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IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and  
DAVID STALHEIM, and FUTUREWISE,  
Appellants,

v.

WHATCOM COUNTY AND WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD,  
Respondents.

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AMICUS CURIAE BRIEF OF  
THE CENTER FOR ENVIRONMENTAL LAW & POLICY

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## **I. INTRODUCTION**

The Center for Environmental Law & Policy (CELP) respectfully offers the following arguments regarding Washington’s water resources statutes, cases, and policies to assist this Court, pursuant to RAP 10.6.

## **II. IDENTITY AND INTERESTS OF AMICUS CURIAE**

Amicus curiae CELP is described in the Motion for Leave to File Amicus Brief attached hereto. The Nooksack River Instream Resources Protection Program for Water Resource Inventory Area (WRIA) 1 (“Nooksack Rule”) is an instream rule in which CELP has an interest. *See* Ch. 173-501 WAC. The Nooksack Rule implements provisions of the Water Resources Act of 1971, Ch. 90.54 RCW, and the Minimum Flows Act, Ch. 90.22 RCW, which authorize the Department of Ecology (“Ecology”) to establish “minimum water flows or levels for streams . . . for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters . . .” RCW 90.22.010. The values called out in these statutes are the same values CELP promotes generally, and more specifically in this matter through the filing of an amicus brief that directs the Court’s attention to issues of substantial public interest. CELP has deep experience in the science of protecting surface and ground water and the state’s water resources laws.

This Brief is supplemental to the amicus curiae brief<sup>1</sup> that CELP submitted in the Court of Appeals proceeding, and is responsive to the reasoning of the Court of Appeals in this matter (*Whatcom County v. Western Washington Growth Management Hearings Board*, 186 Wn. App. 32, 344 P.3d 1256 (2015)), as well as to the supplemental briefs submitted to this Court by the parties.

Briefly, CELP provides argument on a county's duty under the Growth Management Act (GMA) to protect and preserve water resources and fish and wildlife habitat through rural area planning, the deference owed to the Growth Management Hearings Board ("Board") (rather than to Ecology) regarding interpretation of the GMA, and on the implications of the Court of Appeals' decision with respect to preserving Washington's water resources.

### **III. STATEMENT OF THE CASE**

CELP concurs with and adopts the statement of the case set forth in the Hirst Petition for Review at pp. 3-8 (March 24, 2015).

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<sup>1</sup> CELP's Amicus Curiae Brief to the Court of Appeals, filed November 4, 2014 (CELP Amicus Brief).

## **IV. ARGUMENT**

### **A. Standard of Review**

This court reviews issues of statutory interpretation and claimed errors of law de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). As the party asserting error in the Board's decision related to the GMA provisions requiring the protection of surface and ground water, the burden remains on Whatcom County to demonstrate that the Board erred. RCW 34.05.570(1)(a); *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wash.2d 543, 553, 14 P.3d 133 (2000).

### **B. The Growth Management Act, not Ecology's interpretation of the Nooksack Instream Flow Rule, is primarily at issue in this case.**

#### **1. The issues in this case fall squarely within the ambit of the Growth Management Act.**

Whatcom County continues its effort to mischaracterize this case as a dispute over the meaning of Ecology's Nooksack Instream Flow Rule, Chapter 173-501 WAC (the "Rule"), on the theory that the Board must entirely defer to Ecology's interpretation of permit-exempt well use in the Nooksack watershed. Supplemental Brief of Respondent Whatcom County at 10-12. The Court of Appeals agreed with this argument, in a decision that drew heavily from Ecology's amicus curiae brief, filed with

the Court of Appeals August 29, 2014 (“Ecology Amicus Brief”).

*Whatcom County*, 186 Wn. App. 32. However, the Board’s obligation is to review comprehensive plans and development regulations adopted under the GMA, which requires the County to protect water resources in its planning under the Growth Management Act.<sup>2</sup> The Board based its decision on the evidence in the administrative record, which indisputably establishes “water availability limits.” AR 1370. The Board found that “year-round or seasonally closed watersheds account for a large portion of the County,” *id.*, and that “average minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year.” AR 1371. The County’s own reports have long recognized that “a proliferation of rural residential exempt wells . . . created ‘difficulties for effective water resource management’ by drawing down underlying aquifers and reducing groundwater recharge of streams.” *Id.*

As the Board found and the County has not disputed, “The link between stream flows and groundwater withdrawals in the shallow Whatcom

