No. 91475-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

WHATCOM COUNTY AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, WASHINGTON REALTORS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON STATE FARM BUREAU, AND WASHINGTON STATE ASSOCIATION OF COUNTIES,

Amici Curiae.

RESPONDENT WHATCOM COUNTY'S ANSWER TO AMICUS CURIAE MEMORANDA

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I. INTRODUCTION

Whatcom County (the "County") submits this answer to the amicus memoranda filed by the Squaxin Island Tribe ("Tribe") and the Center for Environmental Law & Policy ("CELP"). In their memoranda, CELP and the Tribe support the Petition for Review (the "Petition") filed by Eric Hirst, Laura Lee Brakke, Wendy Harris, David Stalheim, and Futurewise (collectively "Hirst") seeking review of the Court of Appeals decision in *Whatcom County v. Hirst*, 186 Wn.App 32, 344 P.3d 1256 (2015) ("the Decision"). CELP and the Tribe seek to support only one of the several issues raised in Hirst's Petition; specifically, the Tribe and CELP ask this Court to review the Court of Appeals' conclusion that the County's "rural measures" addressing water supply availability comply with Growth Management Act ("GMA") requirements to protect surface water and groundwater resources pursuant to RCW 36.70A.070(5)(c).

CELP and the Tribe's memoranda largely restate Hirst's arguments in Hirst's Petition for Review which the County has already addressed in its Answer to Hirst's Petition. For the reasons included in the County's Answer to Hirst's Petition and as explained in further detail below, the Court should deny Hirst's Petition on the issue of water availability. The Decision is well-reasoned and thorough. The Court correctly concluded that the County's cooperative regulatory approach to water availability, which incorporates Ecology's instream flow regulations into the County's land use decision making, complies with the GMA. CELP's and the Tribe's memoranda, like Hirst's Petition, fail to justify Supreme Court

review. Their memoranda, like Hirst's Petition, demonstrate that their real grievance is with the Department of Ecology ("Ecology") and its interpretation and enforcement of the governing instream flow rule, not with the County and its rural measures. While the County does not concede that their arguments have merit, Hirst, CELP and the Tribe should be required to pursue recourse for that grievance in any number of avenues available to them under the Water Code and the APA. They should not be allowed to leverage the County's GMA planning to seek changes in Ecology's water resources management and policy. Review by this Court is not warranted.

II. STATEMENT OF THE CASE

The County incorporates the statement of the case included in the County's Answer to Hirst's Petition.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

In their memoranda, the Tribe and CELP fail to demonstrate that Hirst's request related to water availability satisfies the criteria in RAP 13.4(b). The portions of the Decision related to water availability are not in conflict with any decisions of this Court, nor do those portions of the Decision involve an issue of substantial public interest. Accordingly, this Court should deny the Petition.

A. The Decision's Conclusions Regarding Water Availability Are Consistent with this Court's Decisions.

Like Hirst, CELP fails to establish that the Court of Appeals' conclusions regarding GMA protections for water availability are inconsistent in any way with prior Supreme Court decisions. The County incorporates and does not repeat the arguments in its Answer to Hirst's Petition[1] demonstrating that the Decision is consistent with Supreme Court precedent, including: *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.* ("*Kittitas*[2]"); *Postema v. Pollution Control Hearings Bd.* ("*Postema*")[3]; *Swinomish v. Ecology* ("*Swinomish*")[4]; and *Ecology v. Campbell & Gwinn* ("*Campbell & Gwinn*").[5]

In its specific arguments related to *Kittitas*, CELP grossly mischaracterizes the Court of Appeals' consideration and characterization of *Kittitas*. Contrary to CELP's assertions, the Court of Appeals did not "read *Kittitas* as limited to a single narrow issue" related to the daisy-chaining of permit exempt withdrawals that was the specific subject of *Kittitas*. CELP Memorandum at 6. Indeed, the Court of Appeals first observed, as did the Board below, that the specific question in this case is different than that before the Court in *Kittitas*.[6] Noting that *Kittitas* "provides helpful guidance into the proper relationship between Ecology

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[1] *See* County's Answer to Petition for Review at §III.A.
[2] 172 Wn.2d 144, 180, 256 P.3d 1193, 1210 (2011).
[3] 142 Wn 2d 68, 87, 11 P.3d 726, 738 (2000).
[4] 178 Wn.2d 571, 576, 579, 598, 311 P.3d 6, 7, 9, 19 (2013).
[5] 146 Wn.2d 1, 43 P.3d 4 (2002).
[6] 186 Wn.App at 47-48, 344 P.3d at 1263-1264. (quoting FDO).

and counties for purposes of the GMA" the Court then extended *Kittitas* to the specific issue in this case.[7] Thus CELP's assertion that the Court limited *Kittitas* to the specific facts at issue in that case is wrong.[8]

