93203-4

No. 733150-I
(Skagit County Superior Court No. 14-2-00947-2)

SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD and MARNIE FOX, husband and wife,
Appellants,

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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Richard and Marnie Fox ("Fox") petition this Court to accept review of the Court of Appeals decision identified in Part B of this petition.

B. THE COURT OF APPEALS DECISION

Fox requests this court to review the Court of Appeals, Division 1 opinion in *Fox v. Skagit County,* Docket No. 73315-0-I, filed April 11, 2016. A copy of this decision, terminating review, is attached as Appendix A. The Court of Appeals decision reviewed de novo and affirmed the trial court decision dismissing the Fox's writ of mandamus action without a factual hearing. This decision terminated review.

C. ISSUES PRESENTED FOR REVIEW

1. Is a rulemaking determination of hydraulic continuity enough, by itself, to conclude as a matter of law that a permit-exempt groundwater use is subject to the minimum instream flows and interruptible under WAC 173-503-040 and therefore an inadequate water supply under RCW 19.27.097?

2. Did the Court of Appeals err in ruling that Skagit County can impose a new requirement on building permit applicants, who otherwise qualify for the groundwater permit exemption, to either obtain a water right permit or prove legal water availability and non-impairment of instream flows?

3. Did the Court of Appeals err by determining, as a matter of law, that Fox's permit-exempt groundwater use would be junior in priority date to an instream flow water right, without a trial on factual issues concerning whether the priority date precedes the instream flow rule pursuant to the common law relation back doctrine?

D. STATEMENT OF THE CASE

1. Introduction.

The Supreme Court invalidated the 2006 Amended Skagit River Instream Flow Rule in *Swinomish Indian Tribal Cmty. v. Dep't of Ecology,* 178 Wn.2d 571, 311 P.3d 6 (2013). That ruling had the effect of re-codifying the 2001 Skagit River Instream Flow Rule, Ch. 173-503 WAC (the "2001 Skagit Rule") and causing a domino effect that led to this case. The Appellants, Richard and Marnie Fox, are the owners of a rural property in Skagit County who have been unable to get a building permit from Skagit County for a single family home because the 2001 Skagit Rule has been improperly interpreted and applied to permit-exempt wells since the *Swinomish* decision. Skagit County would not issue a building permit to Fox, ostensibly because their exempt well water right would be junior to the instream flow water rights at WAC 173-503-040, even though neither Ecology nor the County adopted rules or made findings that a permit-exempt use of Fox well would "impair" the Skagit River minimum instream flows. The courts below determined that Fox's well would be inadequate as a water supply for their home because it would be interruptible when

minimum flows were not met, and dismissed Fox's writ of mandamus action to compel the County to issue the building permit.

2. Storied History of the Skagit Instream Flow Rule.

Chapter 173-503 WAC has a storied history, beginning with a Memorandum of Agreement (MOA) in which the County, the Swinomish Tribe and Ecology negotiated and agreed that some exempt wells would not be subject to the Instream Flow Rule. (CP 125-126). The 2001 Skagit Rule was silent on express applicability to exempt wells, which prompted an APA challenge by the County to the 2001 Skagit Rule. A settlement of that APA lawsuit resulted in the 2006 Amendments to the Skagit Rule, including multiple reservations for future uninterruptible groundwater uses, including exempt wells, which was challenged by the Swinomish Tribe. The Supreme Court invalidated the 2006 Amendments to the Skagit Rule in *Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), on the basis that those reservations exceeded Ecology's authority to use the "overriding considerations of public interest" exception and were inconsistent with the prior appropriation doctrine. That invalidation resulted in the reinstatement of the 2001 Skagit Rule in its original form. Significantly, the County issued hundreds of building permits to rural residents of the county based on exempt well water supplies under both the

2001 Rule and the 2006 Amendments before the 2013 *Swinomish* decision. Following that decision, but with no other rule-making actions by Ecology or the County, the County added new requirements for approval of water supply adequacy for building permits, the legality of which are the subject of this case. (CP 273).

3. The Fox Writ of Mandamus Action.

Fox acquired the subject property in 2000 with the intention of building their home for retirement, and lawfully divided the property into two building lots in 2000 with a recorded short plat (CP 660), showing the location of groundwater wells. (CP 661). They submitted a building permit application to Skagit County in 2014 but the County refused to approve it, stating that it was "incomplete" and needed to document water availability pursuant to new requirements -- a letter from Ecology acknowledging that Fox's parcel has an approved water right or an approved mitigation plan. (CP 666). Fox submitted a legal opinion indicating they qualified for the statutory exemption and possessed a groundwater right senior in priority to the 2001 Skagit Rule, but the County refused to act on the application or consider it complete. (CP 668-731). On June 11, 2014, Fox obtained an alternative writ of mandamus to comply or show cause why the building permit should not issue. (CP 643). After service of the writ on Skagit

County, Ecology and the Swinomish Tribe intervened and contested issuance of the writ.

4. Decisions below.

The trial court (Snohomish County Superior Court Judge George F. B. Appel presiding after recusal by the Skagit County judges), directed submittal of briefs on mandamus legal issues, and denied Fox's motion to affirm the writ of mandamus. At the same hearing, the trial court essentially ruled on summary judgment that Fox failed to demonstrate that their exempt groundwater use would not reduce the flows of the Skagit River, dismissed the writ of mandamus action, and denied a reconsideration request. Fox appealed both decisions, raising seven assignments of error and six distinct issues.

The Court of Appeals, Division I, affirmed the trial court by a published decision dated April 11, 2016. The Court of Appeals decision concluded that "a permit-exempt well under RCW 90.44.050 is subject to the prior appropriation doctrine and therefore may be limited by senior water rights, including the instream flow rule." Accordingly, the Court of Appeals held that Fox's well may be interrupted, and concluded that water is not legally available for purposes of their building permit application as a matter of law.

There are three fundamental issues in this case that were ignored by the trial court and the Court of Appeals contrary to Supreme Court precedent and statutory mandates, and which have statewide implications for exempt well users in all twenty-nine basins with instream flow rules. First, the Court of Appeals decision is inconsistent with *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d 726 (2000) by allowing a blanket assumption of "hydraulic continuity" in the Skagit Rule (i.e., without any impairment findings) to justify denial of a building permit for a home relying on a permit-exempt use of groundwater. There is no evidence in the Skagit Rule or otherwise that Ecology ever closed the ground waters of the Skagit Basin by rule, and there is no finding in the Skagit Rule that new permit-exempt groundwater uses would impair the minimum instream flows. Richard and Marnie Fox were denied a building permit based only on assumptions that groundwater was hydraulically connected to the Skagit River, without any impairment findings in the rule.

Second, the new county requirements upheld by the Court of Appeals decision violate rulemaking requirements of the Administrative Procedure Act and are contrary to RCW 90.44.050 and *Hillis v. Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). They impose a new requirement not found in RCW 90.44.050, RCW 19.27.097, or the 2001 Skagit Rule that

exempt well users either obtain a water right permit or mitigation plan approval from Ecology, which is a new requirement of general applicability to those seeking to exercise their statutory rights under the groundwater exemption.

Third, even if the 2001 Skagit Rule applies to Fox's exempt well use under prior appropriation principles, the trial court and the Court of Appeals improperly dismissed the Fox's writ of mandamus action after ruling on Fox's motion on the mandamus legal issues. (CP 588-89); (CP 228). The dismissal was based on the courts' conclusion that Fox's permit-exempt groundwater right would necessarily be junior to the Skagit River minimum instream flows as a matter of law. The trial court and Court of Appeals agreed that common law applied to determine the priority date, but they misapplied the relation back doctrine articulated in *Hunter Land Co. v. Laugenour,* 140 Wash. 558 (1926) to Fox's well. Fox was denied a trial regarding the priority date of his permit-exempt water right, despite issues of fact whether that right "related back" to a date prior to the 2001 Skagit Rule.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Appellants seeks review pursuant to RAP 13.4(b)(1) and (4) where the Supreme Court will accept a petition for review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or ...
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals decision is in conflict with decisions of the Supreme Court and Court of Appeals.

a. The Court of Appeals decision that permit exempt water uses are "subject to" the 2001 Skagit Rule and interruptible as a matter of law is contrary to the Supreme Court's decision in *Postema v. PCHB* that hydraulic continuity is not enough. Impairment findings are required to deny a groundwater permit or to limit exempt well water rights in favor of prior instream flow water rights.

WAC 173-503-060 must be read in light of *Postema v. PCHB*, 142 Wn.2d 68; 11 P.3d 726 (2001), where this Court rejected Ecology's argument that a finding of hydraulic continuity is enough to deny a groundwater permit. Hydraulic continuity is not enough by itself to deny a building permit based on an exempt well in this case. A finding of "impairment" of a minimum flow water right or of an effect on the flow of a closed stream is necessary to make junior exempt groundwater withdrawals subject to the Skagit Rule and interruptible to protect the minimum instream flows. *See Postema*, 142 Wn.2d at 93-95. The courts below erred by assuming that Fox's exempt well usage was subject to the Skagit Rule without a finding of impairment. There are no findings by Ecology in the 2001 Skagit Rule or otherwise that exempt ground water

uses would "impair" the instream flows, and no groundwater closure regulation in the 2001 Skagit Rule or under RCW 90.54.050.

WAC 173-503-040(5) provides:

> (5) Future consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, **and withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be expressly subject to instream flows established in WAC 173-503-040 (1) through (3) as measured at the appropriate gage, and also subject to WAC 173-503-060.** (Emphasis added).

The 2001 Skagit Rule was improperly interpreted by the County, Ecology and the courts below, to regulate future exempt groundwater uses solely on the basis of hydraulic continuity, not on any finding of impairment. WAC 173-503-060 provides that when "Ecology determines there is hydraulic continuity," withdrawals may be approved "subject to the [instream] flows," but does not address whether future permit-exempt wells would be regulated without findings of hydraulic continuity or impairment.

> **WAC 173-503-060. Ground Water.** If the department determines that there is **hydraulic continuity** between surface water and the proposed ground water source, a water right permit or certificate shall not be issued unless **the department determines** that withdrawal of ground water from the source aquifer would not interfere with stream flows during the period of stream closure or with maintenance of minimum instream flows. **If such findings are made**, then applications to appropriate public ground waters may be approved subject to the flows established in WAC 173-503-040(2). (Emphasis added).

In *Postema*, however, this Court held:

> "**We hold that hydraulic continuity of an aquifer with a stream having unmet minimum flows is not, in and of itself, a basis for denial of a groundwater application**, and accordingly affirm the superior courts. However, where there is hydraulic continuity **and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights**, then denial is required." 142 Wn.2d at 93. (Emphasis added).

The *Postema* holding is significant because it establishes a standard for determining when new groundwater appropriations are subject to, and interruptible for the protection of instream flow water rights. Hydraulic continuity was rejected as that standard because it is not enough by itself to prove impairment of existing rights as a matter of law under the code. Other facts relating to the source of the aquifer and its location relative to a surface water flow are relevant to findings of impairment. 142 Wn.2d at 40.

There is a significant difference between the Court of Appeals' holding that exempt well water rights are subject to prior appropriation, and whether senior instream flow water rights would be impaired as a matter of law. The Court of Appeals decision was erroneous and inconsistent with *Postema* because it found impairment from the Instream Flow Rule per se, not based upon any impairment findings. As such it attempts to rewrite the *Postema* decision and prior appropriation law by eliminating a central

requirement – that junior water rights can be regulated or application for permits denied if they impair senior water rights.

b. The additional requirement that Fox obtain a water right permit or Ecology-approved mitigation plan is inconsistent with RCW 90.44.050, *Hillis v. Ecology*, and the APA rulemaking requirements.

The County stated Fox's application was incomplete without "[a] letter or email from Ecology ... [1] acknowledging [Fox's parcel] has an approved water right or transfer... [or] [2] an approved mitigation proposal," or "a submittal of an Engineered Plan for a Rainwater Catchment System." (CP 666). There was no county ordinance or Ecology rulemaking adopting this requirement. In effect, this new requirement was tantamount to requiring Fox to obtain a water right permit or its equivalent in a mitigation plan, i.e., to demonstrate to Ecology that their groundwater usage would not impair the instream flows.[1]

Unlike applications for water right permits under RCW 90.03.290, permit-exempt groundwater rights by definition do not require individual "impairment" or "availability" findings. They are presumed to be available as a water supply for new homes under the plain meaning of RCW

[1] Ecology, without rulemaking and only through its legal counsel, sent an email to Skagit County after *Swinomish v. Ecology* was decided in October 2103 that directed the County to stop issuing building permits that rely on the exemption. CP 273. Skagit County did not update its development regulations before enforcing this requirement.

90.44.050. The groundwater exemption is not limitless, however. Ecology could: (1) adopt administrative rules temporarily withdrawing groundwater to new permit-exempt water uses under authority of RCW 90.54.040-.50(2); or (2) amend the provisions of the Skagit Rule to establish that new permit-exempt wells in certain areas would impair the adopted instream flows. Ecology could also pass rules to implement the building permit application requirements of RCW 19.27.097[2] in consultation with the County. Rules under these provisions could also provide for mitigation or other alternatives for rural domestic water supplies. Ecology did neither of these things in the 2001 Skagit Rule or as a follow-up to the *Swinomish* decision. Thus, the Court of Appeals order affirming the trial court's dismissal of Fox's writ of mandamus leaves in place a new requirement of general applicability to those seeking to exercise their statutory rights under the groundwater exemption. This new requirement meets the definition of a rule under the Administrative Procedure Act, chapter 34.05 RCW ("APA"), but it is invalid for failure to comply with the APA rulemaking requirements and inconsistent with a prior Supreme Court ruling.

