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**SUPREME COURT
OF THE STATE OF WASHINGTON**

SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY; THE CITY OF
YELM, and WASHINGTON POLLUTION CONTROL HEARINGS
BOARD,

Respondents.

APPELLANT'S REPLY BRIEF

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 ORIGINAL

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I. Issues for Reply Argument

The Department of Ecology's (Ecology) interpretation of the exception found in RCW 90.54.020(3)(a) is inconsistent with, and contrary to, Washington's Water Code, this Court's ruling in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (Wash. 2013), and to the very chapter in which it resides, RCW 90.54. The Legislature's clear directive to create, protect, and enhance instream flows cannot be subverted via the language of the "OCPI" exemption and Ecology's broad self-delegation of authority based thereupon.

Nothing in the language of the exemption proves it is the Legislature's intent to give Ecology the authority to issue water rights that will impair existing instream flow rights. In fact, it is just the opposite. The Legislature knows how to draft statutory language to make its intentions evident. Despite Ecology's reliance upon it, the use of the word "withdrawal" in the exemption does not evince this intention. Instead, it is the *absence* of several words that provide more understanding of the intent of the Legislature. Key words such as, permit, appropriation, and utilize,

all of which are used in RCW 90.54 and throughout the Water Code show the Legislature purposefully omitted this language from the OCPI exemption. Statutory construction analysis of the sentence creating the OCPI exemption prohibits Ecology's interpretation and it is therefore erroneous.

Furthermore, the issuance of Yelm's water right using the OCPI exemption and yet-to-be out-of-kind mitigation is not an "extraordinary circumstance" and therefore the narrow exemption carved out in the *Swinomish* opinion does not apply in this case. It is not extraordinary that population growth throughout the state will increase demand pressure for water resources. It is inevitable. And as stated in *Swinomish*, it is the main purpose for the enactment of the Water Resources Act. A mitigation plan is also not an "extraordinary circumstance." Apart from whether Ecology has the authority to trade water for new uses for out-of-kind mitigation, it is clear they are doing so and intend to continue. Yelm's mitigation plan is not unique. If Ecology can couple the OCPI exemption with out-of-kind mitigation and call it an "extraordinary circumstance" no instream flow in the state is safe. The exemption would become "a device for wide-ranging

reweighing or reallocation of water...” which this Court specifically prohibited. *Swinomish*, 178 Wn.2d at 585.

II. Reply Argument

- a. Ecology’s interpretation and application of the OCPI exemption is contrary to the Water Code.

Ecology’s interpretation of the exemption in RCW 90.54.020(3)(a) is contrary to legislative intent to protect instream flows from impairment. Courts will uphold an agency’s interpretation of a statute “if it reflects a plausible construction of the statute’s language, and is not contrary to legislative intent.” *Nationscapital Mortgage Corp. v. Washington State Department of Financial Institutions*, 133 Wn.Ap 723, 737, 137 P.3d 78 (2006). If a statute is ambiguous legislative intent is analyzed by reading the statute in the context of what “the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Five Corner Family Farmers v. Washington State Department of Ecology*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011), citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002).

There are several statutes related to RCW 90.54.020(3)(a), which disclose legislative intent for the OCPI exemption. Each of these was

analyzed in the *Swinomish* opinion. These statutes include chapters 77.57 RCW, 90.22 RCW, 90.54 RCW, and 90.03 RCW. Ecology and Yelm ignore the *Swinomish* opinion's analysis of the importance the Legislature placed on instream flows. The analysis of instream flow and minimum flow rights is a substantial portion of the opinion. *Swinomish*, 178 Wn.2d at 592. As part of this analysis, the opinion notes that

Growing, competing demands for water led to a number of new laws over time, and among these are acts and statutes designed to further the goal of retaining sufficient water in streams and lakes to sustain fish and wildlife, provide recreational and navigational opportunities, preserve scenic and aesthetic values, and ensure water quality

Id.