Similarly, CELP's specific citation to *Postema* does not support its claims. In the passage from *Postema* to which CELP cites, the Court indirectly addressed the question of permit-exempt withdrawals and concluded that the exemption from the permitting process for certain domestic uses is not relevant to the criteria applied by Ecology when evaluating new permit applications. 142 Wn.2d at 89. Specifically, the Court rejected a water right permit applicant's arguments that Ecology's permit decision criteria allow for *de minimis* impacts on existing rights. In support of this argument, the applicant analogized to exemptions for domestic use, including the exemption under RCW 90.44.050 and a provision in an instream flow rule exempting single family domestic use even where the withdrawal is from a stream closed to further appropriation. *Id.* (citing WAC 173-508-080(2)). *Postema* rejected the analogy because the exemptions did not apply to the permit application at issue in that case and were therefore irrelevant to the Court's analysis of standards applied under RCW 90.03.290 for permit applications. The

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[7] 186 Wn.App at 47, 50, 344 P.3d at 1263, 1265.

[8] 186 Wn.App at 50, 344 P.3d at 1265.The Court of Appeals embraced the broad, general principle from *Kittitas* that CELP, like Hirst, claims the appellate court ignored. The Court of Appeals confirmed that this general premise has never been contested by the County, stating that the relevant, more refined question is "whether the County must make its own determination about the availability of water or whether it may meet the requirements of the GMA by invoking the assistance of Ecology by the code provisions at issue here."

Court did not directly address permit exempt withdrawals. Thus the Court of Appeals in *Hirst* did not read *Postema* "too narrowly," as CELP contends.

The Court should therefore reject CELP's assertions that the Court ignored or failed to recognize the general principles expressed in other cited Supreme Court water law precedent. The appellate court carefully reconciled its decision in this case with prior decisions of this Court.

B. The Petition's Allegations Regarding Water Availability Do Not Raise an Issue of Substantial Public Interest.

Because the Court of Appeals has correctly resolved all of the issues raised by Hirst in a methodical, well-reasoned, and published Decision, the Petition does not involve an issue of substantial public interest that warrants review by this Court. CELP's and the Tribe's arguments to the contrary largely stem from their allegations that *Hirst* is inconsistent with Supreme Court precedent. Their arguments are without merit.

CELP and the Tribe's arguments on public interest are also based on their incorrect assertion that the County fails to assess the legal availability of water. For example, CELP incorrectly characterizes the County's argument as claiming "that it need not regulate development relying on permit-exempt wells,"[9] and characterizes the central issue in the case as whether "the GMA require[s] a County to protect surface and

[9] CELP's Memorandum at 7.

ground water resources by regulating development proposing to use water" from a permit-exempt withdrawal. Contrary to their suggestions, the County does regulate development relying on permit exempt withdrawals. The question is not whether the County assesses legal availability, but how. In this case, the County prohibits new development premised on a permit exempt withdrawal in areas where Ecology has determined by rule that water is not available. WCC 24.11.090(B)(3), *see also* AR 1663-1676. The County evaluates development proposals relying on permit exempt withdrawals, but because the instream flow rule, according to Ecology, does not legally preclude establishment of a permit-exempt withdrawal, development that relies on that water source may proceed.

The Court of Appeals concluded that this approach is precisely the type of cooperative approach required by the GMA. Specifically, the Court noted that "the supreme court in *Kittitas* anticipated ***consistent*** local regulation by counties in land use planning to protect water resources."[10] Applying *Kittitas*, the Court held that the County's regulations "provide for cooperation between the County's exercise of its land use authority and Ecology's management of water resources," which is "consistent with the cooperative relationship contemplated by *Kittitas* and is consistent with the laws regarding protection of water resources under the GMA."[11]

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[10] 186 Wn.App at 51, 344 P.3d at 1265. (emphasis in original).

[11] 186 Wn.App at 51, 344 P.3d at 1265

Ultimately, CELP and the Tribe's arguments demonstrate that their underlying grievance is with Ecology and its management of water resources, not with the County. The Tribe overtly expresses its frustration with "Ecology's often-defective WRIA regulations"[12] and argues that Ecology's interpretation of the Nooksack rule "directly conflicts with the statutory scheme,"[13] further opining in a section heading that "Ecology Has Lost Sight of Its Statutory Framework, to the Detriment of the Public Interest."[14] More generally, both of their memoranda focus on whether permit exempt withdrawals impair instream flows, which is an issue under Title 90 RCW. The mechanism for resolving those arguments rests in Title 90 RCW and with Ecology, not with the County. Title 90 includes many mechanisms for directly addressing Hirst's, the Tribe's and CELP's claims related to impairment, both programmatically and on a water right-by-water right basis, including: the adjudication process in chapter 90.03 RCW; petitioning the agency for a rulemaking under the APA, chapter 34.05 RCW; petitioning for establishment of a groundwater management zones in chapter 90.44 RCW; and lawsuits against Ecology for its implementation of a rule as applied or on its face. CELP and the Tribe can and do regularly pursue these avenues against Ecology to seek recourse for their issues of concern, but may not always like the outcome. Their