In *Hillis v. Ecology*, the petitioner alleged that procedures and priorities used by Ecology to prioritize water right application processing in

[2] RCW 19.27.097(3)

response to budget cuts were new "qualifications or requirements" relating to the benefit conferred by law. The Supreme Court held that while the requirements to actually acquire a water permit remain the four-part test requirements set out in the statute (RCW 90.03.290):

> [W]ater applicants have the right under the statute to have their application investigated and decided upon. RCW 90.03.290 creates this right. Therefore, when Ecology sets out priorities and establishes prerequisites to those decisions, the agency should engage in rule making so the public has some input into those decisions. 131 Wn.2d at 398.

In the present case, Fox has a statutory right to use less than 5,000 gallons of groundwater per day for domestic purposes without applying for a water right permit, i.e., without proving legal water availability, lack of impairment, or consistency with the public interest. RCW 90.44.050. This is the legislative balance struck when adopting the Ground Water Code in 1945[3], to exempt future users of small quantities of groundwater from the burden of applying for water right permits and satisfying the four-part test. The lower courts' holdings upset that balance, which has been relied upon by rural landowners like Fox for decades. *See Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 26, 43 P.3d 4 (2002).[4] By imposing a new

[3] RCW 90.44.035(3) amended definition of groundwaters in 1973 to include percolating.
[4] Footnote 7 of the majority opinion in *Campbell & Gwinn* indicates a concern that broader misuse of the exemption will decimate the permitting requirement. The Court of Appeals opinion in this case creates the opposite problem – its interpretation of the prior appropriation doctrine as subjecting all exempt wells to prior instream flow rules as a

requirement to either obtain a water right permit or to obtain a mitigation plan approval from Ecology, the County and Ecology were adding conditions to the use of a benefit conferred by law, which meets the definition of a "rule" requiring compliance with the APA.

The Court of Appeals disregarded Fox's rulemaking arguments, holding that "the County had the discretion to consider whether the instream flow rule prevented legal access to water in this case." That decision, however, allows counties to demand proof from exempt well users that they are not impairing instream flows, and adds procedural requirements relating to potential conflicts between permit-exempt wells and instream flow water rights. Just as in *Hillis*, the priority of water rights may be unaffected by this new requirement, but the procedural hurdles to obtaining benefit of the water appropriation system have improperly changed. The County and Ecology cannot impose these new requirements on the use of an exempt well without complying with the rulemaking requirements of the APA. The purpose of those requirements is plain and compelling – so the public, with proper notice, has input into those decisions. 131 Wn.2d at 399. Neither Fox nor any other rural property owner affected by the Skagit Rule were

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matter of law will decimate the exemption itself, eliminating it as a source of drinking water for rural homeowners who comply with, and have relied upon, the limits of the exemption.

consulted to provide input into these new requirements for determining water availability relating to permit-exempt wells, but they should have been.

c. The Court of Appeals decision conflicts with Supreme Court precedent because it misapplied the common law doctrine of relation back and ruled against the Fox's relation back priority date as a matter of law.

The Court of Appeals cited to *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002) for the proposition that water obtained from a permit-exempt well is treated as any other water right, including the "first in time" principle of prior appropriation. Treating exempt well water rights like other water rights includes the relation back doctrine of prior appropriation. When water right permits are issued under the Water Code, it is with a priority date that relates back to the date of application. RCW 90.03.340. This is the statutory version of the relation back doctrine. The groundwater permit exemption at RCW 90.44.050 is silent as to the priority date of permit-exempt water rights. Because there is no application for a permit-exempt groundwater right, common law relation back doctrine must apply to determine the priority date of an exempt well water right and the reasonable diligence required to preserve such priority date. *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 P. 41 (1926). The Court of Appeals acknowledged the common law of relation back priority dates, but

misapplied the rule to Fox, making the assumption that any water right developed by Fox's permit-exempt well would necessarily be junior to the 2001 Skagit Rule instream flows as a matter of law.

At common law, appropriative rights are established by "an intention to appropriate followed by reasonable diligence in applying the water to a beneficial use." *In re Rights to Waters of Alpowa Creek*, 129 Wash. 9, 13, 224 P. 29 (1924). If both elements are met, the date of priority of the right will "relate back" to the time work was first performed to appropriate the water. *Hunter Land*, 140 Wash. at 565. Skagit County and the courts below made broad assumptions without factual investigation that Fox's exempt well water right would necessarily be junior to the 2001 instream flows as a matter of law. In so doing, they failed to consider factual issues whether: (1) Fox's subdivision of their property in 2000 (including well site locations) was sufficient evidence of an intent to put groundwater to use on the property; and (2) whether Fox's actions to develop a well and apply for a building permit during the subsequent fourteen-year period was reasonable under the circumstances. Those circumstances included the legislatively-recognized "Great Recession" of 2008 and the County's unfettered practice of issuing building permits throughout the Skagit basin based on exempt wells until the *Swinomish* decision in October 2013. These

are questions of fact that should have been determined by the trial court instead of dismissing the writ action as a matter of law.

Issues of fact arising in a mandamus matter must be tried before the finder of fact.[5] Questions of fact remain concerning the Fox's relation back priority date and reasonable diligence, therefore dismissal of the writ action was improper and the case should be remanded to resolve those factual issues.[6]

2. The petition involves issues of substantial public interest that should be determined by the Supreme Court.

"The allocation of water rights in this state is of such great magnitude that we cannot tolerate a 'cheap and easy' solution." *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 225, 858 P.2d 232, 236 (1993). This case presents compelling questions regarding the interpretation and application of instream flow rules to permit-exempt water uses that should not be left to a court of appeals decision, or to cheap and easy solutions by the County or Ecology.

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[5] *See, Chief Seattle Properties v. Kitsap County*, 86 Wn.2d 7, 27 (1975) ("An application for writ of mandamus has in it all the elements of a civil action, and if issues of fact are raised, they may be tried before the court and an appropriate judgment entered upon findings").

[6] *Cf. Putnam v. Carroll,* 13 Wn. App. 201 (1979) (reversing trial court's dismissal on mandamus action for a building permit, remanding for a factual hearing on a shoreline exemption).

Who, for instance, is responsible for investigating and making findings regarding the effects of exempt well withdrawals on closed streams or impairment of instream flows when there is no requirement for a water right permit or the four-part test of RCW 90.03.290? In the absence of rule-making findings by Ecology regarding impairment or lack of availability of groundwater for permit-exempt uses, the Court of Appeals decision creates an enormous and unprecedented burden of proof for rural property owners to demonstrate that their permit-exempt groundwater use, even for a single home, does not impair instream flow water rights or have an effect on closed streams.

The Court of Appeals' broad conclusion that permit-exempt wells are subject to prior appropriation and thus subject to senior minimum flow water rights as a matter of law has the potential to be misread and misapplied to all twenty-nine basins with minimum instream flow rules, causing massive disruption to groundwater availability in rural areas throughout the state. The Supreme Court should accept review of this case to determine not only whether the Court of Appeals decision is a correct interpretation and application of the 2001 Skagit Rule and RCW 19.27.097, and whether different results may occur under other instream flow rules.

The Court of Appeals decision is unclear on this point and creates considerable uncertainty throughout the state.

The Supreme Court should also accept review of this case to determine whether additional rules need to be updated before exempt-well users can be required to prove legal water availability or non-impairment of instream flows. The public has a significant interest in being notified and consulted before such new requirements are imposed.

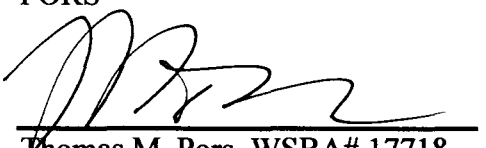
The Court of Appeals decision also makes broad assumptions that new exempt groundwater uses are necessarily junior to instream flow water rights and interruptible as a matter of law. The relation back of priority dates for permit-exempt wells is an issue of significant public interest, and is likely to be repeated in the Skagit Basin and other areas of the state where permit-exempt groundwater uses may conflict with senior rights, including minimum instream flows.

F. CONCLUSION

Fox respectfully petitions the Supreme Court to grant review of this case, for the reasons indicated in Part E., and to reverse the Court of Appeals decision and remand the case: (1) with instructions to issue the writ of mandamus; or (2) for a trial regarding the relation back priority date for the Fox's water right.

Dated: May 11, 2016

LAW OFFICE OF THOMAS M. PORS



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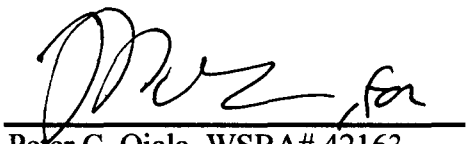

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICHARD A. FOX and MARNIE B. FOX, husband and wife, Appellants, 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, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, SWINOMISH INDIAN TRIBAL COMMUNITY, Respondents.	)	NO. 73315-0-I DIVISION ONE PUBLISHED OPINION FILED: April 11, 2016

LAU, J. — Richard and Marnie Fox appeal the trial court's order denying their motion for a writ of mandamus seeking to compel Skagit County to issue a building permit. The Foxes argue the trial court erred when it ruled that the well on their

property, despite being exempt from the water permit requirement, is not an adequate water supply for purposes of the building permit statute because the well is subject to senior water rights—namely, the 2001 instream flow rule for the Skagit River. We conclude that a permit-exempt well under RCW 90.44.050 is subject to the prior appropriation doctrine and therefore may be limited by senior water rights, including the instream flow rule. Accordingly, because the Foxes' well may be interrupted, water is not legally available for purposes of their building permit application. We affirm.

FACTS

The main facts are undisputed. In March 2014, Richard and Marnie Fox submitted a building permit application to construct a single-family house near Sedro-Woolly, Washington. Skagit County determined the building permit application was "incomplete" because the Foxes failed to demonstrate that they had access to an adequate and reliable source of water for the proposed home. Clerk's Papers (CP) at 666. The Foxes' only source of water is a well on their property. The parties agree the well is in hydraulic continuity[1] with the Skagit River. The 2001 instream flow rule curtails the exercise of water rights when minimum flow requirements for the Skagit River are not met. See generally, WAC 173-503. The parties agree that the Skagit River regularly falls below the minimum flow requirement.[2] The Foxes responded to the County by claiming that despite the instream flow rule, their well was exempt from water

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[1] "Hydraulic continuity" is the term used to describe underground water sources or aquifers that are connected to rivers and other surface water sources.

[2] For example, since 2005, there have been 5 years where the river fell below the minimum flow requirement for 100 days or more. Since 1995, the Skagit River has fallen below the minimum for several days each year, ranging from a low of 29 days in 2013 to a high of 181 days in 2009.

rights permitting requirements because they only sought groundwater for single domestic use not to exceed 5,000 gallons per day. RCW 90.44.050 ("no withdrawal of public groundwaters of the state shall be begun . . . EXCEPT, HOWEVER . . . for single or group domestic uses in an amount not exceeding five thousand gallons a day . . . ."). The County took no action following this response.

On May 23, the Foxes filed a petition for writ of mandamus in Skagit County Superior Court, seeking to compel the County to either issue a building permit or respond and show cause as to why the permit should not be issued. On June 6, the trial court issued an alternative writ commanding the County to issue a building permit to the Foxes or appear and show cause for declining to issue the permit. On June 26, the County responded, reiterating that "[t]he Skagit River instream flows prescribed under WAC 173-503 [the instream flow rule] apply to Mr. Fox's proposed use of permit-exempt groundwater, and he has not demonstrated that his proposed groundwater withdrawal will not impact flows in these tributaries and the Skagit River." CP at 234. In July 2014, the trial court granted the Swinomish Indian Tribal Community's (the Tribe) and the Department of Ecology's (the Department) motions to intervene in the action.

After considering briefs and oral argument, the trial court denied the Foxes' petition for writ of mandamus. On February 2, 2015, the trial court entered its order denying motion to affirm writ of mandamus. The trial court agreed with the Department that the instream flow rule under WAC 173-503 governed permit-exempt groundwater use that is in hydraulic continuity with the Skagit River, including the Foxes' well. The trial court denied the Foxes' motion for reconsideration. The Foxes appeal.

ANALYSIS

Standard of Review

A writ of mandamus "may be issued by any court . . . to compel the performance of an act which the law especially enjoins as a duty . . . ." RCW 7.16.160. "[W]hether a statute specifies a duty that the person must perform is a question of law." River Park Square, LLC v. Miggins, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). Accordingly, whether the County had a legal duty to grant the Foxes' request for a building permit is a question of law we review de novo. See Cost Mgmt. Serv., Inc. v. City of Lakewood, 178 Wn.2d 635, 649, 310 P.3d 804 (2013).

Permit-Exempt Wells are Subject to the Prior Appropriation Doctrine

The core issue in this case involves whether the prior appropriation doctrine applies to a well that is exempt from the permit procedure to withdraw public groundwater under RCW 90.44.050. We conclude that these permit-exempt wells are subject to the prior appropriation doctrine. Therefore, the Foxes' well cannot infringe senior water rights, including the 2001 instream flow rule.

An individual seeking a building permit must demonstrate to the local licensing authority that an adequate water supply is available:

> Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply.

RCW 19.27.097(1). "[C]ounties must assure that . . . water is both factually and legally available." Kittitas County v. Eastern Wash. Growth Mgmt. Hr'gs Bd., 172 Wn.2d 144,

180, 256 P.3d 1193 (2011). The Foxes allege that water is "legally available" to their proposed building because it is exempt from the water permit process under RCW 90.44.050:

> After June 6, 1945, 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 by it as herein provided; EXCEPT, HOWEVER . . . for single or group domestic uses in an amount not exceeding five thousand gallons a day . . . is and shall be exempt from the provisions of this section, but, to the extent that is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter.

