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73315-0-I

No. ~~73315-0-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 HEALTH 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

APPELLANT'S ANSWER TO AMICUS CELP's BRIEF

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ANSWER TO AMICUS BRIEF

A. Introduction

Amicus curiae Center for Environmental Law & Policy (CELP) asks the Court to reject the Fox's argument regarding permit exempt groundwater wells for human domestic use. However, Amicus CELP only takes up issue with common law riparian ground water rights, and does not address the common law appropriative ground water rights.

Ecology has the duties and powers only prescribed by the legislature. The legislature has chosen to allow Ecology to regulate permit exempt withdrawals by way of monitoring and data collection only. RCW 90.44.050. As stated by the attorney general's opinion in 2009, if this monitoring shows exempt withdrawals have an impact that warrants attention, the issue can be taken up with the legislature. "If the information shows that exempt withdrawals are jeopardizing the quantity or quality of water available, these facts can be drawn to the attention of the Legislature, which is the proper body to consider changes in the state's water resource policies." 2005 AGO No. 17 p.7.

CELP's argument that Ecology can do away with exempt wells by virtue of an Instream Flow Rule is at odds with what the legislature has

stated since 1945, is at odds with the balance the legislature has already struck in RCW 90.44.050, and is at odds with the case law of Washington, and at odds with formal attorney general opinions.

Accordingly, CELP's arguments are without merit in this court, an error correcting court, and the merits of CELP's arguments, if any there be, should be directed at the legislature.

Preliminarily, Fox points out that CELPs briefing was submitted on or the day prior to *Foster v. Dep't of Ecology*, 2105 Wash. Lexis 1184 (2015)(slip opinion). In *Foster,* the Supreme Court recognized that the legislature intended different meanings when it uses the term "appropriation" and "withdrawal" within the water code– at least within the context of the overriding considerations of public interest exception to impairment of instream flows. While the court did not have before it the scope of RCW 90.44.050 rights, these textual distinctions are ones Ecology has ignored in addressing whether the exemptions reflect other types of rights besides only common law appropriative rights in the origination of water rights, but that Fox highlighted in their arguments in the context of RCW 90.44.050 to the trial court, in their opening brief, and particularly in their Consolidated Reply Brief submitted even prior to the *Foster* decision being handed down.

B. CELP ignores both broad principles and certain nuances in Washington's water resource scheme with respect to certain small domestic human uses exempt from administrative pre-approval.

It is true that the water code of 1917 and 1945 provides a comprehensive scheme for regulation of water use within the state. And this scheme is primarily and fundamentally accomplished through the permit process (i.e. pre-approval process), and when a use does not require a permit, through the courts and enforcement in making sure the uses not requiring a permit are reserved for those people and uses that plainly qualify through monitoring and court protections of the carefully circumscribed qualification criteria. RCW 90.44.050; *Kim v. Pollution Control Hearings Board,* 115 Wn. App. 157, 61 P.3d 1211 (2003)(overturning the PCHB's too narrow interpretation of the exemptions, rejecting the concept that RCW 90.44.050 must be read in light of modern understanding of hydraulic connectivity and federal protection of salmon species).

Where a permit procedure does not apply as the bases of originating water rights, the common law controls. Fox earlier provided the statutory basis for this proposition. But the principle is implicit in a1977 Attorney General Opinion that recognizes two common law appropriative methods of acquiring water rights, and the additional common law riparian methods

of acquiring water rights that existed in Washington that was replaced by the *permit* procedure for those uses requiring a permit under the code:

> "Since the earliest days of our state's history the two basic water rights doctrines in effect in the various states - the "riparian" and the "appropriation" - have been recognized as a part of Washington law. In re Alpowa Creek, 129 Wash. 9, 13, 224 Pac. 29(1924). The riparian doctrine is based on the concept that a person who owns lands bordering a lake or stream has rights of use to the waters of that body. Crook v. Hewitt, 4 Wash. 749, 750, 31 Pac. 28 (1892). The appropriation doctrine, rather than being based on geographical proximity, is founded on the concepts of time and use; i.e., rights are established by indicating an intention to divert water for a beneficial use and then carrying out that intention within a reasonable time. Hutchins, Selected Problems in the Law of Water Rights in the West, 64 (1942). []
>
> In the early years of statehood, many water rights were established in our state under the two best known variations of the appropriation doctrine. The first, referred to as the "custom" variation, had no statutory base but was rather a doctrine recognized by the state's courts and rooted in the local communities in the arid parts of the state. See, Ellis v. Pomeroy Improvement Co., 1 Wash. 572, 21 Pac. 27 (1889); andThorpe v. Tenem Ditch Company, 1 Wash. 566, 20