[12] Tribe's Memorandum at 3
[13] Tribe's Memorandum at 8.
[14] *Id.*

frustration with Ecology and those available avenues of recourse do not justify their approach in this case.[15]

Both the Tribe and CELP ask this Court to force the County to take a primary role in water appropriations decisions and water resources management and policy. Specifically, they ask the County to impose an impairment analysis for permit-exempt withdrawals that Ecology does not require because those water rights are expressly exempt from that part of the application process.[16] Moreover, they suggest that the generic directive in the GMA at issue in this case requires the County to usurp Ecology's authority over instream flows which, by statute, rests exclusively with Ecology.[17] Neither the GMA nor *Kittitas* support that result.

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[15] Notably, if Hirst, CELP, or the Tribe prevailed in any of these appropriate avenues and it resulted in an amendment to the rule or a change in its interpretation that reflects their position on permit-exempt withdrawals, the County's rural measures would automatically prohibit new development in the Nooksack basin that relies on permit-exempt wells. This simple fact confirms that this GMA appeal is not the appropriate forum for the relief sought by Hirst and *amici*.

[16] Contrary to the Tribe and CELP's contentions, this is different than saying that permit exempt withdrawals are exempt from the prior appropriation doctrine. In that regard, Ecology's briefing from the *Squaxin Island* case attached to the Tribe's brief is consistent with Ecology's current position in this case. A permit-exempt withdrawal is a water right, subject to priority doctrine, and, as argued by Ecology in the *Squaxin* case, "a senior user is not without remedies should that senior user maintain that junior permit exempt uses are causing impairment." Exhibit 1 to Tribe's Memorandum at 44. The question before this Court is whether an impairment analysis is required prior to proceeding with a permit-exempt withdrawal. Simply put, an impairment analysis is not required. Such a requirement would eviscerate the exemption from the permitting process. Nor does the GMA authorize the County to regulate permit exempt withdrawals and in a manner more aggressive role than Ecology by requiring an impairment analysis from which it is expressly exempt.

[17] RCW 90.03.247 ("No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of

In support of this flawed premise, CELP quotes *Kittitas* County, while ignoring a central limiting part of the quotation to which it cites: "the County is not precluded, and in fact, is required to plan for the protection of water resources in its land use planning." CELP's Brief at 8 (quoting *Kittitas County*, 172 Wn.2d at 179). The County has accomplished that by coordinating its land use decisions with Ecology's water resource management decisions. By contrast, Hirst, CELP and the Tribe's position would constitute a sweeping extension of what *Kittitas* envisioned, beyond the County's careful exercise of its land use authority in a coordinated manner, consistent with Ecology's water resources management program.

One of the very statutes to which the Tribe cites in support of its arguments actually contradicts their fundamental premise. The Tribe cites to the 1971 Water Resources Act, chapter 90.54 RCW, which establishes a state-led "comprehensive water resource planning" process. This regional-scale "comprehensive water resources planning" is distinct from County comprehensive land use planning under the GMA.[18] Chapter 90.54 RCW directs Ecology to lead the water resource planning process,

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ecology whose authority to establish is exclusive, as provided in chapter 90.03 RCW and RCW 90.22.010 and 90.54.040.") (Emphasis added).

[18] *See* RCW 90.54.030 (explaining Ecology's role in the performance of the water resources program and development of the comprehensive water resource data program); RCW 90.54.040(1) (directing Ecology to develop and implement "a comprehensive state water resources program"); RCW 90.54.040(2) (directing Ecology "to modify existing regulations and adopt new regulations, when needed and possible," to regulations align with water resource policy of the act and the water resources program)

not local governments.[19] Thus the majority of the sections in chapter 90.54 RCW to which the Tribe cites are directed at Ecology. The statute envisions that local governments as well as Tribes will participate in that planning process.[20] That statute further indicates that local governments should, "whenever possible" exercise their authority "in manners which are consistent with" that state-directed water resources policy, underscoring the need for cooperative and consistent land use planning expressed in *Kittitas*. RCW 90.54.090 (emphasis added). Thus, the Water Resources Act does not support the Tribe's sweeping extension of water resources responsibilities to local government.

IV. CONCLUSION

The water availability issue addressed in *Hirst* does not merit review by the Supreme Court. The County respectfully requests that the Court reject Hirst's Petition.

Respectfully submitted this 17th day of June, 2015.

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[19] RCW 90.54.030; RCW 90.54.040
[20] RCW 90.54.010(1)(b); RCW 90.54.010(1)(d)