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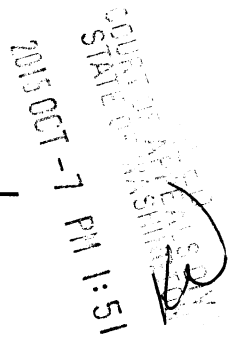

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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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.

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

# CONSOLIDATED REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

**REPLY**

TABLE OF AUTHORITIES

**Washington Cases**

**Washington Statutes**



**Other Authorities**

**Rules**

## REPLY

This case presents a matter of first impression, not to mention *issues* of first impression. Never before in the state of Washington has an individual human person, who plainly qualifies for the exemption from water right permitting in RCW 90.44.050 for human domestic purposes on a small portion of their farm, with a return flow septic system, ever been told by a judge that they cannot obtain a building permit for their small domestic house and home, because of an Instream Flow Rule. The trial court must be reversed.

### A. MOTION

Fox requests an Order to allow him to file an over length brief to consolidate his briefing into a single consolidated reply, and therefore exceed the 25 page limit generally held for a Reply briefs, rather than filing individual Reply Briefs. This Brief is about 37 pages, which is considerably less than the 75 pages otherwise permitted under the Rules.

Fox is Replying to the Response Brief Skagit County, the Response Brief of the Swinomish Tribal Community, and the Response Brief of the Department of Ecology, and the Supplemental Briefing of Ecology.

**B. Standard of Review**

A writ of mandamus to issue a building permit is appropriate relief when the requirements of Skagit County Code and RCW 19.27.097 are met and the standard of review of the trial court order is de novo. *Ecology v. Campbell and Gwinn, LLC*, 146 Wash. 2d 1, 643 P.2d 4 (2002)(The review of the interpretation of statutes is *de novo*); *Eugster v. City of Spokane,* 118 Wn. App. 383, 402-403, 76 P.3d 741 (2003) *review denied,* 151 Wn.2d 1027, 94 P.3d 959 (2004)(The "determination of whether a statute specifies a duty that the person must perform is a question of law" reviewed *de novo*).

*De novo* review means the superior court decision to dismiss is afforded no deference. Likewise, all questions of fact should be taken in Fox's favor. The parties agree that the standard of review, in this error correcting undertaking, is *de novo* review. (Fox's Br. at 6); (Swinomish Tribal Community (hereafter "Tribe") Br. at 15-16); (Ecology Br. at 9).

**C. Overview**

Fox would like to retire to the small lot he created on his farm in Skagit County. He can't because the County and Ecology and the Tribe are fighting with each other over, essentially, who he has to pay to retire. But they are all wrong. Fox has paid enough, he has done enough, he has followed all the rules. An email from Ecology to the County is not binding

law.(CP 273).

The legislature has said Fox is exempt from governmental inquiry into the priority of his water use for his domestic purposes on his small lot for domestic purposes. RCW 90.44.050; *Ecology v. Campbell and Gwinn*, LLC, 146 Wash. 2d 1, 643 P.2d 4 (2002). This is the start and the end of the matter, because *Postema v. PCHB,* 142 Wn.2d 68, 93 (2000) held "we reject the premise that the fact that a stream has unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals." Exempt means exempt in RCW 90.44.050, just as much as exempt means exempt in SEPA. *See, Dioxin Ctr. v. Pollution Bd.*, 131 Wn.2d 345, 347, 932 P.2d 158, 159 (1997)("We hold that actions which are categorically exempt from review under the State Environmental Policy Act of 1971 are in fact exempt.").

Fox respectfully requests that this error correcting court, correct the trial court, order that the mandamus should issue, and Fox should get his building permit without any more fuss.

While Fox does raise alternative arguments and issues, the crux of this case is that the Legislature has not allowed Ecology to remove the right to an exemption through administrative rule permanently (i.e. the right to be excused from governmental inquiry into impairment questions), but that

in passing administrative rules, Ecology must use its tools of collecting information on exempt wells to account for them as a part of the fabric of Washington state.

**D. Framework for Analysis.**

On review, Fox presents the issues in the correct framework for analysis with respect to whether he has a complete building permit application for his long planned personal retirement house vis a vis water for human domestic purposes:

(1) the requirements of Skagit County Code under RCW 19.27.097 and RCW 90.54.050; and if that is not sufficient, whether;

(2) the requirements of the plain text of WAC 173-503 (2001) under RCW 90.54.020(5) and RCW 90.03.247 conflict with Fox's use, and if that were not enough;

(3) whether Fox has shown prima facie evidence of a priority date senior to the Instream Flow Rule and/or a common law correlative groundwater right not subject to the Instream Flow Rule; and finally

(5) if the duty is not on Ecology to programmatically account for all exempt wells as evidenced by Ecology's procedurally ineffective attempt to do so previously with the 2006 Amendments to the Instream Flow Rule, and a January 15, 2015 formal letter regarding solving the water issues in the

basin, whether

(6) the trial court's order otherwise interprets the laws inconsistently with due process considerations and therefore violates due process.