RCW 90.44.050. The Foxes' well is for domestic purposes and will draw less than 5,000 gallons per day. Thus, it is exempt from the permitting process, and they are entitled to "a right equal to that established by a permit." RCW 90.44.050. The Foxes contend this exemption satisfies the building permit requirement for "evidence of an adequate water supply" because it is the legal equivalent of a "water right permit from the department of ecology . . . or another form sufficient to verify the existence of an adequate water supply." RCW 19.27.097(1).[3]

Although this exemption from the water permitting process may establish a right to withdraw groundwater, that right is not absolute. The overall statutory scheme and case law both demonstrate that superior water rights may limit a right to withdraw groundwater via a permit-exempt well.

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[3] The parties agree that the Foxes never sought a water right permit and that obtaining water through a public utility is unlikely, so they were unable to obtain "a letter from an approved water purveyor stating the ability to provide water." RCW 19.27.097(1).

Appropriations of groundwater under chapter 90.44 RCW—the chapter containing the Foxes' alleged "exemption"—are subject to the prior appropriation doctrine. RCW 90.44.020 expressly provides that chapter 90.44 RCW "shall be supplemental to chapter 90.03 RCW . . . and is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of groundwaters within the state." RCW 90.44.020. Chapter 90.03 RCW, the general water code, contains the longstanding principle that water appropriations have priority over other appropriations acquired later in time: "as between appropriations, the first in time shall be the first in right." RCW 90.03.010 (emphasis added). Chapter 90.44 RCW acknowledges this same principle:

> The rights to appropriate the surface waters of the state and the rights acquired by the appropriation and use of surface waters shall not be affected or impaired by any of the provisions of this supplementary chapter [ch. 90.44 RCW] and, to the extent that any underground water is part of or tributary to the source of any surface stream or lake, or that the withdrawal of groundwater may affect the flow of any spring, water course, lake, or other body of surface water, the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to groundwater.

RCW 90.44.030 (emphasis added). Water obtained under RCW 90.44.050 through either a permit or a permit-exempt well constitutes an "appropriation." RCW 90.44.050 (describing a permit to withdraw water as "an application to appropriate such waters . . . ." (emphasis added)). Therefore, because withdrawing water from a permit-exempt well constitutes an appropriation, and because chapter 90.44 RCW is intended to "extend[ ] the application of such surface water statutes to the appropriation . . . of groundwaters," RCW 90.44.020, appropriations under RCW 90.44.050 are subject to the general rule that "first in time shall be first in right." RCW 90.03.010. Although the exemption under

RCW 90.44.050 grants the Foxes a right to withdraw groundwater, like any other right to appropriate groundwater, it is nevertheless subject to the longstanding rule that first in time shall be first in right.

The superior right here is the minimum instream flow rule the Department established for the Skagit River. See WAC 173-503. RCW 90.22.010 empowers the Department to "establish minimum water flows or levels for streams, lakes or other public waters . . . ." RCW 90.22.010. These minimum flow levels "constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment." RCW 90.03.345. Accordingly, these minimum flow levels are like any other water appropriation right—they cannot affect existing water rights, and they take priority over subsequently established rights. See RCW 90.22.030; see also Hubbard v. State, 86 Wn. App. 119, 936 P.2d 27 (1997). The Department promulgated WAC 173-503 in 2001, establishing a minimum flow for the Skagit River. Like any water appropriation, these minimum flow requirements take priority over subsequently acquired water appropriations that would impair the Department's designated minimum flow level. See Postema v. Pollution Control Hr'gs Bd., 142 Wn.2d 68, 81, 11 P.3d 726 (2000) ("Thus, a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals.").[4] The statutory scheme dictates that the

[4] The Foxes cite the following passage from Postema several times in their brief: "Additionally, 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, 142 Wn.2d at 93. This does not support the Foxes' argument that their permit-exempt well is not subject to the senior water rights protected by the instream flow rule. The Foxes ignore the Court's language in the following paragraph: "We hold that hydraulic continuity of an aquifer with a stream having unmet minimum flows is not, in and of itself, a basis for denial of a groundwater application, and

Foxes' right to withdraw water from their permit-exempt well is subject to the superior water rights protected by the instream flow rule.

Washington Supreme Court authority is consistent with this interpretation. In Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 43 P.3d 4 (2002), the Court unambiguously held that water obtained from a permit-exempt well is treated as any other water right and is therefore subject to the prior appropriation doctrine:

> While the exemption in RCW 90.44.050 allows appropriation of groundwater and acquisition of a groundwater right without going through the permit or certification procedures of chapter 90.44 RCW, once the appropriator perfects the right by actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected rights. RCW 90.44.050. Thus, it is subject to the basic principle of water rights acquired by prior appropriation that the first in time is the first in right.

Campbell & Gwinn, 146 Wn.2d at 9 (emphasis added); see also Campbell & Gwinn, 146 Wn.2d at 17 n.8 ("RCW 90.44.050 itself provides that a right acquired under the exemption is to be treated as all other rights, and thus is subject to the prior appropriation doctrine's first in time first in right principle.")[5]

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accordingly affirm the superior courts. However, where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial is required." Postema, 142 Wn.2d at 93 (emphasis added). Therefore, the Foxes' permit-exempt well is still subject to Skagit River's minimum flow rights.

[5] The Foxes repeatedly cite Campbell & Gwinn for the proposition that the statutory exemption in RCW 90.44.050 precludes the Department from employing the four criteria for approval of a water rights permit under RCW 90.03.290, and that therefore a permit-exempt well renders any consideration of existing water rights unnecessary. See Campbell & Gwinn, 146 Wn.2d at 16 ("Ecology does not engage in the usual review of a permit application under RCW 90.03.290."). But the Foxes fail to acknowledge that the Court expressly held that permit-exempt water rights under RCW 90.44.050 are nevertheless subject to prior appropriation doctrine and therefore may be curtailed by senior water rights. Campbell & Gwinn, 146 Wn.2d at 17 n.8

The Court reiterated this point in Swinomish Indian Tribal Community v. Dep't of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013), where it addressed several 2006 amendments to the 2001 instream flow rule. The amendments sought to reserve water for certain uses—including permit-exempt wells—despite whether those uses impaired the minimum flow requirements for the Skagit River. Swinomish, 178 Wn.2d at 578-79. The Department recognized that the 2001 instream flow rule had priority over subsequently acquired water rights, and it therefore believed reservations were necessary to create water access for certain limited uses: "Ecology found that important public interests would be significantly advanced by the reservations because without them, new withdrawals . . . would be interrupted when stream flows fall to the minimums established under the 2001 Instream Flow Rule; new sources of water were otherwise unavailable through most of the basin as a practical matter; and economic productivity would be gained." Swinomish, 178 Wn.2d at 579. The Department relied on the "overriding considerations" exception in RCW 90.54.020(3)(a) to justify the reservations. RCW 90.54.020(3)(a) ("Withdrawals of water which would conflict [with] [minimum flow requirements] shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served."). The Court held that these reservations were invalid because the overriding-considerations exception could not alter the priority date of water appropriations that would otherwise be subject to the senior instream flow rule, including permit-exempt wells:

> [T]he overriding-considerations exception cannot reasonably be read to replace the many statutes that pertain to appropriation of the state's water and minimum flows. Existing statutes govern applications to beneficially use water for the purposes for which the reservations were made here. For example, Ecology determined that noninterruptible water

> is needed for some domestic exempt wells because, while there is a current provision for exempt wells, the appropriators' right to use the water is subject to rights with priority in time. But exempt wells are provided for by statute and Ecology's actions on applications for exempt wells are clearly set out in the water code—without any provision permitting a "jump to the head of the line" in priority as a result of Ecology's reservations of water and use of the overriding-considerations exception. See RCW 90.44.050.[14]
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> [14] The dissent engages in a "factual analysis" intended to show that exempt well uses and rural public water supply systems qualify under a cost-benefit analysis for consideration under the overriding-considerations exception. But the analysis simply shows what is always true—there are hardships attendant to any water right with a later priority date and too little water available to satisfy all rights. The dissent also claims that the reallocations of water for exempt well users and rural public water systems should be permitted since they involve only small quantities of water and will have little impact on minimum flows. But the overriding-considerations exception is not a grant of general authority to reallocate water subject to existing water rights regardless of whether the impact on minimum flows and instream uses would be substantial or slight.

Swinomish, 178 Wn.2d at 598 n.14 (emphasis added). Swinomish controls here: "the appropriators' right to use the water [from a permit-exempt well] is subject to rights with priority in time." Swinomish, 178 Wn.2d at 598.[6] The Foxes' right to use their permit-exempt well is subject to the superior water rights protected by the 2001 instream flow rule.

Both the statutory scheme and case law demonstrate that water is not legally available for purposes of the Foxes' building permit. An exemption under RCW 90.44.050 provides a right to withdraw groundwater legally equivalent to the right

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[6] The Foxes briefly mention that Swinomish was limited to circumstances where someone actually applies for a water permit. But nothing in the statutory scheme or in the Court's language in Swinomish suggests such a limitation. The Swinomish Court meant exactly what it said: permit-exempt wells are subject to the prior appropriation doctrine.

obtained via a permit. Therefore, a permit-exempt well, like any other groundwater appropriation, is subject to prior appropriation doctrine. RCW 90.03.010 ("as between appropriations, the first in time shall be the first in right.") The Washington Supreme Court recognized this straightforward reading of the statutory scheme in Campbell & Gwinn: "RCW 90.44.050 itself provides that a right acquired under the exemption is to be treated as all other rights, and thus is subject to the prior appropriation doctrine's first in time first in right principle." Campbell & Gwinn, 146 Wn.2d at 17 n.8. Because the Foxes' permit-exempt well is subject to the prior appropriation doctrine, it cannot impair the senior water rights protected by the 2001 instream flow rule. See RCW 90.22.030. This is exactly what the Court held in Swinomish: "the appropriators' right to use the water [from a permit-exempt well] is subject to rights with priority in time." Swinomish, 178 Wn.2d at 598. In short, there is overwhelming legal authority that supports the trial court's order denying the Foxes' motion for a writ of mandamus because water is not legally available for their permit-exempt well. The statutory exemption grants them a right to withdraw groundwater from their well. But this right cannot supersede senior water rights such as the minimum flow requirement in the 2001 instream flow rule.

The Foxes' Remaining Arguments are Unpersuasive

The Foxes' remaining arguments purport to show that their well is not subject to the senior water rights protected by the 2001 instream flow rule. We are not persuaded by these arguments.

The building permit process must be consistent with state law

First, the Foxes argue that the County must issue a building permit when RCW 19.27.097 and relevant sections of the Skagit County Code (SCC) are satisfied. They

rely on RCW 19.27.095(2), which provides that "[t]he requirements for a fully completed application shall be defined by local ordinance." RCW 19.27.095(2). The SCC defines "adequate water supply" as "a water supply which is capable of supplying at least three hundred fifty (350) gallons of water per day, meets siting criteria established by State and local regulations, and meets water quality standards in SCC 12.48.110." SCC § 12.48.030. According to the Foxes, because RCW 19.27.095(2) grants counties the authority to define the requirements for a building application, the County here need only apply its own definition of "adequate water supply" for purposes of the building application process under RCW 19.27.097. Therefore, the County had no discretion to consider the legal availability of water beyond its own local definition for "adequate water supply," and the trial court erred when it assumed the 2001 instream flow rule prevented the County from issuing a building permit.

The building permit process must be consistent with state law. The Foxes suggest the County's analysis is limited to its own local ordinance. But the SCC expressly provides that its provisions must comply with the state water code and the instream flow rule specifically: "[t]he purpose of these rules is to . . . (3) Whenever possible, carry out powers in manners which are consistent with Chapter 90.54 RCW and Chapters 173-503 and 173-505 WAC." SCC § 12.48.010(3) (emphasis added). Contrary to the Foxes' argument, the County had the discretion to consider whether the instream flow rule prevented legal access to water in this case.

Even under the County's own definition of "adequate water supply," water is unavailable to the Foxes. As discussed above, permit-exempt wells like the Foxes' are subject to the prior appropriation doctrine. See Swinomish, 178 Wn.2d at 598. The

Foxes' well may be interrupted any time the Skagit River falls below minimum flow requirements under WAC 173-503. A well that is subject to interruption is not "capable of supplying at least three hundred fifty (350) gallons of water per day." SCC § 12.48.030.

Under the Foxes' interpretation of the building permit statute and the SCC, the County essentially has the authority to issue building permits in violation of state law. This is an illogical result.

The Foxes concede that "[o]rdinances are to be interpreted consistent with state law." Br. of Appellant at 14 (citing Eugster v. City of Spokane, 118 Wn. App. 383, 406, 76 P.3d 741 (2003)). A county cannot override state law. See Cannabis Action Coalition v. City of Kent, 183 Wn.2d 219, 227, 351 P.3d 151 (2015) ("state law preempts a local ordinance when [it] permits what state law forbids or forbids what state law permits."). The building permit application process must be consistent with state law, including the hierarchy of water rights established by the prior appropriation doctrine.

Kittitas does not preclude consideration of the instream flow rule

The Foxes rely on Kittitas arguing the test for legal availability of water is satisfied when an applicant properly qualifies for a permit-exempt well under RCW 90.44.050. Kittitas is inapposite. Kittitas demonstrates that water is not legally available when water access would infringe senior water rights:

> The parties dispute whether the requirement of RCW 58.17.110 that counties assure appropriate provisions are made for potable water supplies means only that counties must assure that water is factually available underground or that water is both factually and legally available.
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> . . . .
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> To interpret the County's role under RCW 58.17.110 to only require the County to assure water is physically underground effectively allows the

> County to condone the evasion of our state's water permitting laws. This could come at a great cost to the existing water rights of nearby property owners, even those in adjoining counties, if subdivisions and developments overuse the well permit exemption, contrary to law.
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> . . . .
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> The [Growth Management Act] requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA. The Board properly interpreted the GMA's mandate to protect water to at least require that the County's subdivision regulations conform to statutory requirements by not permitting subdivision applications that effectively evade compliance with water permitting requirements.