> Pac. 588 (1889). The second, known as the "notice" variation, was statutorily based. See, chapter 142, Laws of 1891. This variation provided, generally, that if a notice of claim to water was posted at a point of diversion and filed in the county auditor's office and thereafter the water claimed was put to beneficial use with reasonable diligence, a right to make use of water would be established. Grant Realty Co. v. Ham, Yearsley and Ryrie, 96 Wash. 616, 165 Pac. 495 (1917); see also, chapter 21, Laws of 1889.
>
> Both the riparian doctrine and the several appropriation doctrine variations provided a base for establishing rights to use waters of the state until 1917. In re Crab Creek and Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925). **Until that year the establishment of a [surface] water right under the two appropriation variations, and the other bases then in effect, did not require the approval of any governmental agency, state or otherwise**."

1977 AGLO No. 22, p.2-3.[1] (emphasis added). The displacement of the common law methods (appropriation and riparian) for surface water was recognized in *Ecology v. Abbot* in 1985, but the supreme court distinguished the groundwater code from the surface water code by virtue of the permit

[1] http://www.atg.wa.gov/ago-opinions/offices-and-officers-state-department-ecology-water-issuance-limited-term-water-use#sthash.FREzMrEh.dpuf

exemptions in RCW 90.44.050 i.e. that the common law bases for originating water rights was displaced by the surface water code, but not the ground water code. *Abbot,* 103 Wn.2d 686, 693.

CELP argues that common law riparian rights are at odds with Washington's statutory scheme for surface and groundwater water regulation and that, should this Court conclude that common law riparian rights do in fact exist, such a finding would destroy the state's ability to regulate rural water use and hinder water resource protection statewide. CELPs arguments fail, or should be brought to the legislature.

The common law of Washington recognizes riparian bases for originating water rights[2], and two common law appropriative methods ("notice" method and "custom" method). AGLO 1976 No.22. After the water code was enacted, all surface water rights could not originate but through an approval by Ecology of a permit (and its predecessor state agency). As to ground water, the legislature saw fit exempt pre-approval and governmental inquiry only for certain small uses. RCW 90.44.050.

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[2] 1984 AGO 19 fn.5 (""Correlative rights" implies shared interests in a common res-- and, where truly adopted, limits each user to his fair share. See Restatement (Second) of Torts, § 858. The doctrine of "reasonable use," on the other hand, allows an owner to take all the water he needs, regardless of impact on his neighbor, if the owner's withdrawal is required for a reasonable use of his land. See,e.g., *State v. Michels Pipeline Construction, Inc.*, 63 Wis.2d 278, 217 N.W.2d 339 (1974)")

And in 1973 the legislature applied this pre-approval to all groundwater, including percolating groundwater, not simply well defined underground flows. *See,* 1984 AGO 19. The exception is that there is still no pre-approval for certain small uses, like human domestic supply less than 5000 gallons per day whether from percolating groundwater or other type of groundwater. RCW 90.44.050. And so common law principles still govern the bases for originating these small uses. No preapproval or governmental agency approval is required. RCW 90.44.050; *See,* AGLO 1976 No.22. And so that the exemption does not swallow the rule, the legislature provided Ecology with the tools to monitor withdrawals from exempt wells to ensure that only those uses and people who truly qualified actually used them, and that if there was a problem with the impacts of these withdrawals the legislature could be informed. 2005 AGO No. 17 p.7. ("If the information shows that exempt withdrawals are jeopardizing the quantity or quality of water available, these facts can be drawn to the attention of the Legislature, which is the proper body to consider changes in the state's water resource policies.")