Therefore, the very purpose and reason for the Legislature passing and enacting statutes was for the creation and protection of instream flows in order to protect instream values from the increased and ever growing demand to take this water out of streams. Yet Ecology uses the fact that Yelm's water demands are increasing as the reason to *take* water from instream flows. Ecology's interpretation of the OCPI exemption is directly opposed to the Legislature's goals. This is contrary to clear legislative intent and therefore Ecology's interpretation must be rejected.

The *Swinomish* opinion continues and notes that in 1955 the “Legislature declared the policy of the State to be that sufficient water flow be maintained in streams to support fish populations and authorized rejection of water right applications if these flows would be impaired.” *Id.* citing LAWS of 1955, ch. 12, § 75.20.050 (codified as amended at RCW 77.57.020). This Act shows unequivocal legislative directive authorizing Ecology to reject any water right application that would impair flows necessary to meet the requirements of the statute. Once again, there is no ambiguity or question as to legislative intent; namely to protect instream flows from impairment. Ecology’s interpretation of the OCPI exemption, which allows for impairment to instream flows, is contrary and therefore erroneous.

The Legislature, in 1969, enacts the Minimum Water Flows and Levels Act, which expressly protects instream flows from impairment. RCW 90.22.030 states, “no right to divert or store public waters shall be granted” if doing so conflicts with the minimum flows adopted under the statute. This evinces unquestioned legislative intent that Ecology must treat instream flow rights as it would any other right and protect them from subsequent water appropriators. Ecology’s interpretation of RCW

90.54.020(3)(a) fails to adhere to unambiguous legislative directive and is therefore erroneous.

Yet another statute expressly stating the Legislature's goal of preserving instream flows is found in chapter 90.54 RCW. This is the chapter in question in this case and is therefore most relevant in assisting the Court in determining legislative intent. This chapter's overall goals are; public health, economic well-being, and "*preservation of natural resources and aesthetic values*", which the *Swinomish* opinion states, "shows the legislature continued to recognize that retention of waters instream is as much a core principle of state water use as the other goals..." *Swinomish*, 178 Wn.2d at 594. (emphasis in original). It is important to note, as this Court did in *Swinomish*, that it is water kept instream that is a "core principle" of the state and not a "maximum net benefits" approach as proffered by Ecology and Yelm.

Ecology's interpretation fails to consider the goals of this chapter. In fact, Ecology's interpretation results in frustration of the chapter's goals. Had the Legislature wanted Ecology to weigh the relative merits of impairing an instream flow right in order to provide for new out-of-stream

uses it would have clearly enunciated the exemption. Instead the Legislature did just the opposite.

In RCW 90.54.920(1) the Legislature states, “Nothing in this act shall affect or operate to impair any existing water rights.” The instream flows that Ecology seeks to impair in this case have a priority date of 1981, as set when the instream flow rule was established. WAC 173-511-030, WAC 173-511-040. Importantly RCW 90.54.920(1), which prohibits any part of the act from affecting or operating to impair existing water rights, was enacted in 1989. Therefore, the water rights in question in this case, for the Nisqually and Deschutes Rivers, were in existence when RCW 90.54.920 was enacted.

The Legislature intended that these existing water rights be protected from impairment by any enactment, enforcement, or interpretation of the statutes found in chapter 90.54 RCW. Therefore, Ecology’s interpretation that the OCPI exemption can be used to issue a new water right that would impair instream flows and closed streams in the Nisqually and Deschutes river basins is directly contrary to clear legislative intent and must be rejected.

Acts passed subsequent to the Water Resources Act also show legislative intent to protect instream flows from impairment. Chapter 90.03 RCW, enacted in 1979, reinforce Washington's policy and intent to treat instream flow water rights just like any other type of right, including protection from impairment by junior water users. As the *Swinomish* opinion holds, "[t]his statute (RCW 90.03), contains no qualifications that suggest the importance of minimum flow rights is diminished by either the '[m]aximum net benefits' or overriding-considerations provisions in RCW 90.54.020(2) and (3)(a)." *Swinomish*, 178 Wn.2d at 595.