Kittitas, 172 Wn.2d at 179-81. Nowhere in Kittitas does the Court suggest that a permit-exempt well, alone, satisfies the "adequate water supply" requirement in RCW 19.27.097. Instead, Kittitas requires that water be legally available to permit applicants and this analysis requires consideration of senior water rights.

Consideration of senior water rights is not confined to general stream adjudications

The Foxes contend that "[t]o interpret the legal availability portion of 'adequate' water in RCW 19.27.097 to include a determination by the County of priority of water rights (i.e. the Foxes right versus the Instream Flow Rule), would be inconsistent . . . with the general stream adjudication procedures which the legislature has vested solely in the superior courts, initiated by Ecology, to afford proper due process." Br. of Appellant at 16. We disagree. The County had authority to consider the priority of water rights, including the instream flow rule.

The Foxes primarily rely on Rettkowski v. Dep't of Ecology, 122 Wn.2d 219, 858 P.2d 232 (1993). In Rettkowski, the Court held that the Department had no authority to issue cease and desist orders to water users it believed were infringing senior water rights. Instead, the Department was required to use the general adjudication

procedures under RCW 90.03. Rettkowski, 122 Wn.2d at 234. But Rettkowski involved water users with existing, valid permits. Rettkowski, 122 Wn.2d at 236-37. The Court acknowledged that, during the permit application process, the Department has the authority to consider whether a water user infringes senior water rights: "The inquiry in that situation is relatively straightforward: is there water available to apportion, is the proposed use beneficial and not detrimental to the public interest, and is there any conflict with existing water rights." Rettkowski, 122 Wn.2d at 228. The County's analysis under the building permit process is analogous. RCW 19.27.097. As discussed above, the County's own local code provides that it should be applied consistently with WAC 173-503 (the instream flow rule). The County had the authority to consider whether the Foxes' well infringed senior water rights generally and the instream flow rule in particular.

The Foxes lack any riparian or correlative water rights

Relying on Dep't of Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985), the Foxes argue their riparian or correlative right to use their well means this right is superior to the instream flow rule. This argument fails.

In Abbott, the Court held that "the 1917 water code established prior appropriation as the dominant water law in Washington" and that, "[a]fter 1917, new water rights may be acquired only through compliance with the permit system and existing water rights not put to beneficial use are relinquished." Abbott, 103 Wn.2d at 687. The Foxes concede that the water code "removed all possibility of origination of water rights from . . . unused riparian rights to surface water." Br. of Appellant at 24. They nevertheless cite Abbott for the proposition that "the groundwater code did not

remove certain carefully circumscribed unused groundwater riparian rights because of the exemptions in RCW 90.44.050." Br. of Appellant at 24.

The Foxes point to language where the Court suggests that a domestic exemption existed for groundwater but not surface water:

> The trial judge in this case, despite the shift away from the primacy of riparian rights by the courts and Legislature, concluded that the appropriative permit system embodied in the 1917 water code applied only to *surplus* waters in excess of those required for "ordinary" or "natural" domestic uses by riparians. He also interpreted the forfeiture provisions of the water rights act as applying only to public uses enumerated in article 1, section 16 of the state constitution. Although we need not decide questions concerning that here, even partial adoption of the trial court opinion would effectively create a domestic use exemption from the permit system and state management of water resources. The Legislature did expressly create a domestic exemption in the groundwater code, RCW 90.44.050, but it has never seen fit to create such an exemption for surface water.

Abbott, 103 Wn.2d at 693. They claim this language shows the statutory exemption saved riparian or correlative rights for domestic purposes.

This interpretation is inconsistent with the water code. Just as the 1917 code eliminated riparian rights to surface water, the 1945 code eliminated riparian rights to groundwater:

> Subject to existing rights, all natural groundwaters of the state as defined in RCW 90.44.035, . . . are hereby declared to be public groundwaters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise.

RCW 90.44.040 (emphasis added). Further, the Supreme Court recognized the purpose and effect of the groundwater code is the same as the surface water code insofar as both "are premised on the doctrine of prior appropriation." Campbell & Gwinn, 146 Wn.2d at 7-8. The Abbott language suggests only that the statutory

exemption under RCW 90.44.050 exempts some water users from the permit process, not prior appropriation doctrine altogether. See Swinomish, 178 Wn.2d at 598 ("the appropriators' right to use the water [from a permit-exempt well] is subject to rights with priority in time.").[7]

The instream flow rule applies to the Foxes' well

The Foxes disagree that the 2001 instream flow rule applies to their well. Relying on RCW 90.54.010(1) and RCW 90.54.020(5), they argue that water must be preserved for domestic use and no instream flow rule can limit permit-exempt domestic wells. They also argue because RCW 90.03.247 requires permits to be conditioned to protect instream flow rights, permit-exempt wells are not subject to such rights.

The Foxes' reliance on these statutes to create an exception to senior instream flow rights is misplaced. RCW 90.03.345 expressly provides that minimum flow levels "constitute appropriations . . . with priority dates as of . . . their establishment." Courts have consistently recognized that minimum flow levels have priority over subsequently acquired rights, including permit-exempt wells. See Campbell & Gwinn, 146 Wn.2d at 17 n.8; Swinomish, 178 Wn.2d at 598. In Swinomish, the Court commented on several of the statutes cited by the Foxes, noting they were not "meant to override minimum flow rights" and do not "conflict with the statutes authorizing or mandating rules setting minimum flows" or with those "respecting priority of minimum rights." Swinomish, 178 Wn.2d at 585.

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[7] The Foxes rely on two other cases to support their riparian or correlative water rights theory. See State Highway Comm'n v. Ponten, 77 Wn.2d 463, 463 P.2d 150 (1969), Welch v. Dep't of Ecology, No. 98-108, 2000 WL 871699 (Wash. Pollution Control Hr'gs Bd. May 4, 2000). Neither case is helpful.

Nor do any of the Department rules suggest the instream flow rule does not apply. The Foxes claim that WAC 173-503-040(5) and WAC 173-503-060 indicate that instream flow rights apply only to permitted wells. WAC 173-503-040(5) states the exact opposite:

> 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 instream flows established in [the Rule], and also subject to WAC 173-503-060.

WAC 173-503-040(5) (emphasis added); see also Whatcom County v. Western Wash. Growth Mgmt. Hearing Bd., 186 Wn. App. 32, 60, 344 P.3d 1256 ("[WAC 173-503-040(5)] expressly indicates that it governs permit-exempt uses of water.").

WAC 173-503-060 also fails to support the Foxes' claim. That rule provides:

> If the department determines that there is hydraulic continuity between surface water and the proposed ground water source, a water right permit or certificate shall not be issued unless the department determines that withdrawal of ground water from the source aquifer would not interfere with stream flows during the period of stream closure or with maintenance of minimum instream flows.

WAC 173-503-060. The Foxes contend that because this rule omits permit-exempt wells, the instream flow rule applies only to permitted wells. But nothing in this rule limits the other rules in the same section that unambiguously provide that the instream flow rule applies to all groundwater withdrawals including permit-exempt wells. See WAC 173-503-040(5), 173-503-050(1)-(2); see also Whatcom County, 186 Wn. App. at 60, Swinomish, 178 Wn.2d at 598.

The Foxes selectively highlight portions of the rule-making record to support their argument that the instream flow rule does not apply to permit-exempt wells. These

excerpts were not submitted to the trial court. In any event, the record shows the Department intended to apply the instream flow rule to all future appropriations, including permit-exempt wells. The instream flow rule was developed in part to "reduce the use of exempt wells in those areas of the County experiencing inadequate instream flows . . . as a result of groundwater withdrawal." CP at 343-45; see also CP at 35 ("Exempt wells are virtually everywhere, including adjacent to small tributaries that dry up in the summer. Clusters of these exempt wells could have a detrimental effect on these small streams."). No statute or administrative rule protects the Foxes' well from the instream flow rule.

The Foxes lack any senior water right

The Foxes argue they have an appropriative water right senior to the 2001 instream flow rule. The Foxes failed to present evidence that they manifested the requisite intent to appropriate the water necessary for their proposed building.

In order to establish a common law appropriative water right, the Foxes must show "an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use." In re Rights to Waters of Alpowa Creek, 129 Wash. 9, 13, 224 P. 29 (1924). If both elements are met, the date of priority of the right will "relate back" to the time work was first performed to appropriate the water. Hunter Land Co. v. Laugenour, 140 Wash. 558, 565, 250 P. 41 (1926).

The Foxes argue that they manifested sufficient intent to appropriate the water when they subdivided their property in 2000, dividing the lot into two plots. This is not sufficient to prove an appropriative water right. A water right's priority date will relate back to the "first step" of an appropriation, which is "complete when overt acts coalesce

to openly demonstrate the applicant's intent to appropriate the water for a beneficial use." In re Water Rights of Vought, 76 P.3d 906, 912 (Colo. 2003). Such intent must be for a "fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source." In re Right to Water in Water Dist. No. 36, 696 P.2d 730, 745 (Colo. 1985). Mere subdivision of property cannot meet this level of intent. The Foxes did nothing with the property for several years. Between 2000 and 2014 they rented the land to neighbors, who used it as a horse pasture. The Foxes began construction on their well in 2011. The record fails to show the necessary diligence to support an appropriative right in 2000.

No duty to mitigate by the Department

RCW 90.54.020(5) provides: "[a]dequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." The Foxes argue that this subsection imposes a duty to mitigate on the Department. They claim to "preserve" an "adequate" supply of water, the Department must allow the Foxes to access water despite the instream flow rule. No legal authority supports this interpretation. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). The Foxes' interpretation means that certain uses will always supersede appropriative water rights. Neither the water code nor case authority suggests that the statutory scheme provides the Department the authority to override appropriated water rights. Indeed, this reasoning was central to the Court's Swinomish decision. See Swinomish, 178 Wn.2d at 598.

The Foxes' due process claim fails

The Foxes argue the County's denial of a building permit violated their due process rights. Arguably, we may ignore this argument because the issue was not sufficiently argued at the trial court and is inadequately briefed. RAP 2.5(a); Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) ("We will not consider an inadequately briefed argument.").

In any event, the Foxes' due process claim fails. The Foxes have failed to show a sufficient property interest. Greenhalgh v. Dep't of Corrections, 180 Wn. App. 876, 890, 324 P.3d 771 (2014) ("A threshold matter to a procedural or substantive due process claim is whether the plaintiff possessed a property interest."). The Foxes have no property interest because their permit-exempt well is subject to the senior water rights protected by the instream flow rule.

Even if we assume a property interest, the Foxes fail to address the remaining analysis of their due process claim. After concluding that a sufficient property interest is at stake, the reviewing court must then inquire "(1) whether the regulation aims to achieve a legitimate public purpose, (2) whether the means adopted are reasonably necessary to achieve that purpose, and (3) whether the regulation is unduly oppressive on the property owner." Robinson v. City of Seattle, 119 Wn.2d 34, 51, 830 P.2d 318 (1992). The Foxes fail to analyze any of these considerations. "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 14, 721 P.2d 1 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)). The Foxes' argument erodes the legal framework for appropriative water rights. That

some water rights must necessarily acquiesce to senior water rights is a natural consequence of the prior appropriation doctrine. See, e.g., Swinomish, 178 Wn.2d at 598, n.14 ("there are hardships attendant to any water right with a later priority date and too little water available to satisfy all rights.").

For similar reasons, Skagit County's due process argument also fails. The County contends the Department's instream flow rule interpretation violates the Foxes' due process rights because it repeals a statutory right by implication. Like the Foxes, the County's argument assumes the right granted under in RCW 90.44.050's exemption exists outside of prior appropriation doctrine. As discussed above, the right to withdraw water via a permit-exempt well under RCW 90.44.050 is like any other water right. That right is subject to senior rights, such as the instream flow rule. Contrary to the County's argument, the Department's instream flow rule interpretation does not "vitiate a statutory right by silence," Br. of Skagit County at 21. The statutory right includes only an exemption from the permit process, includes no right to "jump to the head of the line" of priority. Swinomish, 178 Wn.2d at 598.

We also reject the County's claim that the Department's instream flow rule interpretation is "new." The County was on notice that the rule might infringe permit-exempt wells with later priority dates. For example, the introductory comments to the proposed rule provide that it "would affect all future water use, if not exempted," CP at 277, and permit-exempt wells are not listed in the exemptions section of the rule. WAC 173-503-070. In the responsiveness summary and concise explanatory statement for the rule, issued in March 2001, the Department explained that "[g]roundwater withdrawals will be treated as surface water appropriations unless the applicant can

demonstrate the withdrawal is not hydraulically connected to the river." CP at 321. In that same statement, the Department explained a statutory exemption exempts well users only from the permit process, but those permit-exempt wells remain subject to senior water rights:

> Ecology has made statements in the environmental documents and public hearing to clarify that an exempt well is only exempt from permit requirements. It becomes a water right when it is drilled and put to beneficial use. It has a priority date (the date it is put to beneficial use) and could be junior to the instream flow if put to beneficial use after the effective date of the rule. The priority date of the exempt well could become important during a time of scarcity when senior rights would have to be protected.

CP at 322 (emphasis added). The County demonstrated the same understanding of the rule in a 2003 petition for review challenging the rule's validity. The County expressly acknowledged permit-exempt wells were subject to senior water rights, including the instream flow rule. Thus, the wells could not provide an adequate water supply for purposes of the building permit statute:

> Though exempt from [permitting under] RCW 90.44.050, exempt wells, like any other water use, exist within Washington's prior appropriation scheme. This means that exempt wells that are junior to the [rule] can be interrupted if the [rule's] instream flow level . . . is not being met. Interruptible water sources do not meet the requirements for an adequate reliable supply of water needed to authorize issuance of a building permit under RCW 19.27.097.