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<sup>2</sup> Under the GMA, counties meeting certain population and growth requirements (including Whatcom County) “shall” undertake certain planning activities. RCW 36.70A.040(1). Planning goals under the GMA include to “conserve fish and wildlife habitat” and “the availability of water.” RCW 36.70A.020(9); .020(10). Pertinent to this case, counties’ obligations include planning for a “rural element,” providing for protection of surface water and groundwater resources. RCW 36.70A.070(1); .070(5)(c)(iv). Rural character is defined in part as being “compatible with the use of the land . . . for fish and wildlife habitat,” and “consistent with protection of natural surface flows and groundwater and surface water recharge and discharge areas.” RCW 36.70A.030(15)(d); (g).

aquifers is well documented. ‘A number of studies indicate that shallow aquifers of the County are responsible for approximately 70% of base stream flow.’” *Id.* In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011), this Court held that counties “must regulate to some extent to assure that land use is not inconsistent with available water resources.”

The GMA’s planning obligations are placed directly on counties,<sup>3</sup> and exist whether or not Ecology has enacted an instream flow rule for a given river basin. It is precisely Whatcom County’s failure to meet its GMA obligations to protect water resources that is at issue here.<sup>4</sup>

## **2. The Board’s decision was based on the GMA.**

The Board’s Final Decision and Order demonstrates that the Board carefully considered the relationship between land use and water resources. AR 1377-82. Its decision with respect to water quantity was based on its finding that the County’s Policies and Ordinances<sup>5</sup> failed to protect water availability as required by RCW 36.70A.020(10), RCW

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<sup>3</sup> Ecology agrees that “under *Kittitas*, in order to comply with the GMA, the County’s Comprehensive Plan must include measures that ensure that future development in rural areas will not adversely affect water availability.” Ecology Amicus Brief at 8.

<sup>4</sup> The County concedes this: “the central issue in this case explores the County’s responsibility under the [GMA] to adopt rural measures protecting surface and groundwater resources.” Supplemental Brief of Respondent Whatcom County at 1.

<sup>5</sup> Rural Element Policy 2DD-2C incorporates by reference the following Whatcom County Code provisions: WCC 24.11.090((B)(3), WCC 24.11.160(D)(3), and WCC 24.11.170(E)(3). Each of these provisions requires only that a proposed private well “not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist.”

36.70A.030(15), RCW 36.70A.070(1), and .070(5)(c)(iv). AR1382. The Board carried out its function under the GMA, examining the County's Comprehensive Plan policies for consistency with GMA requirements regarding water resources.

According to Whatcom County, the Board's decision represents a "collateral attack" on Ecology's Rule, and resolution of GMA issues regarding water availability can only be resolved through Ecology rulemaking. Supplemental Brief of Respondent Whatcom County at 11. This is simply incorrect, and merely exposes the County's attempt to deflect its GMA responsibilities (which exist regardless of the details of Ecology's Rule) onto Ecology.

**3. By fulfilling its GMA obligations, the County would not create any "duplication of regulation" or conflict with Ecology's Rule**

The County argues that the Board's ruling would force it to make decisions that are "independent of and contrary to Ecology's." Supplemental Brief of Respondent Whatcom County at 9. In fact, the GMA requires that the County adopt measures to protect rural water resources, whether or not Ecology has addressed water availability by rule. *See* section V.B.1, *supra*.

In its amicus brief to the Court of Appeals, Ecology argued that the WRIA 1 Rule does not govern groundwater, including permit-exempt

groundwater use. Ecology Amicus Brief at 15-16. Ecology has not made any finding that water *does* exist for development relying on permit-exempt wells. So, the Board's decision that the County must implement the GMA provisions requiring building permit and subdivision applicants to provide evidence of water availability cannot possibly be "contrary" to Ecology's decision. To the contrary, the County's blanket policy that permit-exempt well use is permissible conflicts with Ecology's closure of certain streams to further appropriation, by ignoring established water law principles regarding groundwater in continuity with closed streams.

*Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 95, 11 P.3d 726 (2000).