Additionally, this chapter expresses legislative intent to protect instream flows by requiring Ecology to condition any subsequent permit to protect instream flows. RCW 90.03.247. As this Court held in *Swinomish*, Ecology's interpretation is in "contrast to the statutory scheme as a whole...several specific statutes...(and) would relegate minimum flow water rights to a lesser class of water right than others..." *Swinomish*, 178 Wn.2d at 596. Ecology's interpretation must be rejected as contrary to clear legislative intent and an erroneous application and interpretation of law.

All parties agree that Washington follows the Prior Appropriation system for the regulation of water resources. Ecology's Response at 4-5. Additionally, all parties agree that instream flows are water rights with a priority date and once created they cannot be impaired by subsequent water users. Ecology's Response at 6. The same is true for streams that Ecology has closed to further appropriations. *Id.* All parties agree that the issuance and exercise of Yelm's water right will impair instream flows and appropriate water from closed streams. Ecology's Response at 9. Therefore, Ecology concedes that but for the exemption in RCW 90.54.020(3)(a) it was required by law to deny Yelm's water right application.

However, nothing in the language of RCW 90.54.020(3)(a) can reasonably be interpreted to give Ecology this authority. The profound lack of any key words, terms, or clear direction in RCW 90.54.020(3)(a) that Ecology can, in fact, permanently impair an instream flow is glaring. Moreover, the vast amount of legislation specifically creating, protecting, and enhancing instream flows shows that the Legislature never intended to allow RCW 90.54.020(3)(a) to be used in the manner Ecology desires.

Ecology's interpretation is erroneous and contrary to legislative intent and should be rejected.

The *Swinomish* ruling is controlling on this point holding:

At present, under the water code minimum flows set by rule are appropriations with a priority date as of the date adopted by rule, minimum flows set by rule cannot impair existing rights and subsequent rights cannot impair existing flow right, and **permits to appropriate water from streams with minimum flows set by rule must be conditioned to protect minimum flows.**

Ecology's interpretation and application of the overriding-considerations fails to give minimum flow water rights the protection the legislature has determined is appropriate, and is thus inconsistent with the statutory scheme.

Swinomish, 178 Wn.2d at 596-597 (emphasis added).¹

- b. Ecology's reliance on the word "withdrawal" is contrary to statutory interpretation and in fact the words used in RCW 90.54.020(3)(a) shows legislative intent to **not** have OCPI applied to individual water rights.

Ecology's interpretation of the single sentence containing the whole of the OCPI exemption is unfounded and contrary to the canon of

¹ Emphasis is added to show the *Swinomish* ruling applies to individual water right permits as well as reservations of water. Ecology and Yelm's contention otherwise ignores this Court's ruling.

statutory construction and must be rejected. Ecology claims the phrase “withdrawals of water” in the OCPI sentence is proof of legislative intent to grant Ecology the authority to issue water right permits that will impair existing instream flows. Ecology’s Response at 23-25. However, this overly optimistic reliance on the word “withdrawal” is misguided and in fact highlights that the Legislature knew how to draft the exemption to grant Ecology this authority but intentionally did not.

It is a recognized rule that there is a presumption that both the Court and the Legislature know the rules of statutory construction. *State of Washington v. Blilie*, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Furthermore, when determining what a statute means, courts will ascribe to the words “their plain and ordinary meaning...” and intent “cannot override an otherwise discernible, plain meaning.” *North Coast Air Services, Ltd. v. Grumman Corporation*, 111 Wn.2d 315, 321, 759 P.2d 405 (1988). An additional tool of statutory construction is that “the legislature is deemed to intend a different meaning when it uses different terms.” *State of Washington v. Michael Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196, (2005), citing *State v. Beaver*, 148 Wash.2d 338, 343, 60 P.3d 586 (2002).