If a government (state or local) had to pre-approve a use in terms of those four part considerations looked at for a permitted water right as articulated in *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 6 (2002) that

otherwise plainly qualified for the exemption, the exemption would be rendered a nullity. So the balance has been struck – Ecology has the duty and power to monitor exempt wells to only those small uses contemplated by the legislature. *Id.;* 1997 AGO No.6.

This means that the common law methods of originating water rights are not disrupted by RCW 90.44.050 for uses that do not require pre-approval (i.e. the certain small exemptions in RCW 90.44.050). The legislature did not use the term appropriation in describing the withdrawals under RCW 90.44.050. RCW 90.44.050 speaks in terms of withdrawals of groundwater, and does not limit withdrawals to only appropriations (unless a permit is required). For example, the monitoring language for those uses that qualify for the exemption, which is the most fundamental language in RCW 90.44.050 regarding the limits on exempt withdrawals so that the exemption does not swallow the rule. RCW 90.44.050; 1997 AGO No.6. If all withdrawals under RCW 90.44.050 were appropriations, the language in RCW 90.44.050 regarding monitoring would be superfluous, because RCW 90.44.250 already provides that information mentioned in RCW 90.44.050 may be obtained from "groundwater appropriators" and the manner and extent of the beneficial use.

This means that while common law appropriative methods are available, so too are common law riparian methods. And being "entitled to a right equal" to a right acquired by permit, does not necessarily mean the user also suffers from limitations and liabilities of an appropriative right. Real property concepts are defined and categorized by rights, liabilities, privileges, and duties in the bundle of rights so to speak. Even so, there was no liability at common law for a groundwater withdrawal from the river valley basin in hydraulic connection with the surface. *Meyer v. Tacoma Light & Water Co.,* 8 Wn. 144, 35 P. 601 (1894). It cannot be overstated that Washington has long recognized and ordered certain uses as more preferable to others – and human domestic use has been paramount. *Hunter Land Co. v. Laugenour,* 140 Wash. 558, 565 (1926)(recognizing natural riparian human domestic needs that largely track with the exemptions in RCW 90.44.050).

1. The concept that water resources belong to the public is legal shorthand for police power and regulation through pre-approval and inquiry into permitting requirements, not "ownership" per se.

CELP states one of the fundamental principles of water law in Washington that augers against common law rights in ground water is that

"groundwater resources belong to the public." (CELP Br. at 4). CELP points out that the Water Code, passed in 1917 and in 1947, defines in general terms that all waters of the state are "public," citing to RCW 90.03.010; *Hillis v. Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). (CELP p. 4). CELP ignores that the "public ownership" theory of water, is merely legal short hand to tell citizens (particularly in 1917 and 1947) that this is an area of intense regulation and police power. *Sporhase v. Nebraska*, 458 U.S. 941, 951 (1982) (rejecting the states' "public ownership" of water theory and recognizing that "public ownership" is merely "legal shorthand" for police power). See also, 1984 AGO No.19 fn.25 ("The State's "ownership" of waters is, at the least, an acknowledgment of police power to regulate their allocation and use comprehensively. See Sporhase, et al v. Nebraska, ex rel. Douglas, 458 U.S. 941, 73 L.Ed.2d 1254, 102 S.Ct. 3456 (1982). In Petersen v. Department of Ecology, 92 Wn.2d 306 596 P.2d 285 (1979), the Court rejected an argument that the refusal of the State to issue a ground water permit was a "taking," concluding that the permit requirement is a reasonable exercise of the State's police power.")[3]

[3] The 1984 Attorney General opinion did not address ground water uses that do not require a permit preapproval under RCW 90.44.050, only permitted groundwater uses, and so the implication of its statement that the ground water code renders obsolete the *Patrick, Evans, and Ponten* case law regarding groundwater rights liabilities and riparian groundwater rights, is that such that these riparian concepts and principles still apply for exempt withdrawals.

In short, the legislature has made most water uses in Washington be subject to first acquiring a permit to reduce the impacts and conflicts, balance the objectives, and protect the resources for the future. 1997 AGO No. 6. The legislature has also spoken that certain small uses are pre-approved notwithstanding permitting inquiries, i.e. the legislature has already struck the balance and the uses have already been balanced. RCW 90.44.050. No second look is available or needed – and if it is, the argument should be brought to the legislature.