While the briefing in this matter shows the sovereigns, the County, Ecology, and the Tribe, pointing fingers at each other about who said what and when, the only one suffering, and that is actually experiencing palpable injury, is the tax paying rule abiding citizens – Richard and Marnie Fox.

Fox relies upon his opening Brief in this matter, but Replies to select several points made by the County, the Tribe, and Ecology as follows.

### E. Fox satisfies skagit county code's rcw 19.27.097 requirements because fox plainly qualifies for the permit exemption under RCW 90.44.050 – no additional inquiry is required by the legislature.

The trial court erred because RCW 19.27.097, as well as Skagit County code implementing RCW 19.27.097, only requires Fox to show evidence that the proposed use (and Fox) plainly qualify for the domestic exemption under RCW 90.44.050, to meet the requirements of showing an adequate supply of water. (Fox Opening Br. at 12).

Ecology urges that, though there was no site specific study of Fox's use in the application file at the County, that the 2001 Instream Flow Rule

means that any water use from Fox's property would impair the Instream Flow Rule as a matter of law. (CP 463). Ecology submitted the declaration of Mr. Liszak says "[After April 14, 2001], any new consumptive withdrawals of groundwater in hydraulic continuity with the Skagit River will cause impairment to the instream flows when they are below the minimum instream flows (MIFS) prescribed in the rule." (CP 463).

This statement is in flat contradiction to the instruction in *Postema v. PCHB,* 142 Wn.2d 68, 92-93 (2000)("[W]e reject the premise that the fact that a stream has unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals."). Further, conclusory statements are not facts.

Ecology also argues that because there is an Instream Flow Rule, Fox's use of an exempt well is an "overuse" of the permit exemption contemplated by *Kittitas County v. EWGMHB,* 172 Wn.2d 144, 180 (2011), and that County's must inquire into an impairment analysis. The fallacy of Ecology's position is that *Kittitas* only requires a County to determine only whether an applicant plainly qualifies for the exemption in RCW 90.44.050 to meet the legal availability prong of adequate water, to prevent "abuse" of the permit exemption, *Id.* at 180 (recognizing that the County must have code to prevent the "**overuse** of the well permit exemption"), and *Postema*

has ruled there is no such thing as impairment per se even when an Instream Flow Rule is unmet and is effected by a withdrawal. Fox is not abusing or over using the permit exemption. Ecology says use of a permit exempt well, without offset, in basin with an Instream Flow Rule is "overuse" of the exemption. This is again a fallacy. Otherwise the exemption from the impairment inquiry in the permitting process otherwise required by RCW 90.44.050 incorporating RCW 90.03.290 would be rendered meaningless, and *Postema* would be meaningless. Further, RCW 90.03.247 only applies to permits, not all withdrawals and the legislature could have, but did not, reference withdrawals in RCW 90.03.247 under RCW 90.44.050 that are exempt from permitting.

Accordingly, the legislature has never required that the burden of proof of impairment to shift to the person who plainly qualifies for the permit exemption. The legislature never contemplated that Ecology would send in a team of experts to provide unsolicited (and not site specific) opinions on water availability for every small domestic user across the state on an ad hoc basis – like they have done with Fox.

Instead, RCW 19.27.097 requires a building permit applicant to show a factual and legal availability of water either through a permit issued by Ecology, or through qualification for the permit exemption. *Kittitas.*

Qualification for the permit exemption is legal availability of water. *Kittitas.* This legal availability of water is not a weighing of priorities, an impairment analysis, or an adjudication, or tentative determination, when a person plainly qualifies for the RCW 90.44.050 exemption. *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002). *Rettkowski v. Department of Ecology,* 122 Wn.2d 219, 228-230, 858 P.2d 232 (1993) ("A general adjudication, pursuant to RCW 90.03, is a process whereby all those claiming the right to use waters of a river or stream are joined in a single action to determine water rights and priorities between claimants."). Otherwise the exemption would be meaningless as an impairment analysis *is required* for a water permit, but when someone and a use qualifies for the exemption, they are "excused" from an impairment inquiry as such is a permitting requirement. *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002). *Postema* even recognized that conditioning a permit on Instream Flows was a permitting requirement independent of an impairment analysis. *Postema,* 142 Wn.2d, at 95.

The exemptions in RCW 90.44.050 groundwater largely track the common law domestic riparian "natural" rights recognized forever as part of American jurisprudence that were an incident of the ownership of the land (compare RCW 90.44.050 with *Hunter Land's* discussion of natural

uses)[1], and so it is not simply a matter of governmental (or Ecology) expedience[2] that the exemption from certain groundwater permitting was so purposefully established by the legislature. *See, Ecology v. Abbot,* 103 Wn.2d 686, 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). Ecology suggests that any use of a permit exemption when a senior user might be impaired is an "overuse" of the exemption. (Ecology Br. at 14). But the legislature and people of Washington did not and do not think so, and the exemption hasn't changed in almost seventy years. RCW 90.44.050. The exemption is not to be reinterpreted in light of modern understanding of hydraulic connectivity and the protection of salmon, as stated in *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

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[1] *Hunter Land Co. v. Laugenour,* 140 Wash. 558, 565 (1926).