Ecology contends the term “withdrawal” shows legislative intent to authorize Ecology to use OCPI to issue individual water right permits that will impair instream flows. Ecology argues that the “plain meaning” of “withdrawal” is defined only in the context of water right permitting. Ecology’s Response at 23. Ecology’s argument is flawed. The plain meaning of “withdrawal” is not one associated with water right permitting. For example, in this same chapter, RCW 90.54.050(2), the legislature uses the term “withdraw” in a manner that is not associated with water right permitting. The section states:

When sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are available. Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department shall consult with the standing committees of the house of representatives and the senate having jurisdiction over water resource management issues.²

RCW 90.54.050(2)

² Appellant recognizes that “withdraw” and “withdrawal” are different words, but grammatically RCW 90.54.020(3)(a) could not have used the term “withdraw” and the two words are synonymous. Merriam-Webster defines “withdrawal” as “the act of moving something or taking something away.” <http://www.merriam-webster.com/dictionary/withdrawal?show=0&t=1414091674>

Here, it is clear the plain meaning of the word withdraw is the common term found in the dictionary. Merriam-Webster online dictionary gives the definition as “to take (something) back so that it is no longer available.” Merriam-Webster online dictionary: <http://www.merriam-webster.com/dictionary/withdraw>. Therefore, ascribing the plain meaning of “withdrawal” to the OCPI exemption, means taking water from a stream in a manner that would conflict with the statute is prohibited unless it is clear the overriding considerations of the public interest will be served. Giving the term its plain meaning is a foundational principle of statutory construction and doing so in this instance makes sense. Ecology’s claim that the word “withdrawal” is proof of legislative intent to allow for the issuance of permanent water rights must be dismissed.

While it is true that the term “withdrawal” and “withdraw” are used in the Water Code there are more specific and unique terms associated with water right permitting. Also, to give “withdrawal” the meaning put forward by Ecology would be contrary to with the statute and statutory scheme and must be rejected. *Public Utility Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). These more specific terms are noticeable by their absence from the OCPI

exemption. The most important term used by the Legislature and Ecology in a water right permitting context is *appropriation*. This is apparent in RCW 90.54.050(2), which is in the same chapter as the OCPI exemption. *See, infra*. In this instance, in which the legislature uses the term “withdraw”, it also uses the term “appropriation.” Appropriation is a specific term in water right permitting and has no other meaning within this context, unlike withdrawal. An appropriation is defined in RCW 90.03.010. This statute, dating from 1917, the earliest codification of the Water Code, states

Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriators, the first in time shall be first in right.

RCW 90.03.010

This section not only provides a clear and simple definition of the prior appropriation system, and its importance as detailed in Appellant’s Opening Brief, but also shows the term “appropriation” is the term known and used by the Legislature to define the use of water for a beneficial purpose. The Legislature’s use of the term in RCW 90.54.050(2) shows it knew the difference between the terms “withdrawal” and “appropriation”

and did so purposefully. Had the legislature wanted to use the term “appropriation” instead of “withdrawal” to lead off the OCPI sentence it certainly could have done so.

The statute detailing the procedure for applying for a water right is titled, “Appropriation procedure—Application—Contents.”³ RCW 90.03.260. This section states, “Each application for permit to appropriate water...” shall include name and address of the applicant, the supply of the water source, and other relevant details. RCW 90.03.260(1). Additionally, the statute relied on by Ecology to argue the term “withdrawal” refers to individual water right permits actually does no such thing. Ecology’s Response at 24.

The referenced section, RCW 90.44.060, begins “[a]pplications for permits for appropriation of underground water shall be made in the same form and manner provided in RCW 90.03.250 through 90.03-340...” (emphasis added). As stated above, RCW 90.03.250-340 all use the term “appropriation” in the context of individual water rights.

³ This part of the Water Code contains several sections, each detailing how to obtain a water right permit. RCW 90.03.260-340 all are entitled “Appropriation Procedure”.

Finally, the Legislature added a “Definitions” section to RCW 90.54. In this section, the Legislature defines the words “utilize” and “utilization.” RCW 90.54.120(2). It defines both as:

Shall not only mean use of water for such long recognized consumptive or nonconsumptive beneficial purposes as domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, thermal power production, mining, recreational, maintenance of wildlife and fishlife purposes, but includes the retention of water in lakes and streams for the protection of environmental, scenic, aesthetic and related purposes, upon which economic values have not been placed historically and are difficult to quantify.
RCW 90.54.120(2).