**C. The County's argument that consistency with Ecology's interpretation of the Nooksack Rule constitutes GMA compliance is without merit.**

- 1. Because its Rural Element requires the County to assume that water is always available for permit-exempt wells, even in closed water basins and in basins subject to unmet instream flows, the Rural Element does not comply with GMA requirements to determine water availability.**

Whatcom County argues that because its Rural Element incorporates regulations that refer to Ecology's Rule, it is necessarily compliant with

the GMA.<sup>6</sup> This proposition is demonstrably false. The County ordinances incorporated by reference in the Rural Element require the County to approve building permits and subdivision applications relying on permit-exempt wells, with no determination of water availability for development, anywhere outside “the boundaries of an area where DOE has determined by rule that water for development does not exist.” WCC 24.11.090(B)(3); WCC 24.11.160(D)(3); WCC 24.11.170(E)(3).

The County reads the Nooksack Rule to not apply to permit-exempt groundwater withdrawals.<sup>7</sup> Under this interpretation, the Rule does not establish boundaries specifying where water is not available. As a result, the Rural Element requires building permits and subdivision approvals to be issued without any showing of water availability. But this ignores the GMA, as well as the water codes and the prior appropriation system.

The County’s Comprehensive Plan would allow it to issue enough building permits or subdivision approvals supported by permit-exempt wells to completely dewater hydraulically connected streams.<sup>8</sup> This

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<sup>6</sup> However, the County agrees that the GMA, as interpreted by this Court in *Kittitas*, requires a county to plan for land use in a manner “consistent with the laws regarding protection of water resources.” Supplemental Brief of Respondent Whatcom County at 6.

<sup>7</sup> The County’s reading of the Rule is based on Ecology’s position that “the Rule’s closures and minimum flow requirements are not applicable to permit-exempt wells in Whatcom County.” Ecology Amicus Brief at 15-16.

<sup>8</sup> Of course, the instream flow as established in the Rule would be violated under these circumstances. Pursuant to established water law principles, withdrawals of water in

interpretation, however, violates the County’s GMA duties to plan for “protection of the quality and quantity of groundwater used for public water supplies” or to protect “surface water and groundwater resources.” RCW 36.70A.070(1); .070(5)(c)(iv). Because the instream flow established by the WRIA 1 Rule constitutes a senior water right, this would also violate the prior appropriations doctrine.<sup>9</sup>

**D. The Court of Appeals improperly deferred to Ecology, rather than to the Board, on interpretation of the Growth Management Act.**

**1. The Court of Appeals relied heavily on Ecology’s arguments relating to Whatcom County’s GMA obligations.**

The Court of Appeals based its decision largely on Ecology’s positions as set forth in its amicus brief. For example, the court stated that it relied on Ecology’s reasoning for the proposition that the Nooksack Rule does not address permit-exempt withdrawals<sup>10</sup> and went on to cite with approval Ecology’s statement that the Rule “does not mandate that water is no longer available for certain new permit-exempt groundwater

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continuity with streams that impairs the instream flow established by rule are not permissible. See WAC 173-501-060.

<sup>9</sup> *Squaxin Island Tribe v. Dept. of Ecology*, 177 Wn. App. 734, 737 n.3, 312 P.3d 766 (2013)

<sup>10</sup> As well as stating that its Rule did not apply to permit-exempt water use, Ecology’s amicus brief opined in no fewer than three places that the County’s land use regulations comply with the GMA. Ecology Amicus Brief at 3; 8; 12.

uses in rural areas of Whatcom County . . .” *Whatcom County*, 186 Wn. App. at 57; 58.

The court further adopted Ecology’s interpretation of the GMA when it concluded that the County could properly fulfill its obligations by doing no more than “adopting regulations that are consistent with Ecology’s Nooksack Rule.”<sup>11</sup> *Id.* at 62. The court was incorrect in finding that the regulations were “consistent” with the Rule, which requires the protection of instream flows, and was incorrect in concluding that the Ecology’s interpretation defines and limits the County’s GMA obligations.

**2. The Board, not Ecology, is entitled to deference with respect to interpretation of the Growth Management Act.**

The Court of Appeals effectively deferred to Ecology not only on the interpretation of the Rule, but also on the question of whether Whatcom County complied with its GMA obligations merely by incorporating regulations that make a reference to the Nooksack Rule. However, the Board, not Ecology, is entitled to deference in interpreting the GMA. Accordingly, Ecology’s interpretation of what a county must

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<sup>11</sup> “[W]hile [under the GMA] counties could adopt provisions that are more restrictive of water use than Ecology rules . . . they are not required to do so.” Ecology Amicus Brief at 4; 12. The obvious flaw in this reasoning is that, where Ecology has enacted no rule, a county would be required to do nothing. Not surprisingly, Ecology offers no authority for this novel proposition.

do to comply with the GMA is not entitled to deference. RCW 34.05.570(3)(b).