[2] Christine Gregoire, in 1997 AGO No. 6 indicates the legislative purposes for RCW 90.44.050 were for practical and administrative purposes so the exempt well user would not be embroiled in even "inexpensive" disputes, citing *State v. Lawrence,* 165 Wash. 508, 510, 6 P.2d 363 (1931)(water code permitting system purpose is to provide an "inexpensive and ready manner for settling all disputes concerning [water use]").

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.").

Under the plain language of RCW 90.44.050 qualification in meeting the carefully circumscribed terms of RCW 90.44.050 is evidence enough for legal availability of water under *Kittitas*, in general, and in particular here. A legal opinion was provided to the County in the permit application as evidence of the legal availability of water. Fox not only plainly qualifies for the exemption from permitting, he also demonstrated prima facie evidence *in his building permit application* of a correlative groundwater right and a common law appropriative right with a priority date senior to the Instream Flow Rule. He showed a water claim from 1973 covering the property, no one has questioned the use of water on the acreage over the years, and he showed his lawful subdivision in 2000 which showed the location of his well (and all the wells on the property). He demonstrated he drilled a well while the 2006 Amendments were the force of law. There is a septic system on his property returning the vast majority of the water back into the system. The County nor Ecology, nor the superior court as invoked in this mandamus action, has jurisdiction to adjudicate priorities of water rights. The trial court erred in essentially ruling that Fox must show

something more.

As the Tribe points out, Ecology seeks to dictate by email (Tribes Br. at 10) (CP273) what the requirements of RCW 19.27.097 are to the County. However, while able to pass rules under RCW 19.27.097(3) in "consultation" with the County, and Ecology has passed no rules implementing RCW 19.27.097. An email is not a rule.

Skagit County has no written rules requiring more than what Fox has shown. There is no statute that requires Fox to get an "email" from Ecology, like the so called "incomplete" letter mentions. The Tribe mentions that the County code provision requiring 350 gallons per day is the legally availability prong of the code. In short, the Tribe says the County code invokes general water code priority principles of "first in time first in right." (Tr. Br. at 19). But the fallacy of the Tribe's argument, which Ecology tries to adopt by reference, is that *Postema* rejected the concept of impairment per se when Instream Flows are unmet. The Tribe seeks to have the County engage in a tentative determination (Tr. Br. at 20), but this is forbidden by RCW 90.44.050. *Campbell & Gwinn,* 146 Wn.2d at 16. Without citing the full text, the Tribe states that the impairment analysis is accomplished under Skagit Code SCC 12.48.110(1)(j), a provision that applies to information for the Health Officer (who obviously has expertise

in water quality, not legal availability of water). If the Legislature wanted the various Health Districts and Health Officers throughout the State to issue water permits or a tentative determination of impairment, the legislature would have said so. The legislature has not said so. Nonetheless, the Tribe points out (Tribes Br. at 10) Ecology's email to the County at CP 273 as controlling Fox's building permit application (and the County likewise cited to that email as the reason they are not acting), but Ecology's attorney's email to the County attorney does not have the force of law as to Fox. (CP 273).

Ignoring the legislative balance and purposes of RCW 90.44.050, as pointed out by the Tribe in their brief at p.10, Ecology seeks to have applicants relying on an exemption seek an approval from Ecology:

> "Accordingly, the County would be out of compliance with the law if it issues such approvals and should either deny, or not act on, . . . building permit applications absent the approval of a mitigation proposal and/or alternative water source *by Ecology*. *** Ecology would then consult with the applicant, and, if their plan would ensure that water use would not interfere with minimum stream flows, work with them towards approval of a water right permit or *another suitable form of approval*. Then, if a permit or other form of approval order is issued by Ecology, that document would provide evidence to the County that the applicant has

> access to an adequate supply that would enable the County to issue a ... building permit." (CP 273)(underlining in original)(italics added).

Ecology hides the ball from the Court. What precisely is "another suitable form of approval"? (CP 273). If a person plainly qualifies for the exemption from a permit, is there some other "suitable form of approval" "from Ecology" they need? Fox cannot find a statute in the water code (let alone one invoked by a Skagit County building permit code) that allows Ecology to issue a different "form of approval" for a person and use that plainly qualifies for the exemption.

In short, Ecology and the Tribe's positions are untenable, and not supported in the Water Code, *Kittitas, Postema,* nor the holding of *Campbell & Gwinn.*

*Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) also is not helpful to the Tribe and Ecology. The illegality of Ecology's procedures in making a reservation of water of more than 5000 gallons of water that also by statutory definition impaired the Instream Flow Rule, does not control this case. Nor does the central holding or reasoning of *Swinomish* control this case. *Swinomish v. Ecology* was not a case where a person plainly qualified for a permit exemption was trying to obtain a building permit from the County under RCW 19.27.097. *Swinomish v.*

*Ecology,* 178 Wn.2d at 598.

Instead, *Swinomish* dealt with a water appropriation (large reservation of water) that as a matter of definition and procedure "impaired" the Instream Flow, i.e. Ecology amalgamated many potential future exempt and non-exempt uses into reservations, through a procedural method that required action by Ecology through authority that itself said it was "impairing" the Instream Flow. Ecology was trying to implement a settlement agreement between governments that was then run through the public process, but through inapposite statutory authority. In short, when the only tool you have in your hand is a hammer, everything looks like a nail – so to speak.