2. CELP points to a legislative mandate for instream flows, but ignores the legislative mandate to protect adequate water for human domestic supply.

CELP argues that Ecology has a mandate to establish instream flows under RCW 90.54.020, but argues (apparently) the primary duty is for the protection of fish and wildlife. But instream flows are for the protection of all beneficial uses, including human domestic needs. Be that as it may, RCW 90.54.020(5) also provides: "**Adequate** and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." Any instream flow rule should be interpreted to be consistent with this mandate as well. The term "adequate" means both factual and legal availability of water as the term "adequate" includes *legal availability* of water. *Kittitas County v. EWGMHB,* 172 Wn.2d 144, 180

(2011). When the same term is used (here "adequate" in RCW 90.54.020(5) and in RCW 19.27.097 in *Kittitas*), it is presumed to have the same meaning. Moreover, it is consistent with the regulatory scheme that the inquiry into whether Fox plainly qualifies for the exempt use for human domestic supply is the extent of inquiry into legal availability of water. *Id.*

3. CELP argues all permit exempt withdrawals are subject to first in time first in right, while this may be true for some exempt withdrawals, permit exempt withdrawals are governed by the common law and regulated by monitoring.

As articulated above, withdrawals that are exempt from the permitting scheme are regulated by monitoring, qualification by type and quantity, and common law principles. RCW 90.44.050. *Abbot v. Ecology.* The Fox's well is not liable to the instream flow rule by the plain text of the 2001 rule that it does not apply to exempt withdrawals, only withdrawals requiring a permit, that the instream flow rule does not disrupt existing rights (which Fox has shown are either riparian groundwater rights or common law appropriative rights with a senior priority date), and also common law liability principles.

CELP argues that *Swinomish Indian Tribal Community v. Ecology* 178 Wn.2d 571, 598 holds that all exempt withdrawals are subject to instream flow rules, particularly in the Skagit under WAC 173-503. The *Swinomish* court was careful in indicating Ecology's actions on

applications for exempt wells (i.e. in issuing a permit for an exempt withdrawal) would not allow a permit for a permit exempt well to have a senior priority. This is not a remarkable statement. RCW 90.03.247 protects instream flows only from uses that obtain a permit, and all other provisions of the water code must be interpreted consistent with it. RCW 90.03.247. A person can apply with a permit for a small use where they otherwise qualify for an exemption. The court has said that in such a rare case, the permit must be conditioned as actions on applications are set out in the code.

C. CELP argues that all instream flows are threatened by permit-exempt withdrawals, but this argument is for the legislature. Even the studies it references show some permit exempt withdrawals help instream flows. The studies show Ecology has the ability to manage, and is managing, the state's water resources despite exempt withdrawals.

CELP ignores that there is no such thing as impairment per se, even if instream flows are not being met. *Postema v. PCHB,* 142 Wn.2d 68, 121 (2000). Ecology has the tools to document and record how much water is withdrawn from exempt wells if Ecology thought it was a problem. RCW 90.44.050 (an exempt withdrawal may have to report its use to Ecology). CELP provides the court with an example of such a study. Ecology has studied exempt wells, and likely has the duty to do so under its management obligations. In the studies that CELP tries to introduce on appeal, Ecology even notes that some use of exempt wells in basins **increases the flow in**

surface streams, i.e. recognizing "gains of up to 0.06 cfs" in certain watersheds due to use of exempt wells.[4]

CELP argues that Fox is pushing for a regime in which exempt wells are wholly unregulated and unlimited. This is a common misstatement regarding the position of people exercising their rights under the exemptions. Instead, it is CELP that is advocating to do away with and get rid of the statutory exemption. Their arguments should be directed at the legislature.

Exempt withdrawals are regulated by the carefully circumscribed requirements of RCW 90.44.050. So it is erroneous to argue that Fox is seeking a position that there is no regulation or oversight. Instead, the legislature has already struck the balance in RCW 90.44.050 and allows Ecology to acquire information on these small and limited uses so that Ecology can make sure only those that plainly qualify for the exemptions are using them, and that Ecology can otherwise plan around those proper uses. See, 2005 AGO No. 17 p.7. (""If the information shows that exempt withdrawals are jeopardizing the quantity or quality of water available, these facts can be drawn to the attention of the Legislature, which is the

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[4]https://fortress.wa.gov/ecy/publications/documents/1511006.pdf. p.24 (publication cited by CELP in their Amicus Brief).

proper body to consider changes in the state's water resource policies."). The 2005 AGO No.17 opinion was cited favorably in *Five Corner Family Farmers v. State,* 173 Wn.2d 296 (2011).