In contrast to Ecology, the Board's interpretation of the GMA is entitled to deference, with a reviewing court giving "substantial weight to the Board's interpretation of the statute it administers."<sup>12</sup> *Kittitas*, 172 Wn.2d at 154; *King County*, 142 Wn.2d at 553. While the Board is to give deference to a county's planning choices, such deference does not extend to interpretation of the GMA. *Kittitas*, 172 Wn. 2d at 156. In *Lewis County v. Western Wash. Growth Management Hearings Board*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006), this Court held that the Board was "entitled to deference in determining what the GMA requires." "What the GMA requires" is precisely what is at issue in this case, and it is precisely what the Board was properly charged with determining.

In *Kittitas*, this Court acknowledged the Eastern Washington Growth Management Hearings Board's jurisdiction over land use matters that affect the water supply, and affirmed that Board's ruling that, under the GMA, a county's land use regulations must protect the water resource. *Kittitas*, 172 Wn.2d at 177-8. Here, just as in *Kittitas*, the County's land use regulations failed to protect the water resource, and just as in *Kittitas*, the Hearings Board found the regulations invalid. The Board's reasoned

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<sup>12</sup> The Court of Appeals' decision itself recognizes this. See *Whatcom County*, 186 Wn. App. at 42.

interpretation of the statutory scheme is entitled to deference under *King County, Kittitas, and Lewis County*.

**3. Ecology cannot negate statutory law and decades of this Court's precedents through administrative rulemaking.**

In short, Whatcom County and Ecology argue that because the 1985 instream flow rule does not address permit-exempt wells, the County may disregard the first-in-time system, the statutory scheme for protection of water resources, and 30 years of this Court's precedents on water and exempt wells. That cannot be the law. Plainly, an administrative rule cannot modify or amend a statute. *H & H Partnership v. State*, 115 Wn. App. 164, 170, 62 P.3d 510 (2003) (Ecology rule cannot modify statutory deadline for filing Shoreline Management Act appeal). To the extent that it conflicts with applicable law, such a rule would be *ultra vires* and subject to invalidation. *Id.* Regardless of its language or interpretation, Ecology's Nooksack Rule may not allow water withdrawals that impair senior rights, may not modify the duties placed on Whatcom County by the GMA, and may not excuse the County's failure to protect water resources as required by law.<sup>13</sup>

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<sup>13</sup> See also WAC 365-196-715(4) (counties and cities to consider related laws in land use planning); WAC 365-196-735(1) (counties to consider existing land use, resource management, and environmental protection regulations).

**E. Whatcom County's interpretation of the GMA would lead to inconsistency in statewide regulation of water use.**

The County argues that because the Rule does not apply to permit-exempt water use, the County need not consider the effect of such water use on surface or groundwater resources in its land use planning.

The absurd result of the County's scheme would be that any planning jurisdiction located in a watershed for which Ecology has not yet enacted an instream flow rule would have no responsibilities to evaluate water availability, or to even consider protection of water resources, in its planning for rural development. This would have far-reaching and dangerous implications for protection of Washington's water resources.

**1. Under the Court of Appeals' decision, instream flows in much of the state would be wholly unprotected from impairment by permit-exempt wells.**

Because groundwater is generally in hydraulic continuity with surface flows, streamflows can be impaired by groundwater withdrawal. *Postema*, 142 Wn.2d at 76; *Squaxin Island Tribe*, 177 Wn. App. at 737; *Hubbard v. State*, 86 Wn. App. 119, 125, 936 P.2d 27 (1997). Where a stream has been closed to appropriation due to low flow, an application for withdrawal of groundwater that would affect streamflow must be denied. *Postema*, 142 Wn.2d at 95.

Permit-exempt wells, like other water rights, are subject to the prior appropriations doctrine, and may not impair pre-existing instream flows. *Id.* at 89-90 (rejecting argument that exemptions from permitting system allow impairment of existing water rights).<sup>14</sup>

Instream flow rules in many WRIAs, including those in some of the most populous or water-short areas in Washington, do not mention permit-exempt wells.<sup>15</sup> The GMA and the water resources statutes nonetheless require protection of base flows. RCW 90.54.020(3)(a) (rivers and streams “shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values”) (emphasis added). If counties in those basins were allowed to follow Whatcom County in declining to consider water availability in their land use planning decisions, streamflows would be subject to essentially unlimited impairment by permit-exempt withdrawals.<sup>16</sup>

Water law treats permit-exempt wells consistently, whether an instream flow rule includes language specific to permit-exempt wells or relies on the prior appropriation doctrine alone to address such

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<sup>14</sup> See CELP Amicus Brief at Section IV.C.3.