In *Swinomish,* no one argued the reservation did not impair the Instream Flow Rule through being excused from inquiry, or from the reservation being factually senior or otherwise not subject to the Instream Flow Rule – and they really couldn't – because of the water code section being used as authority. All parties assumed the large water reservation i impaired the Instream Flow Rule, and so did the court. And yet, the Supreme Court was careful to discuss that the Instream Flow affected RCW 90.44.050 small uses only when Ecology acted on "applications" for a permit exempt well (which are allowed, rare, but not necessary). In such an

event, because Ecology would be issuing a "permit" Ecology had to condition such permits on the Instream Flow under RCW 90.03.247.

Naturally, under the sound reasoning and true holding of *Campbell & Gwinn,* where a water code like RCW 90.03.247 only applies to withdrawals with a permit, such limitations or procedures naturally cannot apply to withdrawals that do not require a permit. *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 16, 43 P.3d 4 (2002) (reasoning that to be exempt from permitting requirements is to be exempt from conditions of permitting and inquiries otherwise required when obtaining a permit). Further, RCW 90.44.050 speaks in terms of all withdrawals that are exempt from permitting, not merely "appropriations" that are exempt from permitting. RCW 90.44.050. Not only does RCW 90.03.247 also mention that all other statutes must be read consistent with it, and it is a very recent statute, the more specific statute controls over the broad general principle statutes, so the generalized priority principles of RCW 90.03.010 made applicable to *appropriations* of groundwater should not necessarily apply to all future exempt withdrawals. *See,* RCW 90.44.050 (not using the term "appropriations"). RCW 90.44.030 and RCW 90.44.130 accordingly do not apply in the way Ecology requests. Moreover, RCW 90.44.050 speaks in terms of withdrawals, not appropriations per se, and so the general rule of

RCW 90.03.010 of priority needn't apply to *all* exempt withdrawals.

*Campbell & Gwinn*, and many other cases, have stated or suggested in dicta the general principle that withdrawals that are exempt from permitting are subject to first in time first in right. This is a general principle applicable especially to other groundwater withdrawals junior to the exempt withdrawal, RCW 90.44.130, and other surface water appropriations also junior thereto. RCW 90.44.030.

Ecology has cited no case where a person that plainly qualified for the exemption was in court where the priority of a withdrawal exempt from permitting was at contested issue. While not all cited by Ecology, none of the cases that pass on this principle did so with any significant analysis, and did not involve a priority dispute under an adjudication, and the statements are nothing more than a recitation of the general statement and are non-binding dicta. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311 fn. 3 (2011); *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 737 fn. 3 (2013). An examination of the language of the water code, the language of the exemptions in RCW 90.44.050, and understanding of the history of water law in Washington that was a dual system, and remains a dual system, shows that the exemptions in RCW 90.44.050, while many such rights could be merely appropriative rights, the exemptions still reflect

those small natural domestic common law uses that have been an incident of ownership of the earth since the rule of law.

Plainly, under the water code, an "appropriator" is someone who obtains the right to use surface or groundwater through the permitting system. Yet "appropriation" is never defined in the water code, as a "definition." RCW 90.44.040 does say that subject to existing rights (presumably including common law correlative groundwater rights), all public groundwater, as defined by the water code (which definition of groundwater changed in 1973 to include percolating ground waters), is subject to appropriation by methods allowed for in the water code and "not otherwise."

Ecology relies on *Brown* to argue all riparian rights must be exercised to be protected – but that case dealt with surplus waters, not natural uses. In *Brown v. Chase,* there was an uncontested appeal that did not question riparian rights, but only questioned whether riparian rights extended to waters in excess of the natural uses (like domestic and reasonable irrigation) to prevent an appropriator from beneficially using surplus waters. *Brown,* 125 Wash. 542, 545. *Brown v. Chase* is not helpful to Ecology. As explained in *Abbot v. Ecology,* under the old cases, an

appropriator could not appropriate those natural common law riparian rights, particularly the domestic uses, and could only appropriate the "surplus" waters. This principle of law kept naturally changing favoring the appropriator more and more for the purpose of a more efficient distribution and development of the water resources of the state to improve lands. *See, Ecology v. Abbot,* 103 Wn.2d 686, 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). And yet, in 1985, the Supreme Court recognized that the exemptions in the groundwater code reflected something more than a mere "administrative expedience" for regulators.

If the court agrees with Fox, no further analysis is required, no examination of the Instream Flow Rule text is required, and the order dismissing the writ should be overturned, and the writ should issue from the trial court. If the court disagrees, an examination of the plain meaning of WAC 173-503 (2001) is required in light of RCW 90.03.247, RCW 90.44.050 and RCW 19.27.097 in the next issue. The administrative rule cannot be read inconsistent with RCW 90.44.050, and RCW 19.27.097, RCW 90.03.247.

