of Ecology (Ecology) in each of the above-captioned appeals. The board has reviewed and considered the following pleadings and declarations together with all material attached thereto.

1. Ecology's Motion for Summary Judgment.

2. Ecology's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment.

3. Declaration of Candy Pittman.

4. Stoneway Concrete's Memorandum in Opposition to Motion for Summary Judgment.

5. Response to Ecology's Motion for Summary Judgment filed on behalf of Burke, Masterson, Scheumann, Teanaway Ranch, Inc., Hancock, Coe and Van de Graaf Ranches, Inc.

6. Affidavit of Lawrence E. Martin.

7. Hoff Memorandum in Opposition to Motion for Summary Judgment.

8. Bethel Fuel Sales and Victor C. Jansen's Brief in Opposing Summary Judgment and Supporting Cross Motion for Summary Judgment.

9. OHanley Response to Motion for Summary Judgment.

10. Welch response to motion for summary judgment.

11. Ecology's reply in Support of Summary Judgment.

12. Obert's response to Ecology Motion filed on March 31, 2000.

The board additionally heard oral argument on the motions on March 27, 2000. Based on this review, the board enters the following order.

Ecology seeks summary judgment affirming its rejection of water right claims filed by each of the above-captioned appellants. There are no genuine issues of material fact. For ease in analysis the claims may be considered in two groupings. Claims for the Burkes (98-232), Masterson (98-233), Scheumann (98-234), Teanaway Ranch, Inc. (98-235), the Hancocks (98-236), Coe (98-237), Van de Graaf Ranches (98-238), Patty (98-239), Bethel fuel Sales, Inc. (98-240), Jansen (98-241) and the Hoffs (98-258) were all denied for failing to file claims in substantial compliance with the requirements of RCW 90.14.051. Ecology rejected the remaining claims filed by the appellants on the ground the claim failed to state that beneficial use was made of claimed water prior to the effective dates of the Water Code, chapter 90.03 RCW, and the Groundwater Code, chapter 90.44 RCW. We begin our discussion with the first group of appeals.

The Registration Act, RCW 90.14.010 et seq., was adopted in 1967 to address the confusing patchwork of water right claims and rights that exist under Washington Law. As stated in the statute, "The purpose of this chapter is to provide adequate records for efficient administration of the state's waters, and 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. To accomplish this goal any person claiming a right to use waters of the state was required to file a statement of claim for the right. The consequences for failing to file a claim are severe. The Registration Act provides, that any such person "shall be conclusively deemed to have waived and relinquished any right, title, or interest in said right." RCW 90.14.071.

***2** The initial claim registration period closed on July 1, 1974. The requirements of the act applied to "all persons using or claiming the right to withdraw or divert and make beneficial use of public surface or ground waters of the state." RCW 90.14.041. The claims registry was reopened for a brief period in 1985. The 1985 opening required an application to this board for certification of a claim. RCW 90.14.043. Any certification by the board required a finding that "waters of the state have been applied to beneficial use continuously (with no period of nonuse exceeding five consecutive years) in the case of surface water beginning not later than June 7, 1917, and in the case of ground water beginning not later than June 7, 1945." RCW 90.14.043(2)(a).

The third and current opening did not require certification by the PCHB. Rather, it applied to "each person or entity claiming under state law a right to withdraw or divert and beneficially use surface water under a right that was established *before the effective date of water code established by chapter 117, Laws of 1917, and any person claiming under state law a right to withdraw and beneficially use ground water under a right that was established* before the effective date of the ground water code established by chapter 263, Laws of 1945, shall register the claim with the department during the filing period unless the claim has been filed in the state water rights claims registry before July 27, 1997." (Emphasis added.). The effective dates for the Water Code, chapter 90.03 RCW, is June 7, 1917. The effective date for the Ground Water Code, chapter 90.44 RCW, is June 7, 1917 and June 7, 1945. RCW 90.14.068 Reviser's Notes.

The critical question before the board today is the meaning of the word established as used in RCW 90.14.068. Ecology contends that established means a fully vested water right. This interpretation requires that the water subject to a claim under RCW 90.14.068 to have been put to beneficial use prior to the effective dates of the two statutes. This argument is based on the Black's Law Dictionary definition of established meaning "to settle, make or fix firmly." The state asserts that a water right only meets this definition where there has been beneficial use. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582; 957 P.2d 1241 (1998); *Department of Ecology v. Abbott*, 103 Wn.2d 686, 694 Pac. 1071 (1985). The department additionally cites the terms of the Ground Water Code to confirm its view that beneficial use is required to have a fully vested water right. At RCW 90.44.090 any person claiming a vested right to use ground water by "virtue of prior beneficial use" could apply within three years of June 6, 1945 for a certificate of ground water right.