D. CELP argues Fox is asking for a "super-priority." Fox is seeking recognition that he has shown prima facie evidence of a groundwater riparian right and/or a groundwater common law appropriative right sufficient to satisfy the requirements of RCW 19.27.097 and not subject to the Instream Flow Rule by its own terms, if qualifying for the exemption is not enough, per se.

CELP argues variously that Fox seeks to "resurrect" correlative or riparian groundwater rights. But with respect to domestic human needs of small natural quantities that do not require a permit, no case in Washington has ever held that the water code has killed such fundamental human rights and privileges for those small domestic uses exempt from permitting under RCW 90.44.050. The Supreme Court has indicated the opposite is true with respect to groundwater, unlike surface water. *Ecology v. Abbot,* 103 Wn.2d 686 (1985).

Fox has consistently made the argument that water rights reflected in RCW 90.44.050 are something more than merely appropriative rights because of the history of water law in Washington and the use of the language in RCW 90.44.050 not speaking in purely appropriative terms. The basis of these arguments were recognized in *Abbot v. Ecology,* the code

being subject to existing rights, natural and customary expectations reflected in the ground water code exemptions.

In the origination of water rights, RCW 90.44.050 has always provided certain exemptions from the permitting procedure particularly for domestic human supply. *See, Ecology v. Abbot,* 103 Wn.2d 686, 693, 694 P.2d 1071 (1985)(recognizing exemptions in groundwater code distinguished it from the surface water code in holding that the surface water code did away with common law riparian rights where the ground water instead had certain exemptions). The court decisions have been very protective of the legislative balance struck in RCW 90.44.050, and have rejected both developers' interpretations attempting to expand the narrowly circumscribed criteria, *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002), and Ecology and PCHB interpretations trying to narrow and do away with the exemptions. *Kim v. Pollution Control Hearings Board,* 115 Wn. App. 157, fn.6, 61 P.3d 1211 (2003)(recognizing RCW 90.44.050 has withstood many legislative proposal to change it, rejecting the PCHB's position that "the policy context for interpreting the 1945 statute must be illuminated by our current scientific understanding of ground and surface water continuity, the federal mandates to protect

endangered salmon, and the increasing demand for water to serve our growing populations and economy.").

Now *Foster* has recognized that the term "withdrawal" encompasses a concept more general than "appropriation." *Foster,* has recognized that the use of the term appropriation does not equate with the term withdrawal.

In *Foster*, the Washington Supreme Court recently discussed the distinction between appropriations and withdrawals. Starting from the presumption that "the legislature intends a different meaning when it uses different terms," the Court found that the "physical nature of the term" withdrawal, the incompatibility of an assignment of a permanent legal water right with the regulation of "withdrawal rates," and the use of both appropriation and withdrawal in the same statutory provision of the water code indicated that the legislature did not intend the two terms to be synonymous for purposes of the overriding considerations of public interest exception to impairment.[5] *Foster v. Dep't of Ecology*, 2105 Wash. Lexis

[5] The Court also looked to Washington's statutory scheme, specifically RCW 43.83B.410(1)(a), which permits Ecology "to authorize an emergency "withdrawal" of public surface and ground waters during drought conditions "on a temporary basis,"" to support its conclusions. However, reference to this provision is not necessary to reach the majority's conclusion. As the dissent notes, the primary focus of RCW 43.83B is executive agency powers, not water rights, and the inclusion of "on a temporary basis" detracts from the contention that a withdrawal is inherently temporary in nature. Despite this shortcoming, a distinction between appropriations and withdrawals is supported by the statutory scheme of the Water and Groundwater Codes.