**F. WAC 173-503 (2001) by its terms does not and cannot apply to persons who plainly qualify for the exemption from permitting under rcw 90.44.050.**

WAC 173-503(2001) by its plain terms does not apply to exempt wells. While the text of WAC 173-503(2006) was at issue in *Whatcom County v. Western Wash. Growth Mgmt. Hr'gs Bd.,* 186 Wn. App. 32 (2015)(where the Court mentioned in dicta that WAC 173-503(2006) applied to exempt wells), WAC 173-503 (2001) was not at issue, an individual that qualified for the exemption in the Skagit Basin was not at issue, and the court did not consider the text of the rule in the context of RCW 90.44.050 and RCW 90.03.247 discussed above, but apparently adopted Ecology's proffered comparison to the Whatcom County Rule.

In short, the dicta in *Whatcom County* cannot be binding because the provisions were not interpreted in light of all the code says on Instream Flows in the context of RCW 90.44.050 and RCW 90.03.247.

Because Ecology leaves out important parts of the rule when quoting it in their brief (Ecology Br. at 18), it bears worth repeating that WAC 173-503-040(5)(2001) states that "Future consumptive water right **permits** issued hereafter for diversion of surface water …, and withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be **expressly** subject to the instream

flows … as measured at the appropriate gage, and **also subject to WAC 173-503-060**." (emphasis added).

Ecology argues that the plain meaning of WAC 173-503-040(5), without mentioning exempt withdrawals or exempt wells, plainly applies to exempt wells - silently. Ecology argues that operative language regarding permits applies to only one category of water uses described in WAC 173-503-040(5) (surface water), and not the other category mentioned (groundwater). But this interpretation is untenable. Ecology states "the term 'permits' qualifies only the clause before the comma, which contains surface water use" but not the second category. (Ecology Br. at 19). However, this is untenable because the term "permits" would be rendered superfluous (all surface water uses require permits), and the term "expressly" after both categories would be rendered superfluous (Ecology only expresses Instream Flow Rule conditions on permits, RCW 90.03.247). Lastly, Ecology's interpretation that the rule applies to exempt groundwater withdrawals ignores the last phrase of WAC 173-503-040(5) directing the reader to the specific groundwater permitting section of the Instream Flow Rule WAC 173-503-060. In fact, Ecology leaves this clause out of its quotation to the court. (Ecology Br. at 18). This court should,

respectfully, reject Ecology's post-hoc rationalization and interpretation of the 2001 Instream Flow Rule.

The Tribe, for its part, argues that Fox's reading of the groundwater provision in WAC 173-503-060 (which applies only to groundwater) make it apply to effectuate an exemption from surface water permits as well. (Tr. Br. at 43-44). The Tribe's reasoning is not clear. Fox doesn't make that argument. The Tribe does suggest that because WAC 173-503-050(1)-(2) provides that Ecology found that perhaps 200 cfs is available to be appropriated under the Rule, and that because the DOE therein advised that "water rights issued to appropriate [the 200 cfs] will be interruptible rights" that this means Fox's use is barred. But that provision applies again to those rights "issued" by Ecology. Ecology doesn't "issue" exempt water rights, only permits.

The plain text of WAC 173-503(2001) does not apply to uses that qualify to be exempt from permitting.

As pointed out by the County, there was nothing in the permit file on a factual analysis by Ecology of a hydraulic connection or impairment, and that their expert merely recited the legal standard that has been rejected by *Postema*. (CP 643); (County Br. at 8).

The Supreme Court has stated "we reject the premise that the fact that a stream has unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals." *Postema v. PCHB,* 142 Wn.2d 68, 93 (2000). As interpreted by Ecology, WAC 173-503(2001) is therefore inconsistent with *Postema's* analysis of the Water Code, if the Instream Flow Rule is to be interpreted to bar Fox's use. Applying *Campbell & Gwinn* and *Postema,* a person who plainly qualifies for the exemption is excused from inquiry into whether Ecology has determined whether water is available for further appropriations, or not. *Postema,* 142 Wn.2d at 95 ("Stream closures by rule embody Ecology's determination that water is not available for further appropriations. Since this is a basis on which a water permit application must be denied under RCW 90.03.290 independent of the question of whether a withdrawal would impair an existing right, we hold that a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied [in the permit process] if it is established factually [in the permit process] that the withdrawal will have any effect on the flow or level of the surface water.") That is, to qualify for the exemption from permitting, is to be "excused" from these inquiries invoked during the permitting process. *Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 16, 43 P.3d 4 (2002).

The terms of WAC 173-503 (2001) do not prohibit the application from being complete as the rule only applies to water rights requiring a permit. The administrative rule must be read consistent with state statutes, which when read together, the statutes plainly show the legislature intended only for water uses requiring *a permit application* to be offset, when there is an instream flow rule, not those uses exempt from a permit application requirement. The more specific statute controls over the general. RCW 90.03.247.

If the court agrees, no further analysis is necessary and the trial court should be reversed and the writ entered. If the court disagrees, and holds that WAC 173-503 (2001) precludes the Foxes from having a complete building permit application due to a perceived problem with the priority of water rights, the writ should still issue as this mandamus matter is not an adjudication of water rights as provided for in statute as the only method of determining water right priorities. *Rettkowski v. Department of Ecology,* 122 Wn.2d 219, 228-230, 858 P.2d 232 (1993). If the Court engages in an impairment analysis, an examination of whether Fox has placed a prima facie case of either (1) common law riparian rights or (2) common law appropriative rights senior to the Instream Flow Rule is the only appropriate inquiry. And because Fox has, the writ must issue.