CP at 10. In 2001, the Department believed the instream flow rule would supersede subsequently acquired water rights such as permit-exempt wells, and the County understood this interpretation. As discussed above, this interpretation properly conforms with the statutory scheme and case law. See Swinomish, 178 Wn.2d at 598.

CONCLUSION

For reasons discussed above, we affirm.

Jay, J.

WE CONCUR:

Spearman, C.J.

Cox, J.

APPENDIX B

RCW 19.27.097

Building permit application—Evidence of adequate water supply—Applicability—Exemption.

(1) Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply.

(2) Within counties not required or not choosing to plan pursuant to RCW **36.70A.040**, the county and the state may mutually determine those areas in the county in which the requirements of subsection (1) of this section shall not apply. The departments of health and ecology shall coordinate on the implementation of this section. Should the county and the state fail to mutually determine those areas to be designated pursuant to this subsection, the county may petition the department of enterprise services to mediate or, if necessary, make the determination.

(3) Buildings that do not need potable water facilities are exempt from the provisions of this section. The department of ecology, after consultation with local governments, may adopt rules to implement this section, which may recognize differences between high-growth and low-growth counties.

[2015 c 225 § 17; 2010 c 271 § 302; 1995 c 399 § 9; 1991 sp.s. c 32 § 28; 1990 1st ex.s. c 17 § 63.]

NOTES:

Purpose—Effective date—2010 c 271: See notes following RCW 43.330.005.

Section headings not law—1991 sp.s. c 32: See RCW 36.70A.902.

Severability—Part, section headings not law—1990 1st ex.s. c 17: See RCW 36.70A.900 and 36.70A.901.

RCW 34.05.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjudicative proceeding" means a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

(3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, and the purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions, or (b) determinations as to the sufficiency of a showing of interest filed in support of a representation petition, or mediation or conciliation of labor disputes or arbitration of labor disputes under a collective bargaining law or similar statute, or (c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests, or (d) the granting of a license, franchise, or permission for the use of trademarks, symbols, and similar property owned or controlled by the agency.

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the agency head.

(5) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(6) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(7) "Institutions of higher education" are the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, the various community colleges, and the governing boards of each of the above, and the various colleges, divisions, departments, or offices authorized by the governing board of the institution involved to act for the institution, all of which are sometimes referred to in this chapter as "institutions."

(8) "Interpretive statement" means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order.

(9)(a) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law, but does not include (i) a license required solely

for revenue purposes, or (ii) a certification of an exclusive bargaining representative, or similar status, under a collective bargaining law or similar statute, or (iii) a license, franchise, or permission for use of trademarks, symbols, and similar property owned or controlled by the agency.

(b) "Licensing" includes the agency process respecting the issuance, denial, revocation, suspension, or modification of a license.

(10) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution, as provided in RCW 34.05.260. "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(11)(a) "Order," without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

(b) "Order of adoption" means the official written statement by which an agency adopts, amends, or repeals a rule.

(12) "Party to agency proceedings," or "party" in a context so indicating, means:

(a) A person to whom the agency action is specifically directed; or

(b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

(13) "Party to judicial review or civil enforcement proceedings," or "party" in a context so indicating, means:

(a) A person who files a petition for a judicial review or civil enforcement proceeding; or

(b) A person named as a party in a judicial review or civil enforcement proceeding, or allowed to participate as a party in a judicial review or civil enforcement proceeding.

(14) "Person" means any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(15) "Policy statement" means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency's current practice, procedure, or method of action based upon that approach.

(16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale. The term includes the amendment or repeal of a prior rule, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, (ii) declaratory rulings issued pursuant to RCW 34.05.240, (iii) traffic restrictions for motor vehicles, bicyclists, and pedestrians established by the secretary of transportation or his or her designee where notice of such restrictions is given by official traffic control devices, (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit,

graduation and the granting of degrees, employment relationships, or fiscal processes, or (v) the determination and publication of updated nexus thresholds by the department of revenue in accordance with RCW 82.04.067.

(17) "Rules review committee" or "committee" means the joint administrative rules review committee created pursuant to RCW 34.05.610 for the purpose of selectively reviewing existing and proposed rules of state agencies.

(18) "Rule making" means the process for formulation and adoption of a rule.

(19) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal or electronic service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company.

[2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

NOTES:

Effective dates—Severability—1992 c 44: See RCW 42.41.901 and 42.41.902.

Effective dates—1989 c 175: "Sections 1 through 35 and 37 through 185 of this act are necessary for the immediate preservation of the public peace, health, or safety, or the support of the state government and its existing public institutions, and shall take effect on July 1, 1989. Section 36 of this act shall take effect on July 1, 1990." [1989 c 175 § 186.]

Severability—1982 c 10: See note following RCW 6.13.080.

Legislative affirmation—1981 c 324: "The legislature affirms that all rule-making authority of state agencies and institutions of higher education is a function delegated by the legislature, and as such, shall be exercised pursuant to the conditions and restrictions contained in this act." [1981 c 324 § 1.]

Severability—1981 c 324: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 324 § 18.]

RCW 90.03.010

Appropriation of water rights—Existing rights preserved.

The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in RCW 90.03.040, and the amount and priority thereof may be determined by the procedure set out in RCW 90.03.110 through 90.03.240.

[1917 c 117 § 1; RRS § 7351. Prior: 1891 p 127 § 1. Formerly RCW 90.04.020.]

RCW 90.03.247

Minimum flows and levels—Departmental authority exclusive—Other recommendations considered.

Whenever an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the levels or flows. 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 ecology whose authority to establish is exclusive, as provided in chapter 90.03 RCW and RCW 90.22.010 and 90.54.040. The provisions of other statutes, including but not limited to *RCW 77.55.100 and chapter 43.21C RCW, may not be interpreted in a manner that is inconsistent with this section. In establishing such minimum flows, levels, or similar restrictions, the department shall, during all stages of development by the department of ecology of minimum flow proposals, consult with, and carefully consider the recommendations of, the department of fish and wildlife, the **department of community, trade, and economic development, the department of agriculture, and representatives of the affected Indian tribes. Nothing herein shall preclude the department of fish and wildlife, the **department of community, trade, and economic development, or the department of agriculture from presenting its views on minimum flow needs at any public hearing or to any person or agency, and the department of fish and wildlife, the **department of community, trade, and economic development, and the department of agriculture are each empowered to participate in proceedings of the federal energy regulatory commission and other agencies to present its views on minimum flow needs.

[2003 c 39 § 48; 1996 c 186 § 523; 1994 c 264 § 82. Prior: 1987 c 506 § 95; 1987 c 505 § 81; 1980 c 87 § 46; 1979 ex.s. c 166 § 1.]

NOTES:

Reviser's note: *(1) RCW 77.55.100 was repealed by 2005 c 146 § 1006.

**(2) The "department of community, trade, and economic development" was renamed the "department of commerce" by 2009 c 565.

Findings—Intent—Part headings not law—Effective date—1996 c 186: See notes following RCW 43.330.904.

Legislative findings and intent—1987 c 506: See note following RCW 77.04.020.

RCW 90.03.290

Appropriation procedure—Department to investigate—Preliminary permit—Findings and action on application.

(1) When an application complying with the provisions of this chapter and with the rules of the department has been filed, the same shall be placed on record with the department, and it shall be its duty to investigate the application, and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied. If it is proposed to appropriate water for irrigation purposes, the department shall investigate, determine and find what lands are capable of irrigation by means of water found available for appropriation. If it is proposed to appropriate water for the purpose of power development, the department shall investigate, determine and find whether the proposed development is likely to prove detrimental to the public interest, having in mind the highest feasible use of the waters belonging to the public.

(2)(a) If the application does not contain, and the applicant does not promptly furnish sufficient information on which to base such findings, the department may issue a preliminary permit, for a period of not to exceed three years, requiring the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary. If the applicant fails to comply with the conditions of the preliminary permit, it and the application or applications on which it is based shall be automatically canceled and the applicant so notified. If the holder of a preliminary permit shall, before its expiration, file with the department a verified report of expenditures made and work done under the preliminary permit, which, in the opinion of the department, establishes the good faith, intent, and ability of the applicant to carry on the proposed development, the preliminary permit may, with the approval of the governor, be extended, but not to exceed a maximum period of five years from the date of the issuance of the preliminary permit.

(b) For any application for which a preliminary permit was issued and for which the availability of water was directly affected by a moratorium on further diversions from the Columbia river during the years from 1990 to 1998, the preliminary permit is extended through June 30, 2002. If such an application and preliminary permit were canceled during the moratorium, the application and preliminary permit shall be reinstated until June 30, 2002, if the application and permit: (i) Are for providing regional water supplies in more than one urban growth area designated under chapter 36.70A RCW and in one or more areas near such urban growth areas, or the application and permit are modified for providing such supplies, and (ii) provide or are modified to provide such regional supplies through the use of existing intake or diversion structures. The authority to modify such a canceled application and permit to accomplish the objectives of (b)(i) and (ii) of this subsection is hereby granted.

(3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied: PROVIDED, That where the water applied for is to be used for irrigation purposes, it shall become appurtenant only to such land as may be reclaimed thereby to the full extent of the soil for agricultural purposes. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard

to the highest feasible development of the use of the waters belonging to the public, it shall be duty of the department to reject such application and to refuse to issue the permit asked for.

(4) If the permit is refused because of conflict with existing rights and such applicant shall acquire same by purchase or condemnation under RCW 90.03.040, the department may thereupon grant such permit. Any application may be approved for a less amount of water than that applied for, if there exists substantial reason therefor, and in any event shall not be approved for more water than can be applied to beneficial use for the purposes named in the application. In determining whether or not a permit shall issue upon any application, it shall be the duty of the department to investigate all facts relevant and material to the application. After the department approves said application in whole or in part and before any permit shall be issued thereon to the applicant, such applicant shall pay the fee provided in RCW 90.03.470: PROVIDED FURTHER, That in the event a permit is issued by the department upon any application, it shall be its duty to notify the director of fish and wildlife of such issuance.

[2001 c 239 § 1; 1994 c 264 § 84; 1988 c 36 § 66; 1987 c 109 § 86; 1947 c 133 § 1; 1939 c 127 § 2; 1929 c 122 § 4; 1917 c 117 § 31; Rem. Supp. 1947 § 7382. Formerly RCW **90.20.050 and 90.20.060.]**

NOTES:

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW 43.21B.001.

Inapplicability of section to RCW 90.03.290: RCW 90.14.200.

RCW 90.03.340

Appropriation procedure—Effective date of water right.

The right acquired by appropriation shall relate back to the date of filing of the original application with the department.

[1987 c 109 § 90; 1917 c 117 § 35; RRS § 7387. Formerly RCW 90.20.110.]

NOTES:

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW 43.21B.001.

RCW 90.44.035

Definitions.

For purposes of this chapter:

(1) "Department" means the department of ecology;

(2) "Director" means the director of ecology;

(3) "Groundwaters" means all waters that exist beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of this state, whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves. There is a recognized distinction between natural groundwater and artificially stored groundwater;

(4) "Natural groundwater" means water that exists in underground storage owing wholly to natural processes;

(5) "Artificially stored groundwater" means water that is made available in underground storage artificially, either intentionally, or incidentally to irrigation and that otherwise would have been dissipated by natural processes; and

(6) "Underground artificial storage and recovery project" means any project in which it is intended to artificially store water in the ground through injection, surface spreading and infiltration, or other department-approved method, and to make subsequent use of the stored water. However, (a) this subsection does not apply to irrigation return flow, or to operational and seepage losses that occur during the irrigation of land, or to water that is artificially stored due to the construction, operation, or maintenance of an irrigation district project, or to projects involving water reclaimed in accordance with chapter 90.46 RCW; and (b) RCW 90.44.130 applies to those instances of claimed artificial recharge occurring due to the construction, operation, or maintenance of an irrigation district project or operational and seepage losses that occur during the irrigation of land, as well as other forms of claimed artificial recharge already existing at the time a groundwater subarea is established.

[2000 c 98 § 2; 1987 c 109 § 107; 1973 c 94 § 2; 1945 c 263 § 3; RRS § 7400-3. Formerly RCW 90.44.010.]

NOTES:

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW 43.21B.001.

Purpose—1973 c 94: "It is the purpose of this 1973 amendatory act to state as well as reaffirm the intent of the legislature that "groundwaters," as defined in chapter 263, Laws of 1945, means all waters within the state existing beneath the land surface, and to remove any possible ambiguity which may exist as a result of the dissenting opinion in State v. Ponten, 77 Wn.2d 463 (1969), or otherwise, with regard to the meaning of "groundwaters" in the present wording of RCW 90.44.035. The definition set forth in section 2 of this 1973 amendatory act accords with the interpretation given by all of the various administrative agencies having responsibility for administration of the act since its enactment in 1945." [1973 c 94 § 1.] This applies to the amendment to RCW 90.44.035 by 1973 c 94 § 2.

RCW 90.44.050

Permit to withdraw.

After June 6, 1945, 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 by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW **90.44.052**, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW **90.44.090** may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

[**2003 c 307 § 1; 1987 c 109 § 108; 1947 c 122 § 1; 1945 c 263 § 5;** Rem. Supp. 1947 § 7400-5.]

NOTES:

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW **43.21B.001**.

RCW 90.54.040

Comprehensive state water resources program—Modifying existing and adopting new regulations and statutes.

(1) The department, through the adoption of appropriate rules, is directed, as a matter of high priority to insure that the waters of the state are utilized for the best interests of the people, to develop and implement in accordance with the policies of this chapter a comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use. The department may develop the program in segments so that immediate attention may be given to waters of a given physioeconomic region of the state or to specific critical problems of water allocation and use.