<sup>15</sup> The rules for the Snohomish, Cedar-Sammamish, Green-Duwamish, Puyallup, Nisqually, and Okanogan river basins, *inter alia*, do not specifically address permit-exempt wells. See Chapters 173-507, 173-508, 173-509, 173-510, 173-511, and 173-549 WAC.

<sup>16</sup> For a discussion of the implications of *Whatcom County* in the Deschutes and Kennedy-Goldsborough watersheds (WRIAs 13 and 14), see section V.B of the Squaxin Island Tribe’s Amicus Curiae Brief.

withdrawals.<sup>17</sup> Under Ecology’s and Whatcom County’s interpretation of the GMA, however, use of permit-exempt wells and corresponding reductions of streamflows would also vary from basin to basin. This would lead to inconsistent protection of water resources in different areas of the state, contrary to RCW 90.54.020(3)(a)’s requirement that flows “shall” be retained. It would also lead to inconsistent application of the prior appropriation doctrine.

**2. The Court of Appeals’ decision would upend the prior appropriation system in Washington.**

Extensive development based on new permit-exempt wells sets up an inevitable conflict with more senior right holders. As appropriative water rights, instream flows in Washington enjoy the same protection from impairment by junior users, including permit-exempt wells, as do any other senior water right. *Swinomish Tribal Comm. v. Ecology*, 178 Wn.2d 571, 597, 311 P.3d 6 (2013); *Squaxin Island Tribe*, 177 Wn. App. at 737 n.3. When permit-exempt wells deplete stream levels, they also potentially impair the abilities of senior users to exercise their out-of-stream rights. *See* sections IV.C.2-3 of CELP Amicus Brief. Many exempt wells have been constructed in WRIA 1. Since 1986, exempt

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<sup>17</sup> For example, the Snohomish River rule exempts “domestic inhouse use for a single residence” from regulation, but makes no specific mention of permit-exempt wells. WAC 173-507-050(2). On the other hand, the Methow River rule bars new permit-exempt wells in certain areas without a water right. WAC 173-548-050.

wells in WRIA 1 have increased from an estimated 3,294 wells to an estimated 12,195 wells, and approximately 77% of that increase has been in basins closed to water withdrawals. AR 1803.

By removing limitations on development that relies on permit-exempt wells, the Court of Appeals' decision eliminates the protection from impairment enjoyed by senior users, creating a "super-priority" class of users.<sup>18</sup> Ecology has expressly taken the position that the closures in the Nooksack Rule simply do not apply to permit-exempt groundwater withdrawals.<sup>19</sup> Ecology Amicus Brief at 13-20; *see also* CELP Amicus Brief at Sec. IV.C.3. By relying on Ecology's interpretation of groundwater regulation, this decision would authorize groundwater withdrawals in continuity with streams that have been closed to further withdrawals, in violation of statutes and this Court's precedents.

**3. Permit-exempt diversions in basins where instream flows are already impaired will increase the impacts of climate change.**

Washington State is already experiencing the effects of climate change, and predictions are that summer streamflows will be further

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<sup>18</sup> As a result, some of the most junior water rights in a basin would effectively be given the highest priority.

<sup>19</sup> "[T]he express language of the Rule pertains only to whether water rights can be established under the permitting system . . ." Ecology Amicus Brief at 16; "The language in all the above sections pertains to the issuance of water right permits, and cannot be read to also apply to permit-exempt groundwater withdrawals which occur outside of the permitting system . . . As a result, the Nooksack Rule, in its present form, does not govern permit-exempt groundwater use." *Id.* at 17-8.

reduced in future years.<sup>20</sup> Land use policies that allow unfettered development of permit-exempt wells will increase pressure on streams even while climate change reduces streamflows, and reduce the state's ability to comply with its statutory obligation to manage its water resources to protect fish and wildlife. As a practical matter, once exempt water use for residential development has begun, it is politically almost impossible to curtail. *See Campbell & Gwinn*, 146 Wn.2d at 17 (“after the fact” remedies are less effective than review before appropriation occurs). See also CELP Amicus Brief at 15-18 (describing state policy against use of interruptible water rights for domestic use).