### G. Fox has shown prima facie evidence of common law groundwater riparian rights not subject to the Instream Flow Rule.

As stated above, RCW 90.44.050 reflects and is broad enough to include a mechanism for a landowner to originate water rights through both appropriative common law rights and common law riparian or correlative rights. No case has held otherwise. Skagit County points out that in its view the exemptions in RCW 90.44.050 reflect or is "codifying the common law" (Skagit Br. at 16).

RCW 90.44.050 never refers to exempt withdrawals as "appropriations." Ecology argues that with the passage of RCW 90.44.050, there can be no other groundwater rights but purely appropriative water rights. But, Ecology ignores that RCW 90.44.050 also purposefully does not use the term "appropriate" or "appropriative" or "appropriations" when discussing withdrawals allowed, recognizing the various ownership doctrines of groundwater in *originating* water rights – and it is of no matter that once they are put to beneficial use they are "entitled" (not restricted) to the rights of prior appropriation. RCW 90.44.050. The important legislative balance so that the exemption would not swallow the rule, was the legislature's expression that the small withdrawals in RCW 90.44.050 may have to furnish information to Ecology as to the quantity. *Campbell &*

*Gwinn.* If all withdrawals of groundwater under RCW 90.44.050 were by "appropriators" or were "appropriations" then the provision striking the legislative balance in RCW 90.44.050 would be superfluous, as RCW 90.44.250 already provides: "[T]he department from time to time may require reports from each *groundwater appropriator* as to the amount of public groundwater being withdrawn and as to the manner and extent of the beneficial use." What is clear, is the Legislature intended the entitlements under RCW 90.44.050 to be special, and only for those people and uses that plainly qualify – like Mr. Fox.

The Department of Ecology boldly states that Fox's riparian groundwater rights, and the 1974 water claim to the extent it reflects riparian domestic rights, has been relinquished. (Ecology Br. at 35-36). Ecology ignores that Fox's land has always been part of a large farm, even with the subdivision. Ecology is not entitled to make a claim of statutory relinquishment here, and such briefing violates due process and should be disregarded. There has been no adjudication of relinquishment. RCW 90.14.200. Ecology has not provided any evidence or order of relinquishment of riparian rights issued to Fox under RCW 90.14.130 to the County, or on appeal. Of course an exempt user need not register their claims, so failure to register is not evidence of statutory relinquishment.

RCW 90.14.041 (exempt users are not subject to the claim registry); RCW 90.14.071. Fox would be entitled to a fair hearing and appeal of any water resource decision claiming he or his property had relinquished his rights. RCW 90.14.190. This demonstrates both that Ecology's position is wrong, and that Fox has constitutionally protected real property interests in his exempt well.

**H. Fox has shown prima facie evidence of a common law appropriative right with a priority date senior to the Rule.**

Ecology concedes that Fox's subdivision is a valid common law appropriative priority date for his well, which is senior to the Instream Flow Rule. (Ecology Br. at 37 fn.15). Ecology concedes that such an analysis can be an intricate factual determination. (Ecology Br. at 38 fn.15). Accordingly, the trial court erred in determining as a matter of law that Fox was not reasonably diligent under all the facts and circumstances because all must be taken in favor of Fox. The matter was dismissed on Fox's motion for summary judgment as to questions of law, without an evidentiary hearing. But, such an evidentiary hearing would only be appropriate in the context of an adjudication of the priority of water rights. Exempt well users should have to bring a court action to prove up their rights prior to having a complete building permit application.

Moreover, 11 or 13 years is a more appropriate to be deemed "reasonable per se" than "unreasonable per se" – particularly here, since Mr. Fox subdivided in 2000, no one has shown any evidence that Fox intended to abandon his plans on building his retirement home on the property (i.e. selling the land or holding it out for sale) and particularly here, where the County never considered any law to prevent Fox from obtaining a building permit, until the Ecology attorney wrote the County attorney an email in October 2013 after the *Swinomish v. Ecology* decision.

In the land use and real property context which demands certainty and predictability based upon reasonable investment backed expectations, under Washington's date certain vesting principles, and LUPA, and the prior appropriation doctrine (which has similar purposes), it is most appropriate to have a bright line rule for the priority date of exempt wells (i.e. the first time they show up in the public record be it through a subdivision, a well agreement being recorded on the real property records, a well drilled, etc.) – without an inquiry later into the moves and countermoves of a landowner and the government. *Cf. Allenbach v. Tukwila,* 101 Wn.2d 193 (1984). For example, once a water availability determination is made by a local government under RCW 58.17.110, it should not be subject to attack again at the building permit stage because of

LUPA, common sense, vesting, and due process. Ecology addresses Fox's LUPA argument in a footnote, and so is deemed to have waived a response. But Ecology's argument that RCW 19.27.097 would be a nullity if there was not two bites at the apple, is wrong. To the extent the legislature does require an examination of water availability in RCW 58.17.110, and also in RCW 19.27.097, the reason is simple – not every lot is first subdivided (i.e. goes through RCW 58.17 et seq) before a building is built thereon (i.e. goes through RCW 19.27 et seq). A person who does not challenge the water availability determination in a subdivision approval is barred from challenging a building permit later on the same grounds under LUPA. *JZ Knight v. City of Yelm,* 173 Wn.2d 325 (2011)(senior water rights holder has standing under LUPA).