Appellants counter inchoate rights for the future use of water may be as established or as firmly fixed as fully vested water rights. Washington law, for example, recognizes certain riparian rights to use water. The Water Code was adopted subject to existing rights, RCW 90.03.010. Such rights survived the enactment of the Water Code as long as the subject water was put to beneficial use within a reasonable period of time. *Brown v. Chase*, 125 Wash. 542, 217 Pac. 23 (1923); *Procter v. Sim*, 134 Wash. 606, 236 Pac. 114 (1925). *In Abbott*, at 103 Wn.2d 695 a reasonable period of time was considered to be 15 years.

***3** This first class of claims, subject to the pending motion for summary judgment, was denied for failing to comply with RCW 90.14.051. RCW 90.14.068 provides: "A statement filed during this filing period shall be filed as provided in RCW 90.14.051 and 90.14.061 and shall be subject to the provisions of this chapter regarding statements of claim." RCW 90.14.051 in turn requires:

The statement of claim for each right shall include substantially the following:
(1) The name and mailing address of the claimant.

(2) The name of the watercourse or water source from which the right to divert or make use of water is claimed, if available.

(3) The quantities of water and times of use claimed.

(4) The legal description, with reasonable certainty, of the point or points of diversion and places of use of waters.

(5) The purpose of use, including, if for irrigation, the number of acres irrigated.

(6) The approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (3).

(7) The legal doctrine or doctrines upon which the right claimed is based, including if statutory, the specific statute.

(8) The sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

The following claims are similar in their compliance with this statutory provision. Burke, Masterson, Scheumann, Teanaway Ranch, Hancock, Coe, Van de Graf Ranches, and Patty, all claim rights in ground water, state that first date of use occurred sometime before 1900, describe the right as applying to all ground water on property owned by the claimants under the legal doctrine of appropriation, riparian and other including "Acquavella, Congressional Acts and vested rights." (The Masterson claims do not have this quoted language.) The claims do not provide information regarding the instantaneous quantity or annual quantity of water used under the claimed rights. The Bethel Fuel Sales, Inc. and Jansen claims are similar in the information provided on the Ecology provided form.

Ecology argues that these statement-of-claim forms fail to substantially comply with RCW 90.014.051 and were therefore properly denied. Absent information regarding the location of the ground water point of withdrawal and quantities withdrawn, the state maintains that the statements of claim fail to satisfy the basic purposes of the Registration Act to provide information necessary for the administration of our water resources. These appellants contend that Ecology lacks authority to reject any claim except where there has been a failure to pay the two dollar filing fee provided under RCW 0.14.061.

The purposes of the Registration Act are set forth in the statute at RCW 90.14.010. In addition, the Legislature found in RCW 90.14.020 as follows:
(1) extensive uncertainty exists regarding the volume of private claims to water in the state;

(2) such uncertainty seriously retards the efficient utilization and administration of the state's water resources, and impedes the fullest beneficial use thereof;

*4 (3) A strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state;

(4) Enforcement of the states beneficial use policy is required by the states rapid growth;

(5) All rights to divert or withdraw water, except riparian rights which do not diminish the quantity of water remaining in the source such as boating, swimming, and other recreational and aesthetic uses must be subject to the beneficial use requirement;

(6) The availability for appropriation of additional water as a result of the requirements of this chapter will accelerate growth, development, and diversification of the economy of the state;

(7) Water rights will gain sufficient certainty of ownership as a result of this chapter to become more freely transferable, thereby increasing the economic value of the uses to which they are put, and augmenting the alienability of titles to land.

We conclude Ecology has the right to reject claims that do not substantially comply with RCW 90.14.051. RCW 90.14.111 explicitly limits claims that may be filed in the state registry, as those "set forth pursuant to RCW 90.14.041, 90.14.051 and 90.14.061." The above claims fail to quantify or locate the point of withdrawal of the water. The essentially are claims not to existing water use, but rather to potential future use of specifically quantified waters. These claims do not substantially comply with RCW 90.14.051(3), (4) and (5). Acceptance of these speculative claims would only add more uncertainty to the status of existing rights, which is counter to the express purposes of RCW 90.14. Ecology properly rejected these claims.