In providing this precise and out of the ordinary meaning for the terms “utilize” and “utilization” the Legislature makes its intentions regarding the OCPI exemption clear. Had the Legislature wanted the OCPI exemption to include “such long recognized consumptive or nonconsumptive beneficial purposes as domestic, stock watering, industrial, commercial...” it could easily used the word “utilization” instead of “withdrawal” to lead off the OCPI sentence. The fact that the Legislature purposefully chose not to do so shows the term “withdrawal” does not have the definition Ecology vainly attempts to prove. It is

presumed that when the Legislature “uses different words within the same statute, we (courts) recognize that a different meaning is intended.” *Simpson Inv. Co. v. Department of Revenue*, 141 Wash.2d 139, 160, 3 P.3d 741 (2000). Because the Legislative purposefully used a different term the word “withdrawal” should be given its “plain and ordinary meaning.” *North Coast Air Services*, 111 Wn.2d at 321.

The word “withdrawal” in this instance is an act. It is simply the act of taking water out of a stream. It is not, as Ecology argues, the legal process one engages in “when Ecology processes individual water right permit applications.” Ecology’s Response at 24. The Legislature’s use of the term “withdrawal” rather than “appropriation” or “utilization” is evidence only of the broad goals of the Water Resources Act.

The OCPI exemption allows Ecology, in “extraordinary circumstances”; to take water established for instream flows if it is “clear that overriding considerations of the public interest will be served.” However, because the Legislature used the term “withdrawal” rather than “appropriation” or “utilization” the Legislature did not intend for Ecology to use OCPI on individual water right permits. This is in line with the *Swinomish* ruling restricting the use OCPI to “extraordinary

circumstances” and *Postema*’s holding that it is a “narrow exception.” *Swinomish*, 178 Wn.2d at 594, *Postema*, 142 Wn.2d at 735. Issuing individual water right permits is not an extraordinary circumstance.

However, there may be instances, temporary emergency situations, in which Ecology would be authorized under the OCPI exemption to authorize the “withdrawal” of water from an instream flow. This is much different than allowing for the issuance of a water right that would permanently and perpetually take water from an instream flow, in contravention of the Water Code, case law, and RCW 90.54 itself. Employing the tools of statutory construction, and giving the term “withdrawal” its plain meaning, does not render the OCPI exemption meaningless or superfluous. It is Ecology’s reading of the statute that is contrary to its plain meaning and legislative intent and should be rejected.

- c. A water right permit for municipal use coupled with a mitigation plan is not an “extraordinary circumstance.”

Respondents claim Yelm’s increased demand for municipal water coupled with the mitigation plan fits within the *Swinomish* ruling of an “extraordinary circumstance” and therefore Ecology can utilize the OCPI exemption. Yelm’s Response at 5, Ecology’s Response at 28. Respondents attempt to characterize the mitigation plan as different than the economic

benefits Ecology relied on improperly in the *Swinomish* case. Their argument is that Ecology can use the OCPI exemption to issue new water rights that permanently impair existing instream flows if there is a mitigation plan that has “net ecological benefits” because this constitutes an “extraordinary circumstance.” Ecology Response at 30-43.

This is a legally unsupported attempt to differentiate the facts in this case from *Swinomish*. Yelm argues the facts between the two cases are inapposite. Yelm’s Response at 33. While true the *Swinomish* case concerned a water reservation and no mitigation and this case concerns a large municipal right and out-of-kind mitigation this distinction does not save them. Respondents read the *Swinomish* and *Postema* decisions too narrowly. The legal failing of Ecology in the *Swinomish* case was not that it created a reservation or did not seek mitigation. Ecology failed because it violated several statutes of the Water Code and the Prior Appropriation Doctrine with its erroneous interpretation of the OCPI exemption as stated above.