Ecology is espousing a reasonableness test that says "imminent" (Ecology Br. at 39-42) – but the common law only says "reasonable diligence" which should favor the landowner who is following all the rules, not harsh imminence. In short, Ecology is conflating the common law test into a single test, and should be rejected. Ecology is confusing the "first step" test with the "reasonable diligence" prong of the inquiry, in pushing for an exclusive "drilled well" date. A drilled well may come very late in the natural process (like here). Ecology also argues that because a permit

filed but not obtained prior to an Instream Flow Rule must be conditioned upon the Instream Flow Rule, an exemption started prior must also be subject to an Instream Flow Rule. Ecology is wrong. The legislature has not said that. Rather, following the sound reasoning of *Campbell & Gwinn,* a person who is exempt from the permitting process is likewise exempt from the permitting limitation of being conditioned upon Instream Flows. RCW 90.03.247 (only applies to permits).

What is clear, is that Ecology's interpretation of the priority date of an exempt withdrawal being the date the water is put to "beneficial use" is clearly wrong. If Ecology were correct, an applicant for a building permit for new household domestic purposes would first have to put water to beneficial use for household purposes, which he cannot do (lawfully) without a building permit – a circular problem that is inconsistent with RCW 90.44.050 and RCW 19.27.097. This demonstrates that Ecology's interpretation of "legal availability" of water under RCW 19.27.097 should be afforded no deference.

**I. Because Ecology has a duty to provide for "adequate" water for human domestic purposes in RCW 90.54.020(5), Ecology has tried (improperly) to account for domestic exempt users, and Ecology's January 2015 letter says that it will continue to find a solution for domestic exempt users, Fox is not required to make any ad hoc showings regarding his permit exempt water use.**

If the court holds that Foxes building permit application is incomplete due to priorities of water supply or mitigation/offset issues with respect to the Instream Flow Rule, then duty to offset or mitigate is on Department of Ecology under RCW 90.54.020(5), the duty is not on the individual qualified for an exemption under RCW 90.44.050. Otherwise, even the "administrative expedience" purpose of RCW 90.44.050 is rendered meaningless. Mr. Fox requests the Court of Appeals enter this holding in the alternative, in the reversal of the trial court's dismissal.

Ecology in its brief does not address that the Legislature in RCW 90.54.020(5) uses the term "adequate" water for human domestic supply, and that "adequate" must mean both factual and legal availability of water in RCW 90.54.020(5), if it has that same meaning in RCW 19.27.097 and RCW 58.17.110. Ecology in its brief argues it has no duty because it cannot summon more water to a basin than arrives there through natural means, but Ecology knows it is not a water availability issue, but simply a timing issue (CP 90) "We have been working very hard to provide on-the-ground solutions for property owners in the Skagit Basin including purchasing water rights, mitigation banks, extending water supply infrastructure, ....and re-timing reservoir release."

Ecology pleads on appeal that this court should not interpret RCW 90.54.020(5) such "that it requires Ecology to make good on potentially infinite claims to a finite resource." (Ecology Br. at 47). First, the term "adequate" with respect to water has already been determined in *Kittitas County* to mean both factual and legal availability of water. Ecology does not address this point. Instead, it relegates its argument to footnotes – which can and should be deemed a waiver by this Court of its argument. There is only so much *domestic* supply needed in a basin from domestic exempt wells – but, the first place Ecology should look are to all of the lawfully approved buildable lots in the County which are tallied in the Comprehensive Plan. And if Ecology felt that were the bare minimum duty, but wanted to work a little harder, it could ensure there was enough for all the projected growth under the existing County Comprehensive Plan. Particularly for human domestic supply from exempt wells, Ecology knows even these amounts do not hurt fish, and reservoirs up river have enough supply. Ecology is not powerless to act, as evidenced by its letter. The Tribe argues that even if Ecology had the duty, Fox has not shown that Ecology has mitigated for his exempt use. (Tr. Br. at 48). That question is for a different day. Fox hasn't been able to use his home. There is nothing to mitigate or offset at this time.

**J. Fox has a constitutional right to use of water under a permit exempt well and the trial courts Order interprets the Instream Flow Rule and Water Code inconsistently with Fox's rights.**

A trial court interpretation of a regulation that makes the regulation violate due process can be challenged on appeal. Constitutional questions may be raised for the first time on appeal. A court is free, even, to raise constitutional issues *sua sponte, Clark County v. WWGMHB,* 177 Wn 2d. 136 (2013) citing *Conard v. University of Washington,* 119 Wn.2d at 529-30(1992)(considering due process claim raised sua sponte that address the same underlying dispute actually raised and argued on appeal) and seek additional briefing on issues.