The last remaining claim, in this category, was filed by the Hoffs. The claim states a right to waters in Black Lake. The Hoffs have not provided any date on which water was first put to use or provided any legal authority to support the claimed right. The Hoffs failed to take advantage of an opportunity to supply Ecology with additional information and have been represented by counsel in this proceeding. The statement of claim remains incomplete and fails to substantially comply with RCW 90.14.051. It does not provide the basic information required for a statement of claim and does not advance any theory that would demonstrate a right to use waters of the state that was established prior to the effective dates of the water codes. The claim was properly rejected.

We next turn to the claims that Ecology rejected on the basis of failure to identify an appropriate date for putting the water to beneficial use. The Ground Water Code states that it was adopted subject to existing rights. RCW 90.44.040. Among such existing rights may be correlative rights in ground water. Correlative rights arise as a indicia of real property ownership. *State v. Ponten*, 77 Wn.2d 463, 463 P.2d 150 (1969). The correlative right is akin to a riparian right applied to ground water. A. Tarlock, Law of Water Rights and Resources, § 4.06(3), at 4-18, n. 16 (1989). There is no reported decision on the reasonable time period (or even if there is a reasonable time period) within which such rights must be put to beneficial use following the effective date of the Ground Water Code. What is clear, however, is that such rights may have been established prior to the effective date of the Ground Water Code on June 7, 1945.

*5 We are not inclined to adopt the more restrictive interpretation of the word "established" in the context of RCW 90.14.068 advanced by Ecology, in regard to those claims arguably based upon correlative rights. First, the failure to file a registry claim may result in the waiver and relinquishment of any rights under the preclusive terms of terms of RCW 90.14.071. Second, the Legislature could have adopted the more restrictive language applied to the 1985 claims registry opening. The fact that the Legislature chose not to impose those limitations suggests that the 1997 opening is intended to encompass the range of claims that could have been filed in 1967. Ecology concedes that claims based on correlative rights could have been filed in 1967. We conclude as a matter of law that such claims should be accepted for filing in the registry.

This ruling would apply to Stoneway Concrete (98-153) and the Thayers (98-144). Both claim "riparian" rights in ground water that may have been established before June 7, 1945. The Oberts claim riparian rights in surface water put to beneficial use prior to July 20, 1945. This claim should not be allowed, however, because the Oberts have failed to document any beneficial use of the surface water right prior to 1932, which is the cutoff date for surface water rights under *Abbott*, at 695. The O'Hanley claim (98-201) was also properly rejected. Her claim states the water was first put to use in 1987. Her claim relies upon appropriation as the legal basis. She has failed to make any claim that fairly can be identified as based upon the theory of correlative rights in the ground water. Therefore, Ecology properly rejected that claim. Welch (98-108) similarly sets forth a claim based upon the appropriation doctrine. His claim asserts water was first put to use prior to 1951. He failed to establish a claim of use prior to 1945. Ecology properly rejected his claim because he does not base his claim upon correlative rights. We reach the same conclusion regarding the Smith statement-of-claim (98-143). The Smith claim states May 1946 as the date the claimed water was first put to beneficial use and lists no legal doctrine for the claim. The statement of claim accordingly fails to state a claim to a water right that may have been established prior to the effective dates of the Water Code and Ground Water Code. The Smith claim was properly denied for filing in the claims registry.

In accordance with the foregoing ruling, summary judgment is granted to Department of Ecology with respect to the Burkes (98-232), Masterson (98-233), Scheumann (98-234), Teanaway Ranch (98-235), the Hancocks (98-236), Coe (98-237), Van de Graaf Ranches (98-238), Patty (98-239), Bethel fuel Sales, Inc. (98-240), Jansen (98-241), the Hoffs (98-258), Welch (98-108), Smith (98-143), the Oberts (98-198) and O'Hanley (98-201); AFFIRMING the denial of claim registration and dismissing the appeals therefrom.

Summary judgment is granted to Stoneway Concrete (98-153) and the Thayers (98-144), REVERSING the Department of Ecology. These appeals are hereby remanded to the Department of Ecology for registration of the subject statements of claim in accordance with the ruling of the board.

***6** SO ORDERED this 4th day of May, 2000.

JAMES A. TUPPER, JR.
Presiding
ANN DALEY
Chair
ROBERT V. JENSEN
Member

2000 WL 871699 (Wash.Pol.Control Bd.)

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