(2) In relation to the management and regulatory programs relating to water resources vested in it, the department is further directed to modify existing regulations and adopt new regulations, when needed and possible, to insure that existing regulatory programs are in accord with the water resource policy of this chapter and the program established in subsection (1) of this section.

(3) The department is directed to review all statutes relating to water resources which it is responsible for implementing. When any of the same appear to the department to be ambiguous, unclear, unworkable, unnecessary, or otherwise deficient, it shall make recommendations to the legislature including appropriate proposals for statutory modifications or additions. Whenever it appears that the policies of any such statutes are in conflict with the policies of this chapter, and the department is unable to fully perform as provided in subsection (2) of this section, the department is directed to submit statutory modifications to the legislature which, if enacted, would allow the department to carry out such statutes in harmony with this chapter.

[1997 c 32 § 2; 1988 c 47 § 5; 1971 ex.s. c 225 § 4.]

NOTES:

Application—Severability—1988 c 47: See notes following RCW 43.83B.300.

RCW 90.54.050

Setting aside or withdrawing waters—Rules—Consultation with legislative committees—Public hearing, notice—Review.

In conjunction with the programs provided for in RCW 90.54.040(1), whenever it appears necessary to the director in carrying out the policy of this chapter, the department may by rule adopted pursuant to chapter 34.05 RCW:

(1) Reserve and set aside waters for beneficial utilization in the future, and

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

Prior to the adoption of a rule under this section, the department shall conduct a public hearing in each county in which waters relating to the rule are located. The public hearing shall be preceded by a notice placed in a newspaper of general circulation published within each of said counties. Rules adopted hereunder shall be subject to review in accordance with the provisions of RCW 34.05.240.

[1997 c 439 § 2; 1997 c 32 § 3; 1988 c 47 § 7; 1971 ex.s. c 225 § 5.]

NOTES:

Reviser's note: This section was amended by 1997 c 32 § 3 and by 1997 c 439 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

WAC 173-563-015—Validity—1997 c 439: "WAC 173-563-015 as it existed prior to July 27, 1997, is void." **[1997 c 439 § 1.]**

Application—Severability—1988 c 47: See notes following RCW 43.83B.300.

APPENDIX C
Skagit County Code

Chapter 12.48
RULES AND REGULATIONS OF THE SKAGIT COUNTY BOARD OF HEALTH GOVERNING INDIVIDUAL AND PUBLIC DRINKING WATER SYSTEMS*

Sections:

*Prior history: Resolution 11111.

12.48.010 Purpose and intent.

These rules and regulations are established by the Skagit County Board of Health pursuant to its authority under RCW 70.05.060 and WAC 246-290-030 permitting local boards of health to enact local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof. The purpose of these rules is to:

(1) Define minimum regulatory requirements and to protect the health of consumers whether they drink from an individual or a public water system and to meet the intent of the Growth Management Act; and

(2) Comply with and implement the requirements of Chapters 173-160, 246-290 and 246-291 WAC, and Chapters 12.05 and 14.24 SCC; and

(3) Whenever possible, carry out powers in manners which are consistent with Chapter 90.54 RCW and Chapters 173-503 and 173-505 WAC, as the same may hereafter be amended; and

(4) Direct the public to the best source of drinking water and the best location for that source of water; and

(5) Apply the best public health development standards and practices for the protection of drinking water sources. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.015 Drinking water and well construction standards adopted.
The following rules and regulations are hereby adopted as minimum requirements. When any part of these rules and regulations conflicts with another part, the more restrictive rule or regulation shall apply.

(1) Chapter 246-290 WAC, Group A Public Water Systems, as the same may hereafter be amended; and

(2) Chapter 246-291 WAC, Group B Public Water Systems, as the same may hereafter be amended; and

(3) Well construction, capping and abandonment shall conform to Chapter 173-160 WAC, Minimum Standards for Construction and Maintenance of Wells, as the same may hereafter be amended. (Ord. O2007004 (part))

12.48.020 Applicability.
(1) These regulations:

(a) Shall apply to all public and individual water systems in Skagit County;

(b) Establish adequate and potable water supply requirements for existing and proposed development, including building permits and land divisions.

(2) The following development proposals are not subject to review by the Health Officer under these regulations:

(a) Repairs of existing buildings that will not increase the use of an existing water supply;

(b) Remodel or replacement of existing, nonresidential buildings when the new work will not increase the use of an existing water supply; and

(c) Remodel or replacement of existing residential buildings that do not:

(i) Increase the number of bedrooms; or

(ii) Add more than five hundred (500) square feet of gross floor area.

(d) Development determined by the Health Officer to not have a detrimental effect on public health or conflict with the intent of these regulations. (Ord. O20110012 Att. D: Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.030 Definitions.
For the purposes of these regulations the following definitions together with those in Chapters 173-160 and 246-290 WAC shall apply unless the context thereof clearly indicates to the contrary.

"Adequate water supply" means a water supply which is capable of supplying at least three hundred fifty (350) gallons of water per day, meets siting criteria established by State and local regulations, and meets water quality standards in SCC 12.48.110.

"Affected Indian tribe" means any Indian tribe, band, nation or community that is federally recognized by the United States Secretary of the Interior and that will or may be affected by a development proposal.

"Alternative source" means a drinking water source other than a drilled well constructed in conformance with Chapter 173-160 WAC and drilled by a licensed well driller, including a spring, dug well, jetted or driven point, cistern, homeowner-drilled well, or surface source.

"Aquifer assessment" means a SCPHD assessment of the aquifer's ability to serve a land division. This includes, but is not limited to:

(a) Copies of all available well logs within one-quarter (1/4) mile of the development;

(b) Approved sewage system site evaluation(s) and/or designs;

(c) Well site approval(s);

(d) U.S.D.A. Soil Conservation Service soil map of the project site; and

(e) Any other pertinent geological or topographical data.

"Board of Health" means the Board of Health of Skagit County pursuant to the provisions of Chapter 70.05 RCW.

"Building permits" means building permits and their related prior land use approvals for which either a connection to, or a determination of, adequate and potable water is required. This includes related land use approvals that could affect future building permits such as: special use permits, variances, "quasi-judicial" property rezones, shoreline substantial development/conditional use permits, and boundary line adjustments.

"CWSP" means the Skagit County Coordinated Water System Plan.

"DOH" means the Washington State Department of Health.

"Ecology" means the Washington State Department of Ecology.

"Evaluation" means:

(a) Review of an individual water system by the SCPHD using SCC 12.48.110; or

(b) Review of a public water system by either the SCPHD or DOH using SCC 12.48.220 and Chapters 246-290 and 246-291 WAC.

"Flow-sensitive basin" means a sub-basin management unit as identified in Chapter 173-503 WAC or a stream management unit as identified in Chapter 173-505 WAC.

"Group B public water system" means a public water system that meets the Group B public water system definition as stated in Chapter 246-291 WAC.

"Health Officer" means the Health Officer of Skagit County or his authorized representative.

"Individual water system" means a water system serving or proposed to serve a single-family dwelling unit.

"Land division" means an application for land development that proposes to create new lots or additional building sites, including long subdivision, short subdivision, planned unit developments, mobile home parks, and binding site plans.

"MCL" means the maximum contaminant level permissible in water delivered to any individual water system user.

"PDS" means Skagit County Planning and Development Services.

"Plot plan" means a project site drawing depicting:

(a) First and second choice for well location with one hundred (100) foot radius; and

(b) Within one hundred (100) feet of the well:

(i) Property dimensions, easements, related zoning and north indicator arrow,

(ii) Adjoining properties,

(iii) Existing and proposed septic tanks, drainfields and replacement drainfield areas, privies, and wastewater piping,

(iv) Existing and proposed buildings and roads (public and private) with distances,

(v) Lakes, streams, ditches, and swampy areas,

(vi) Slope with direction and percent, and

(vii) Other potential sources of contamination (e.g., underground storage tanks, railroad tracks, etc.)

"Potable" means water suitable for drinking.

"Public water system" means a system providing water for human consumption that is not an individual water system.

"RCW" means the Revised Code of Washington.

"Sanitary survey" means an on-site inspection of an existing public water system, performed by the Health Officer, including, but not limited to, the water source and its suitability for a public water supply, the physical construction of the system, the bacteriological and chemical quality of the water, source and system capacity, and compliance with state and local regulations.

"SCC" means the Skagit County Code.

"SCPHD" means the Skagit County Public Health Department.

"Sensitive area" means an area where drilled wells have been known to have potential quantity or quality problems.

"Spring" means a source of water percolating laterally through permeable material overlying an impermeable stratum or where the land surface intersects the water table.

"USGS" means the United States Geological Survey.

"WAC" means the Washington Administrative Code.

"Water system status report" means a report filed with the Auditor's Office that provides the status of the water system.

"Water well report" means a record of the construction or alteration of a well which is completed and filed with Ecology in accordance with Chapter 18.104 RCW.

"Well driller" means a person who is licensed by Ecology.

"Well-protection zone" means an area around a well that protects the well from contamination. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.040 Administration.
(1) The SCPHD will evaluate individual water systems according to this Chapter.

(2) These rules and regulations pertaining to public water systems are administered according to the interagency agreement between the DOH and the SCPHD.

(3) PDS shall not issue any building permit for a structure with plumbing, or land division approvals until the Health Officer has approved the water system.

(4) Fees shall be charged in accordance with the most recently adopted SCPHD schedule of charges or PDS fee schedule. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.050 Coordinated water system plan (CWSP).
(1) As required in Chapter 246-293 WAC, before a new public system is created, the applicant shall contact existing nearby purveyors to provide service. The service should be both timely and reasonable.

(2) The Health Officer shall inform applicants for individual water systems of nearby approved public water systems.

(3) The CWSP will define service areas.

(4) Design standards in the CWSP shall be compatible with the County's Comprehensive Plans and/or Zoning Map with consideration given to public health. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.060 Flow-sensitive basins—Public water system responsibilities, Health Officer duties and exemptions.
(1) Public Water System Responsibilities.

(a) All new public water systems within flow-sensitive basins shall install and maintain water source meters.

(b) All public water systems expanding after April 14, 2001, for areas subject to Chapter 173-503 WAC or after September 26, 2005, for areas subject to Chapter 173-505 WAC shall install and maintain water source meters.

(c) Public water systems that provide water service in flow-sensitive basins established in WAC 173-503-074 and 173-505-090 shall provide an annual report of monthly water use data to the Health Officer.

(2) Health Officer Duties. The Health Officer shall:

(a) Estimate the amount of water used or to be used for development activities established after April 14, 2001, that are located within a flow-sensitive basin defined in WAC 173-503-074 and development activities established after September 26, 2005, that are located within a flow-sensitive basin defined in WAC 173-505-090. Water estimates shall be based on actual meter data for new and expanding public water systems, where available. For individual wells and where meter data are otherwise unavailable, the Health Officer shall assume average daily demand of three hundred fifty (350) gallons per day for each new residential connection, reduced by fifty (50) percent of average daily demand to account for return flows, except to the extent sewage is transported outside the flow-sensitive basin for disposal.

(b) Provide an annual report to the Administrative Official, Ecology and affected Indian tribes of the amount of water remaining for each reservation quantity established in WAC 173-503-074 or the amount of water available established in WAC 173-505-090.

(3) Exemptions. The Health Officer's estimate of water use developed pursuant to Subsection (2)(a) of this Section shall not include water uses that are otherwise exempt from reservation quantity limits pursuant to Chapters 173-503 or 173-505 WAC. (Ord. O2007004 (part))

12.48.090 Individual well site approval.

(1) Well site approval for an individual water system must be performed by the SCPHD or a licensed well driller. The Health Officer has the option to view the well site prior to drilling. The applicant is responsible for advising the inspecting authority regarding the location of all potential sources of contamination.

(2) Lots with Individual Water Systems.

(a) For lots created before January 1, 1992, individual water systems should have one hundred (100) foot minimum well protection zones.

(i) If the well is located on property not owned by the applicant, the applicant will provide proof of easements and/or covenants to the SCPHD; and

(ii) The well must meet Chapter 173-160 WAC.

(b) For lots created after January 1, 1992, applicants for individual water systems must follow the provisions of SCC 12.48.240.

(c) Single-family residences and private roads are not considered a source of contamination for individual systems. Greater setback distances may be required by the Health Officer based on geological and hydrological data or local water quality trends.

(3) Wells located within the sphere of influence of an underground storage tank will comply with Chapter 173-360 WAC. If it is exempted from the underground storage tank regulations, the SCPHD may require appropriate mitigations. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.100 Water right permits, surface water diversions and groundwater withdrawal limits.

(1) Groundwater uses are subject to Chapter 90.44 RCW, and surface water uses are subject to Chapter 90.03 RCW.

(2) When a water right permit is required, a water right permit must be issued by Ecology before SCPHD can proceed with a water system evaluation. Water right permit applications

and water well reports are not acceptable substitutes. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.110 Individual water system utilizing drilled wells.
(1) An applicant proposing to rely on an individual water system to provide safe and reliable potable water service shall provide evidence of an adequate water supply by submitting the appropriate documents and meeting the requirements of this section:

(a) Water right permit, if required. Water right permit applications and water well reports are not acceptable substitutes.

(b) If the point of withdrawal for an individual water system is located within a flow-sensitive basin as defined in SCC 12.48.030, the applicant must demonstrate that there are no existing public water systems that are able to provide safe and reliable potable water service in a timely and reasonable manner.

(c) Well site approval document issued by the SCPHD or licensed well driller.

(d) Application with scaled plot plan of the project site.

(e) For properties requiring or containing on-site sewage systems, the SCPHD approved sewage system site evaluation(s) shall be included. Site evaluations or designs shall show location and general boundaries for components of the proposed or existing sewage systems.

(f) A detailed water well report.

(g) The written results of a bailer, air line, or pump test, any of which is performed for a minimum of one hour, verifying a minimum well yield of three hundred fifty (350) gallons per day.