Furthermore, Respondents’ reliance on the Pollution Control Hearings Board (Board) “twelve compelling factors” to prove Ecology’s use of OCPI is narrowly crafted for an extraordinary circumstance is

improper. Respondents cannot rely on the Board's twelve factors because several of the factors do not recognize the legal holdings of *Postema* and *Swinomish* and are therefore unlawful. One factor the Board found to support Ecology's OCPI determination was that "[t]he amount of water depletion was small so that there is non or only minimal impact to water resources." CP 271-272, Final Order at 23-24 (number 8). However, under *Postema* it does not matter if the impairment is minimal or significant. *Postema*, 142 Wn.2d at 739. Therefore, the Board's finding in this regard is erroneous. Similarly, the Board found that out-of-kind mitigation was allowable to "offset the minor depletion of water." CP 271-272, Final Order at 23-24 (number 5). Ecology's own brief admits that new water rights cannot impair instream flows even if there is no showing of a "direct, and measurable impact." Ecology's Response at 18. There is no legal basis for the Board's determination that instream flows can be depleted if out-of-kind mitigation is used. It is quite the opposite in fact, as this Court enunciated in *Swinomish*.

Based the Prior Appropriation Doctrine and the many statutes relating to instream flows, subsequent appropriators cannot impair minimum flows. Ecology cannot decide that the water already

appropriated for instream flows is better served out of the stream without overcoming the burden of showing there is an extraordinary circumstance that is clearly in the overriding consideration of the public interest. More importantly, Ecology cannot issue new water rights that will permanently impair existing instream flows. Yelm's mitigation plan, which relies on ignoring the *Postema* and *Swinomish* rulings, is not an extraordinary circumstance. The Board's approval of Ecology's interpretation and application of the OCPI exemption is erroneous.

Finally, if Ecology and an applicant seeking a new water right were allowed to create the "extraordinary circumstance" via an out-of-kind mitigation package in order to use OCPI it would no longer be a "narrow exception." Instead it would become a wide-ranging policy tool for reallocation of water. As Ecology notes in its Response Brief it is moving forward with out-of-kind mitigation in order to secure new water rights. Ecology's Response at 27 fn 10. "Minor depletions" of instream flows will occur throughout the state as population increases and legally available water supply decreases. "Net ecological benefits" will replace actual minimum flows of water, previously determined via sound science,

and water levels once thought to be the absolute minimum for a healthy river system will decline.

The Water Resources Act and the statutes authorizing the creation and protection of minimum flows prove legislative intent to have these values preserved. These acts were passed in the face of growing demand to take this water out of stream and give it to an ever-growing population. Ecology's interpretation and application of the OCPI exemption is the antithesis of the goals and policies of these acts. Ecology's interpretation is contrary to the Prior Appropriation Doctrine. It is contrary to chapters 77.57 RCW, 90.22 RCW, 90.54 RCW, and 90.03 RCW. It is contrary to this Court's ruling in *Postema* and *Swinomish*. Finally, it is contrary to the legislative intent of the exemption itself.

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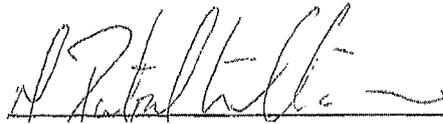
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III. Conclusion

For the foregoing reasons, Ms. Foster respectfully requests the Supreme Court rescind Water Right Permit No. G2-29085.

Dated this 24th day of October 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Patrick Williams", written over a horizontal line.

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IN THE SUPREME COURT OF WASHINGTON

SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF
ECOLOGY, POLLUTION CONTROL
HEARINGS BOARD, and THE CITY
OF YELM

Respondents.

No. 90386-7

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

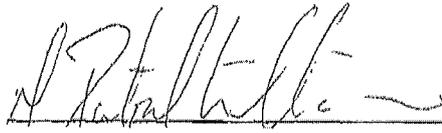
On October 24th, 2014, I e-filed Appellant's Reply Brief with the Washington State Supreme Court and served a copy of the appeal via email to:

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I declare under penalty of perjury in accordance with the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of October 2014 at Seattle, WA.

A handwritten signature in black ink, appearing to read "M. Patrick Williams", written over a horizontal line.

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To: The Law Offices of M. Patrick Williams
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Subject: RE: Appellant's Reply Brief No. 90386-7

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Attached is Appellant Sara Foster's Reply Brief and Certificate of Service in the above titled case.

Please contact me if you have questions.

Thank you,

Patrick

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