No one disputes that the requirements to plainly qualify for the exemption in RCW 90.44.050 are specific, mandatory, and carefully circumscribed by the statute. There is a protected property interest in the RCW 90.44.050 exemptions in that a person and use that qualifies, are entitled to be excused from governmental inquiry into the priority of their water right. When Fox subdivided his property, no one disputed his right to the exemption. When Fox drilled his well, no one disputed his right to the exemption. But now, when all the other requirements of the building permit application are met (which is per se evidence of good faith reliance)

except, allegedly his right to the exemption (under the trial court's interpretation of WAC 173-503(2001) applying to exempt wells and Foxes exempt well) all of a sudden Fox is no longer entitled to be excused from governmental inquiry into impairment questions.

Ecology tries to avoid the due process issue simply by saying Foxes rights have been relinquished. But, Ecology knows it cannot bring up relinquishment questions in litigation involving impairment. Moreover, and more fundamentally, uses that qualify for the exemption under RCW 90.44.050 are not subject to relinquishment without an order or an adjudication – which is due process.

While Fox urges that the exemptions in RCW 90.44.050 are a reflection of common law groundwater riparian rights, that question technically doesn't have to be answered in this Court as there is not an adjudication or a relinquishment order concerning his rights originating at the common law, as it goes without saying that even the statutorily created property rights are protected by due process. *Durland et al v. San Juan County et al.,* 182 Wn.2d 55, 71-72 (2014)(constitutionally protected property interests may be created either through (1) contract, (2) common

law, or (3) statutes and regulations.") *citing Conard v. University of Washington,* 119 Wn.2d at 529-30.

Ecology concedes that the exemption from permitting is a property right. Ecology argues that Fox has relinquished his riparian groundwater right. However, the correlative groundwater right that Fox claims need not be adjudicated here. It is less than 5000 gallons per day. RCW 90.14.041 provide that uses that qualify for the exemption need not register.

The interpretation that WAC 173-503(2001) applies to prohibit Foxes use violates due process of law. The Foxes have otherwise been entitled to and Skagit County was issuing building permits at any and all times under Skagit County code and Ecology Rules with respect to adequate water, until, apparently, October 3, 2013 when *Swinomish v. Ecology* decision was entered, and an Ecology attorney sent an email to the County attorney with an informal take, and without any warning or notice to the Foxes, the Foxes have been denied a right protected by the due process clauses of the Washington and United States Constitutions.

The Tribe argues Fox never relied upon the 2006 Amendments to the Instream Flow Rule, but concedes that it is undisputed that Fox drilled

a well in 2011. As stated in *Campbell & Gwinn,* "where a permit is required, it is required before any wells are dug." 146 Wn.2d at 12.

The Foxes subdivided the property prior to the effective date of the Instream Flow Rule. And the Foxes drilled a well while the 2006 amendments were operative. RCW 90.44.050 requires anyone that does not qualify for an exemption, to obtain a water permit prior to drilling a well, but if a person and use qualify for the RCW 90.44.050 exemption, they are excused from permitting.

The vested rights doctrine was originally born essentially in due process. *See Allenbach v. Tukwila,* 101 Wn.2d 193 (1984) *quoting Hardy v. Superior Court,* 155 Wn.244, 248-49 (1930)("A statute speaks from the time it goes into operation and not from the time of passage"). *Hull v. Hunt* essentially recognized these constitutional due process rights of applicants that rely in good faith upon the ordinances in effect at the time of their actions. While the Tribe is correct that *Hull v. Hunt* was not a mandamus proceeding, in *Allenbach v. Tukwila,* which was a mandamus proceeding which Fox cited in string citation with *Hull v. Hunt,* the *Allenbach* court recognized *Hull v. Hunt at* 130 for the proposition of Washington's "date certain" protection of applicants, which is essentially due process in

Washington. Fox is not unmindful of recent decisions which suggest that Washington's vesting law is merely statutory. *Padilla Bay.* But even if it were, RCW 90.44.050 is also a statute that plainly lays out carefully circumscribed criteria to qualify for the exemption, and Skagit County even recognizes the property interest that rural Skagit County property owners have in the right to an exempt well.

**K. Fox has stated a recognized ground in equity for the reimbursement of his reasonable attorney's fees, and is entitled to attorney's fees in this matter.**

The Foxes have done everything the law required them to do, and this case benefits many people in the state of Washington providing clarity in a matter of first impression regarding important legislative principles underlying RCW 19.27.097, RCW 90.44.050, RCW 90.54.020(5) and/or constitutional principles.

Whether or not the private attorney general doctrine, labeled as such, exists in Washington or not is for this court to determine – but be that as it may, Fox has requested and articulated the reasons in *equity* in addition to the concept of private attorney general.

Now, Skagit County has conceded that Fox has a recognized property interest here, but still refuses to act. Under such extraordinary circumstances, a fee award should enter. It is appropriate that a fee award

be allocated between the intervenors and Skagit County here, jointly and severally. From the briefing, it is apparent that sovereigns are staking their ground, but that caught in the cross-fire, Fox is suffering from the injury this mandamus matter seeks to redress.

Dated this 5th day of October, 2015

Respectfully submitted,

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