**F. The Court of Appeals' decision would render parts of the Growth Management Act superfluous.**

Statutes should be construed so as not to render any portion superfluous. *Stone v. Chelan Cty. Sheriff's Office*, 110 Wn.2d 806, 811, 756 P.2d 736 (1988).

**1. The Court of Appeals reads the requirement to protect water resources out of the GMA.**

Several GMA provisions specifically require a county to protect water resources in its land use planning. RCW 36.70A.020(9), .020(10);

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<sup>20</sup> L. Binder, *Preparing for Climate Change in the U.S. Pacific Northwest*, 15 Hastings W.-N.W. J. Env. L. & Pol'y 183, 184-85 (2009). Ecology has recognized that “shrinking snow packs and other effects of climate change” affect water resource management to protect instream flows. Ecology, *Instream Flow Rules* (undated, accessed 9/3/15), available at <http://www.ecy.wa.gov/programs/wr/instream-flows/isfrul.html>.

RCW 36.70A.070(5)(c)(iv); RCW 36.70A.030(15) (d), .030(15)(g).

Under the scheme for water regulation that includes the GMA, a county is to act in cooperation with Ecology; their duties are complementary, not redundant. As the *Kittitas* court noted, “[w]hile Ecology 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, including subdivision, at least to the extent required by law.” *Kittitas*, 172 Wn.2d at 180. “The extent required by law” unquestionably includes the duties placed on the County by the GMA.<sup>21</sup> The Court of Appeals’ conclusion that the County need not regulate to protect water resources beyond what Ecology has chosen to do (or not do) would render each of these provisions superfluous.

If the Legislature wanted to give Ecology sole authority over land and water use, it could have done so. But it did not, and all of the GMA provisions referenced above can be given meaning only by interpreting them to mean what they say: counties must regulate land use to protect water resources.

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<sup>21</sup> RCW 36.70A.020(9), .020(10); RCW 36.70A.070(5)(c)(iv); RCW 36.70A.030(15)(d), .030(15)(g).

**2. The Court of Appeals' decision negates an applicant's burden to show an adequate water supply for a building permit or subdivision.**

The GMA also places the burden to show adequate availability of water on an applicant for a building or subdivision permit. RCW 19.27.097(1); RCW 58.17.110(2)(a). The applicant must demonstrate not only the physical presence of water, but its legal availability. *Kittitas*, 172 Wn.2d at 180. Where a permit-exempt well would impair streamflows in an area closed to further surface water appropriations, the legal availability standard is not met. *Postema*, 142 Wn.2d at 89-90.

The Court of Appeals' decision would read this requirement, too, out of the statutes. The language of RCW 19.27.097 and RCW 58.17.110(2)(a) can only be given meaning by requiring more from an applicant than the bare statement that a permit-exempt well would be used to support a development project.

RCW 19.27.097 states that an adequate water supply may be shown by "a water right permit from the Department of Ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply." The Board correctly recognized that the County's Comprehensive Plan and development regulations do not require this showing, in violation of the GMA. AR1389.

## V. CONCLUSION

The Board's decision was reasoned and correct under the laws requiring protection of our state's water resources. By recognizing Whatcom County's duties under the GMA, the Board respected and implemented Washington's statutory scheme requiring water resource protection. For the reasons set forth above, amicus curiae CELP respectfully requests that this Court reverse the Court of Appeals' decision in this matter and reinstate the Board's Final Decision and Order.

Respectfully submitted this 4<sup>th</sup> day of September, 2015.

/s/ Dan J. Von Seggern

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**DECLARATION OF SERVICE**

I, Dan J. Von Seggern, certify that I am a resident of the State of Washington, residing in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on September 4, 2015, I caused the following documents to be served on the following parties in the manner indicated: **Motion of Center for Environmental Law & Policy to File Amicus Curiae Brief; Center for Environmental Law & Policy's Amicus Curiae Brief.**

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Signed and certified on this 4th day of September, 2015,

Dan J. Von Seggern

/s/ Dan J. Von Seggern

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Court and Counsel-

Attached is an updated copy of CELP's amicus curiae brief for filing in this case, with a formatting error corrected. Please substitute this for the version previously circulated. There are no changes to CELP's Motion to File Amicus Brief.

Thank you.

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