(h) Water quality results, analyzed by a DOH certified laboratory, verifying compliance with minimum standards, including:

(i) Bacteriological satisfactory analysis result for sample collected within the past six months;

(ii) Inorganic chemicals and physical characteristics as listed in Table 1.

Table 1

Inorganic chemical or physical characteristic	MCL (in mg/L unless otherwise stated)
arsenic	0.05
antimony	0.006
barium	2.0
chromium	0.1
fluoride	4.0
mercury	0.002
nitrate	10.0
selenium	0.05

chloride	250
conductivity	700 µmhos/cm
iron	*
lead	*
hardness	*
manganese	*
pH	*
sodium	*
total dissolved solids	*
turbidity	*
*no MCL	

(A) Results that are above the maximum contaminant level must be resampled to confirm contamination.

(B) Inorganic testing will be acceptable for five years.

(iii) Such other parameters that the Health Officer deems significant based upon local trends of water quality.

(i) Construction documents or general as-built plans, as required.

(j) Additional information deemed necessary by the Health Officer.

(2) For systems needing water treatment equipment, as determined by the Health Officer, detailed water treatment plans will be reviewed by the SCPHD prior to installation, and raw and finished water will be evaluated for potability.

(3) The SCPHD evaluation will be satisfactorily completed before the applicant connects to the well. If SCPHD finds that a health hazard exists and no remedial treatment is available, an unsatisfactory evaluation will result.

(4) A satisfactory well site evaluation will be valid for five years provided that an updated plot plan demonstrates no potential contamination and that nearby wells drilled after the initial evaluation show adequate quality and quantity.

(5) Connecting an individual water system to another water system or water source without approval is prohibited. (Ord. O2007004 (part): Ord. 15314 (part), 1994; Ord. 14063 (part), 1991)

12.48.120 Group B public water systems.

(1) An applicant proposing to establish a Group B public water system, or alter or expand an existing Group B public water system is subject to the requirements stated in Chapter 246-291 WAC in addition to the conditions listed in this Subsection.

(a) The applicant must submit to the SCPHD for review the complete plans and specifications fully describing the proposed project, together with the appropriate application fee.

(b) Plans must be prepared by a professional engineer licensed in the State of Washington, except as noted in Subsection (c) of this Section.

(c) If a proposed system consists of a simple well and pressure tank with one pressure zone, and does not require treatment or special hydraulic considerations, and will not serve more than six (6) connections, the applicant may design the system if he or she plans to reside at the property to be served by the water system, provided he or she has the expertise to operate the proposed system. If the Health Officer determines that additional engineering expertise is required, a professional engineer shall be required to prepare plans and specifications.

(d) Applicant Requirements. If the applicant prepares the plans and specifications for the water system, the Health Officer must perform a final inspection. It shall be the responsibility of the applicant to schedule one or more inspections so the Health Officer can see the entire completed system, including water lines, valves and any other equipment which is to be buried.

(e) Professional Engineer Requirements. In preparation for final inspection by the Health Officer, the professional engineer designing the water system must complete a final inspection of the system and certify on an SPCHD furnished form that the system conforms to the approved plans and specifications. The Health Officer requires twenty-four (24) hour advance notice for final inspections, and may require the engineer to be present during the inspection.

(2) The Health Officer may inspect any Group B public water system for the purpose of conducting a sanitary survey, determining conformance with plans and specifications or to investigate a complaint about the system.

(3) If after investigation the Health Officer finds that any public water system or person fails to comply with Chapter 246-291 WAC, or with this Chapter, the Health Officer shall send a compliance letter to the purveyor of the Group B public water system or to any individual who connects to an unapproved Group B public water system or one that is not approved for the proper number of connections. This letter shall include the following:

(a) Specification of the areas where the public water system or person fails to meet the requirements of Chapter 246-291 WAC, or of this regulation; and

(b) A compliance schedule, which may include any steps designed to bring the public water system into compliance with Chapter 246-291 WAC, or with this Chapter.

(4) Service of the compliance letter shall be made either personally or by mailing a copy of such compliance letter by certified mail, postage prepaid, return receipt requested. If the address of any such person cannot reasonably be ascertained, then a copy of the notice and order shall be mailed to such person at the address of the location of the violation and a copy shall be posted in a conspicuous location on the premises. The failure of any such person to receive such notice shall not affect the validity of any enforcement proceedings. Service by mail in the manner herein provided shall be effective on the date of mailing.

(5) Failure to adhere to the compliance schedule shall be punishable by a fine established in the SCPHD schedule of charges.

(a) Each violation of this Chapter shall be a separate and distinct offense, and in the case of a continuing violation each day's continuance shall be a separate and distinct violation.

(b) The fine shall become due and payable within thirty (30) days after receipt of written notice from the Health Officer describing the violation with reasonable particularity and advising such person that the penalty is due.

(c) This fine may be appealed pursuant to SCC 12.48.290, Appeals.

(6) If a person continues to violate the provisions of this Chapter after being duly informed in writing by the Health Officer that he or she is in violation of these regulations and that he or she shall cease and desist from such violations, the appropriate law enforcement agency shall enforce these provisions.

(7) The Health Officer may make a written request to the Prosecuting Attorney to bring injunctive action against a violator of this Chapter in order to prevent further violation until such time as the violator's case is processed in the courts through and including any appeals.

(8) If the Health Officer finds evidence indicating that an injunction is violated, the Health Officer shall present evidence to the Prosecuting Attorney and request that contempt proceedings be filed in the court issuing the injunction. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.210 Group A public water systems.

(1) Applicants for a land division or building permit shall obtain from the proposed public water system purveyor a completed water system evaluation application stating the system's ability and intention to provide water for the proposed buildings or use(s). The water system must be in substantial compliance with Chapter 246-290 WAC before the PDS permit is issued.

(2) Prior to final approval by the SCPHD and as an alternative to completing installation of a Group A public water system, a land division applicant may provide a performance bond in favor of the SCPHD and sign an agreement with the SCPHD. The bond and agreement shall meet the following conditions:

(a) Guarantee that construction will be completed, including availability of water to each lot, within one year of the date of the approval of the agreement. If the applicant has not completed the water system within this time limit, the Health Officer may use the bond or escrow account referenced in this Subsection to construct the unfinished portions of the water system in accordance with the approved plans and specifications;

(b) The bond shall be on a satisfactory form and in an amount based on an estimate prepared by a professional engineer in conformance with Chapter 246-290 WAC plus thirty-five (35) percent (twenty (20) percent for a two (2) year inflationary period—ten (10) percent for contract expenditure and five (5) percent for administrative costs);

(c) Be to the satisfaction of DOH or the Health Officer and legal counsel for Skagit County;

(d) Before the SCPHD can accept the bond, the applicant must:

(i) Install the water source and pump, test the source for yield and submit bacteriologic, inorganic chemical and physical parameter test results, which must meet the water quality standards set forth in Chapter 246-290 WAC; and

(ii) Submit an itemized list of materials with the water system plans;

(e) The purveyor must install any water treatment facilities necessary to bring water quality into compliance with applicable standards before the SCPHD can accept the bond, and must document the treated water quality through testing to be determined by the Health Officer;

(f) The applicant may substitute an escrow impound account for completion of the water system in lieu of a bond if confirmed in writing to the satisfaction of the County. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.220 Rental housing individual water system requirements.
(1) Landlords must provide adequate and potable water to their renters pursuant to Chapter 59.18 RCW, Residential Landlord Tenant Act.

(2) The water quality and quantity will meet minimum requirements noted in SCC 12.48.110.

(3) In the event that the water supply ceases, the landlord shall:

(a) Provide potable drinking water within twenty-four (24) hours; and

(b) Repair major plumbing fixtures within seventy-two (72) hours (e.g., chlorinator, filters, or other devices that make the water safe); or

(c) Show a documented good faith attempt to meet minimum drinking water standards, subject to approval by the Health Officer.

(4) In the event of a valid complaint, as confirmed by the SPCHD investigation, the rental is to be kept vacant until the drinking water meets the minimum standards unless otherwise provided under Subsection (3)(c) of this Section. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.230 Water requirements for building permits.
(1) Each applicant for a building permit shall provide evidence of an adequate water supply for the intended use of the building as provided under this Chapter.

(2) Unless exempted by SCC 12.48.020(3), a building permit application to PDS for a new building or change of use of an existing building which will require potable water must include a satisfactory evaluation by SCPHD declaring that an individual water system or a public water system will serve the building(s) specified in the permit application.

(3) Final inspection and occupancy approval for any structure will be withheld until legal connection to the required water system has been demonstrated to, and approved by, the jurisdictional authority.

(4) Boundary line adjustments for lots served by existing or proposed individual water systems must be reviewed and approved by the SCPHD. Applicant must demonstrate that all well protection zones can be maintained and will not be diminished in size. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.240 Water requirements for land divisions.
(1) Each applicant for approval of a land division must provide evidence of an adequate water supply for the land division as provided under this Chapter. Land division applications to PDS must include:

(a) A satisfactory evaluation by the SCPHD declaring that a public water system will serve the land division; or satisfactory evaluation(s) of the existing individual water system(s) as required in SCC 12.48.110.

(b) If the land is not in a sensitive area and the applicant chooses to submit the land division application without the completed individual water system evaluation(s), the applicant is required to follow the following procedure:

(i) Step one is a SCPHD aquifer assessment with field visit which is to be completed prior to the submission of the PDS application. The applicant will sign and have notarized a disclaimer which acknowledges that the land division will not be approved until the SCPHD satisfactorily evaluates the individual water system(s). Depending on the aquifer assessment information submitted, the SCPHD will conclude one of the following:

(A) The development appears to be within or near a sensitive area and each lot must have a satisfactorily evaluated water system.

(B) The development appears to be in an area which has an adequate potable water supply, requiring only one of every four (4) lots in the proposed development to obtain a satisfactorily evaluated individual water system. Well locations must be representative of the geology and topography of the development and approved by the SCPHD. If any of the representative wells result in an unsatisfactory evaluation, SCPHD will declare all lots in the development to be within a sensitive area per SCC 12.48.260.

(C) If sufficient hydrogeological information is not available to make an assessment, the PDS shall not approve the land division application. Additional hydrogeological information will be requested by the SCPHD and may include additional wells with pump test data.

(ii) Step two is the appropriate evaluation(s) which is to be completed prior to the land division approval.

(c) Bacteriological tests may be waived at the discretion of the SCPHD.

(2) Requests to the PDS for final land division approval must include:

(a) Evidence that all lots have been stubbed at the property line or that buildings have been connected. Appropriate bonding will also be acceptable.

(b) Evidence that the SCPHD has confirmed compliance with Subsection (4) of this Section.

(3) All final plats will have notes that describe the approved public water system. If the water is to be supplied from individual water systems, the following statement shall be shown on the final plat:

Water will be supplied from individual water systems. Contact Skagit County Health Department to determine if additional water quality or quantity testing will be required for building permit approvals.

(4) All land division applicants proposing lots of less than five (5) acres in size must show well protection zone(s) and approved on-site sewage system area(s) on all preliminary and final plat maps.

(5) The one hundred (100) foot radius well protection zone for individual water systems must be located entirely on the proposed lot owned in fee simple, or the owner must have the right to exercise complete sanitary control of the land within the required well protection zone through other legal provisions, such as recorded covenants or easements. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.250 Individual water systems utilizing alternative sources.
(1) The Skagit County Public Health Department discourages alternative sources. Before an alternative source will be allowed by SCPHD, the applicant will be required to:

(a) Provide written documentation why either an approved public drinking water system or a drilled well cannot be utilized; and

(b) Follow appropriate regulations or guidance documents (DOH, Ecology or U.S. Environmental Protection Agency) and provide construction documents, when required; and

(c) Upgrade substandard sources; and

(d) Obtain the SCPHD plan approval before construction begins; and

(e) Collect the water in a drainable covered structure not vulnerable to contamination by surface water; and

(f) Consider surface sources as the last option; and

(g) Provide evidence of legal rights and utility access for well protection control if the source is off-site.

(2) If an alternative source is approved, the applicant and/or property owner shall:

(a) Submit quarterly quality and quantity data on a schedule determined by the SCPHD throughout the year; and

(b) Provide minimum treatment via disinfection and filtration by a method approved by the Health Officer unless sufficient evidence is submitted to the Health Officer showing that the source does not require such treatment. If treatment is used, raw and finished water quality will be evaluated. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.260 Sensitive areas.
(1) SCPHD may require more extensive testing if a proposed well, or a well nearby the proposed well, is in an area where water quantity or quality is poor (e.g., seawater intrusion).

(2) Following DOH and Ecology protocol, SCPHD may require well head source meters for some water systems. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.270 Water system status report.
(1) A water system status report will be on a form approved by the Health Officer and properly filed with the Auditor's Office under the following circumstances:

(a) Quality. The water source contaminants exceed MCL standards, but can be reduced by treatment to the MCL standard or below; or

(b) Quantity. The well produces less than three hundred fifty (350) gallons per day; or

(c) An alternative source requiring special treatment is utilized; or

(d) The evaluation is unsatisfactory.

(2) If a water system status report is filed for a water system, the system shall not be used for the creation of new lots. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.280 Waivers and variances.
(1) The Health Officer may upon written petition by the applicant, and upon concurrence of the BOH, waive such rule or regulation or portion thereof; provided, that the waiver is consistent with the intent of these rules and regulations, Chapters 173-160, 246-290 and 246-291 WAC, and that no public health hazard will result. A written response will be made within ten (10) working days of receipt of the petition.

(2) In the event the regulation to be waived is also a state law or regulation, the concurrence of the Secretary of the DOH or Department of Ecology must be obtained prior to the granting of the waiver.