1184 (2015). Based on this analysis, in the context of "overriding considerations of public interest" or OCPI, the Court concluded that a withdrawal that could impair an instream flow was a temporary action and it, "unlike 'appropriation,' carries with it no suggestion that it includes the permanent assignment of a legal water right." *Foster v. Dep't of Ecology*, 2105 Wash. Lexis 1184 (2015).

However, in reaching this conclusion, because the scope of the rights under RCW 90.44.050 were not before the court, the majority of the Court did not take the opportunity to further analyze RCW 90.44, in which the legislature repeatedly uses the term "withdrawal" to also refer to permanent rights. The concept that a withdrawal may be authorized under the common law, that is not an "appropriation" but is still a permanent right, as reflected in RCW 90.44.050 is not inconsistent with *Foster,* but supported by the textual nuances recognized by *Foster.*

While RCW 90.44.050 was not discussed in *Foster* outside of the dissent, the distinction between an appropriation and other bases for withdrawals is also demonstrated in the context of RCW 90.44.050, which states "No *withdrawal* of public groundwaters of the state shall be begun, nor shall any well or other works for such *withdrawal* be constructed unless an application to *appropriate* such waters has been made to the department

and a permit has been granted." (emphasis added). In using both withdrawal and appropriate in the same section of the same statute, the Legislature shows its intention that the two terms be given different meanings. *See also,* RCW 90.44.250 (allowing Ecology to gather information from "groundwater appropriators") *Cf.* RCW 90.44.050 (allowing exempt withdrawals to be monitored). It is clear from the wording that the Legislature intended the right to appropriate to be a legal right, regulated by the state and conditioned upon the issuance of a permit, while withdrawal refers to the physical act of taking water for use by *other legal bases* than the permit process. The common law legal bases for the withdrawal of ground water (or any other water) was recognized in Washington under the common law of appropriation and common law riparian. 1977 AGLO No.22.

Even the Attorney General has recognized the fundamental difference between the two types of acquired rights – exempt withdrawals and permit appropriations. 1997 AGO No.6. The Attorney General found that "[r]ights derived from an exempt groundwater withdrawal may not be transferred or changed pursuant to [RCW 90.44.105] without first applying for and receiving a permit." 1997 AGO No.6. Assuming there is no

common law procedure, the inability to transfer a water right away from land it is associated with is a hallmark of riparian ground water rights.

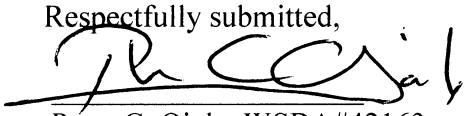
E. Conclusion

CELP's arguments against common law riparian rights to certain small uses for human domestic supply less than 5000 gallons per day do not usher in their fears of inability to manage water use under the specter of climate change. Rather, the legislature has indicated that certain small uses are exempt from certain well defined inquiries into legal availability and impacts. RCW 90.44.050. If that needs to change, which it doesn't, the arguments should be taken up with the legislature.

The ground water code exemptions reflect something more than merely exempt appropriative rights – and even if they didn't, Fox has shown a senior priority date under common law appropriative principles. Irrespective, no governmental pre-approval is required for Fox's use where he plainly qualifies for the exemption under RCW 90.44.050.

Dated this 9th day of November, 2015

Respectfully submitted,



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

Respondents,

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Intervenors below.

NO. 733150-I

PROOF OF SERVICE

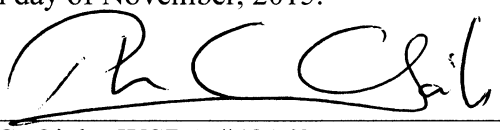
OF APPELLANT'S ANSWER TO AMICUS CELP's BRIEF

Peter C. Ojala, of OJALA LAW INC., P.S., Counsel of Record for Appellant RICHARD A. FOX and MARNIE B. FOX, husband and wife, , states and declares that:

1. A true and correct copy of APPELLANT'S ANSWER TO AMICUS CELP'S BRIEF was placed in the U.S. Mail, postage prepaid, on November 9, 2015, and emailed the same day to the to the attorney of record for Skagit County and related respondents, the Department of Ecology, intervenor below, and the Swinomish Tribal Community, intervenor below, and Amicus CELP, at the addresses shown below.

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

Dated this 9th day of November, 2015.



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