(3) Well site variances for individual water systems will be processed by Ecology following Chapter 173-160 WAC. Copies of their written approval must be submitted as part of the application. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.290 Appeals.
(1) Persons aggrieved by a notice of violation, order, fine or assessed costs issued pursuant to this Chapter may request a hearing with the Health Officer for the purpose of disputing or requesting a stay or modification of such notice, order, fine or assessed costs.

(2) A request for hearing before the Health Officer shall be made in writing and served to the Health Officer within ten (10) working days of the serving of the notice, order, fine or assessed costs. The request shall be made by fully completing and submitting a request for hearing form supplied by SCPHD.

(3) The Health Officer shall hold a hearing not less than twenty (20) days nor more than thirty (30) days from the serving of the notice, order, fine or assessed costs unless mutually agreed upon in writing by the Health Officer and person requesting the appeal.

(4) Notice of the hearing shall be given the person requesting the appeal and the property owner, if different from the person requesting the appeal, via personal service at least three (3) days prior to the hearing date or via certified mail at least ten (10) days prior to the hearing date.

(5) Upon holding the hearing requested, the Health Officer shall provide written notice of intent sustaining the order, fine or assessed costs within five (5) working days of the hearing. Notice shall be served personally or via certified mail to the person requesting the appeal and property owner, if different than the person requesting the appeal.

(6) The aggrieved party may make a written request to appeal the Health Officer's decision to the BOH within ten (10) working days of the date the decision is issued. The request for appeal must meet the requirements of Subsection (2) of this Section. The BOH will hear the request for appeal within sixty (60) days of receipt of the application to appeal the Health Officer's decision.

(a) A fee in the amount listed in the most current Skagit County Health Department schedule of charges is due and payable when an appeal of the Health Officer's decision is made to the BOH.

(7) Following the issuance of the BOH's written decision, an aggrieved person may file a writ of certiorari in a court of competent jurisdiction to appeal such decision within thirty (30) days of the issuance of such decision.

(8) The filing of a request for hearing or appeal pursuant to this Section shall operate as a stay from the requirement to perform corrective action ordered by the Health Officer, except when:

(a) The requirement for immediate compliance is issued as an emergency order; or

(b) When an imminent public health threat exists. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.300 Severability.
Provisions of these rules and regulations are hereby declared to be separable, and if any section, subsection, sentence, clause, phrase, or portion of these rules and regulations is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of these rules and regulations. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.310 Liability.
(1) Nothing in this Chapter or the rules adopted under this Chapter creates or forms the basis for any liability on the part of the State and local health jurisdictions, or their officers, employees, or agents, for any injury or damage resulting from the failure of the owner or operator of any water system to comply with this Chapter or the rules adopted under this Chapter; or by reason or in consequence of any act or omission in connection with the implementation or enforcement of this Chapter or the rules adopted under this Chapter on the part of the State and local health jurisdictions, or by their officers, employees, or agents;

(2) All actions of local Health Officers and the secretary shall be deemed an exercise of the State's police power. The Health Officer's responsibility includes reviewing data provided by the applicant. The applicant bears any liability for compliance with all statutes, codes and regulations. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

12.48.320 Effective date.
This chapter shall be in full force and effect June 14, 2007, after its passage and approval as provided by law. (Ord. O2007004 (part): Ord. 14063 (part), 1991)

APPENDIX D
2001 Skagit Instream Flow Rule

Chapter 173-503 WAC

Last Update: 10/9/13

INSTREAM RESOURCES PROTECTION PROGRAM—LOWER AND UPPER SKAGIT WATER RESOURCES INVENTORY AREA (WRIA 3 AND 4)

Chapter Listing

WAC Sections

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

173-503-025 Definitions. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-025, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-051 Future stream closures. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-051, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-052 Future out-of-stream uses in the Upper Skagit River subbasin management unit. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-052, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-061 Baker River project settlement agreement flows. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-061, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-071

Lakes and ponds. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-071, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-072 Administrative requirements. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-072, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-073 Water reservations. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-073, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-074 Establishment of subbasin management units and reservation quantities by subbasin management unit. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-074, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-075 Future stock watering. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-075, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-081 Future changes and transfers. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-081, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-110 Establishment of trust water rights program. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-110, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-116 Incorporating new hydrologic investigations and information in rule. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-116, filed 5/15/06, effective 6/15/06.] Decodified by

WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-120 Maps. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-120, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-130 Appeals. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-130, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-140 Regulation review. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-140, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

173-503-150 Water rights subject to instream flows predating the reservations. [Statutory Authority: Chapters 43.27A , 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-150, filed 5/15/06, effective 6/15/06.] Decodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013).

Reviser's note: The Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013), invalidated the 2006 amendments to chapter 173-503 WAC, adopted by the department of ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006). See WSR 13-21-044, filed 10/9/13.

173-503-010
General provision.

These rules apply to waters within the Lower and Upper Skagit water resources inventory area (WRIA 3 and 4), as defined in WAC 173-500-040, excluding the Samish River subbasin, Fidalgo, Guemes, Cypress, Hope and Goat islands. This chapter is promulgated pursuant to chapter 90.54 RCW (Water Resources Act of 1971), chapter 90.22 RCW (Minimum water flows and levels), and chapter 173-500 WAC (Water resources management program).

[Recodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013); Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-010, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-010, filed 3/14/01, effective 4/14/01.]

Reviser's note: The Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013), invalidated the 2006 amendments to chapter 173-503 WAC, adopted by the department of ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006). See WSR 13-21-044, filed 10/9/13.

173-503-020
Purpose.

The purpose of this chapter is to retain perennial rivers, streams, and lakes in the Lower and Upper Skagit water resources inventory area and Cultus Mt. Tributaries with instream flows and levels necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality.

Chapter 90.54 RCW (Water Resources Act of 1971) requires that utilization and management of waters of the state be guided by a number of fundamentals, including:

Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial. (RCW 90.54.020(1))

The quality of the natural environment shall be protected and, where possible, enhanced, as follows:

Perennial rivers and streams of the state shall be retained with base flows necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. (RCW 90.54.020 (3)(a))

Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. (RCW 90.54.020 (3)(b))

In administering and enforcing this regulation, the department's actions shall be consistent with the provisions of chapter 90.54 RCW.

[Recodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013); Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-020, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-020, filed 3/14/01, effective 4/14/01.]

Reviser's note: The Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013), invalidated the 2006 amendments to chapter 173-503 WAC, adopted by the department of ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006). See WSR 13-21-044, filed 10/9/13.

173-503-030
Findings.

Ecology finds that:

(1) The magnitude or variability of flows are important in maintaining the aquatic ecosystem that sustains both fish and other valuable resources. Criteria to limit total withdrawals of water from the Lower Skagit River were developed to protect the aquatic ecosystem in the region covered by this rule.

(2) To protect the estuary area below river mile 8.1 the duration of flow inundation of at least one foot of depth, in selected estuary habitat, can be reduced no more than ten percent from existing conditions from the date of enactment of this regulation. This criterion applies to the period of February through August to withdrawals from the Skagit River. Total withdrawals greater than eight hundred thirty-six cubic feet per second during that period will result in a greater than ten percent deviation from existing conditions and therefore would result in harm to the fisheries resources and aquatic ecosystem in the region covered by this rule.

(3) Protection of the aquatic ecosystem of the estuary in the months of September through January requires that the total withdrawals of water from the Skagit River not exceed 1/10 of the fifty percent exceedance flow for each month, based on the period of record (1/1/41 - 12/31/95) for the U.S. Geological Survey (USGS) stream gage on the Skagit River near Mt. Vernon, WA (Sta. #12-2005-00) in order to maintain channel morphology and other estuarine and riverine functions. This equates to a low point of eight hundred thirty cubic feet per second during the month of September. Total withdrawals greater than eight hundred thirty cubic feet per second during the month of September will not protect and preserve fish, wildlife and other environmental values and therefore would be harmful to fisheries resources and the aquatic ecosystem in the region covered by this rule in violation of chapter 90.54 RCW.

(4) The rules setting minimum flows in the Lower and Upper Skagit River (WRIA 3 and 4) (WAC 173-503-040) and finding certain waters available (WAC 173-503-050) are necessary to protect and preserve wildlife, fish, scenic, aesthetic and other environmental values.

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-030, filed 3/14/01, effective 4/14/01.]

173-503-040
Establishment of instream flows.

(1) Stream management units and associated control stations are established as follows:

Stream Management Unit Information

Stream Management Unit Name Control Station No.	Control Station by River Mile and Section, Township and Range; Latitude and Longitude	Stream Management Reach
Skagit Mainstem:		
Skagit River near Mt. Vernon, WA USGS Sta. #12-2005-00	River Mile (RM) 15.7	From mouth of Skagit River including tidal fluctuation to headwaters.*
Cultus Mountain Tributaries:		
Mundt Creek	Stream gage will be installed at RM 3.4 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Turner Creek	Stream gage will be installed at RM 4.2 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Gilligan Creek	Stream gage will be installed at RM 3.2 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Salmon Creek	Staff gage periodically recorded will be installed at RM 4.3 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.

*Other additional control stations and instream flows may be established in WRIAs 3 & 4 to improve water management.

(2) Instream flows are established for the stream management units in WAC 173-503-040 (1) as follows (See Figures 1 through 3):

Instream Flows as measured at USGS Sta. #12-2005-00 (Instantaneous cubic feet per second)

Month	Day	USGS Sta. #12-2005-00 Skagit River
Jan.	1–31	10,000
Feb.	1–29	10,000
Mar.	1–31	10,000
Apr.	1–30	12,000
May	1–31	12,000
Jun.	1–30	12,000
Jul.	1–31	10,000
Aug.	1–31	10,000
Sep.	1–30	10,000
Oct.	1–31	13,000

Nov.	1–15	13,000
	16–30	11,000
Dec.	1–15	11,000
	16–31	10,000

Instream Flows for Cultus Mountain Tributaries, WRIA 3 (Instantaneous cubic feet per second)

Month	Day	RM 3.4 Mundt Creek	RM 4.2 Turner Creek	RM 3.2 Gilligan Creek	RM 4.3 Salmon Creek
Jan.	1-31	6.4	7.9	19.8	4.0
Feb.	1-29	6.4	5.4	19.8	4.0
Mar.	1-15	6.4	5.4	19.8	4.0
	16-31	9.4	5.4	27.7	4.0
Apr.	1-30	9.4	7.9	31.7	4.0
May	1-31	9.4	7.9	31.7	1.4
Jun.	1-30	9.4	4.9	31.7	1.4
Jul.	1-31	7.6	4.9	39.6	1.4
Aug.	1-31	7.6	4.9	39.6	1.4
Sep.	1-30	7.6	4.9	39.6	4.0
Oct.	1-31	7.6	7.9	23.8	4.0
Nov.	1-30	9.4	7.9	27.7	4.0
Dec.	1-31	9.4	7.9	27.7	4.0

(3) Instream flow hydrograph.

Figure 1

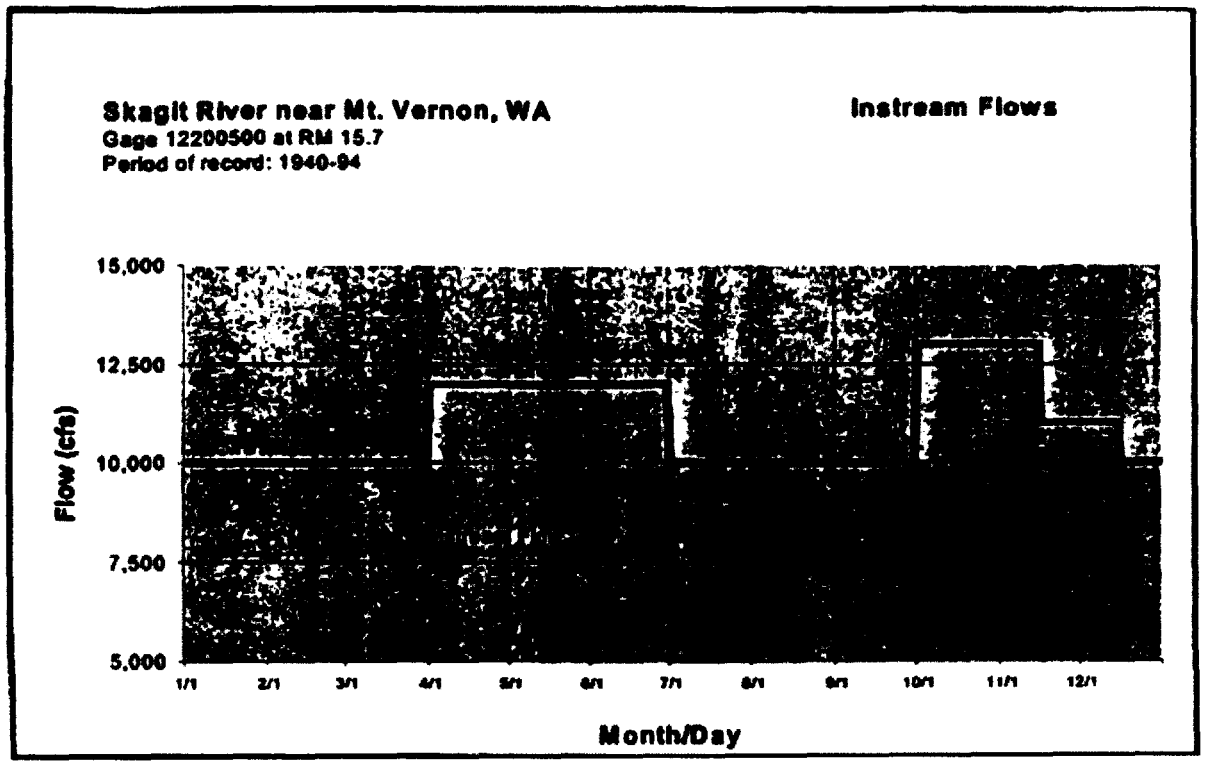


Figure 2

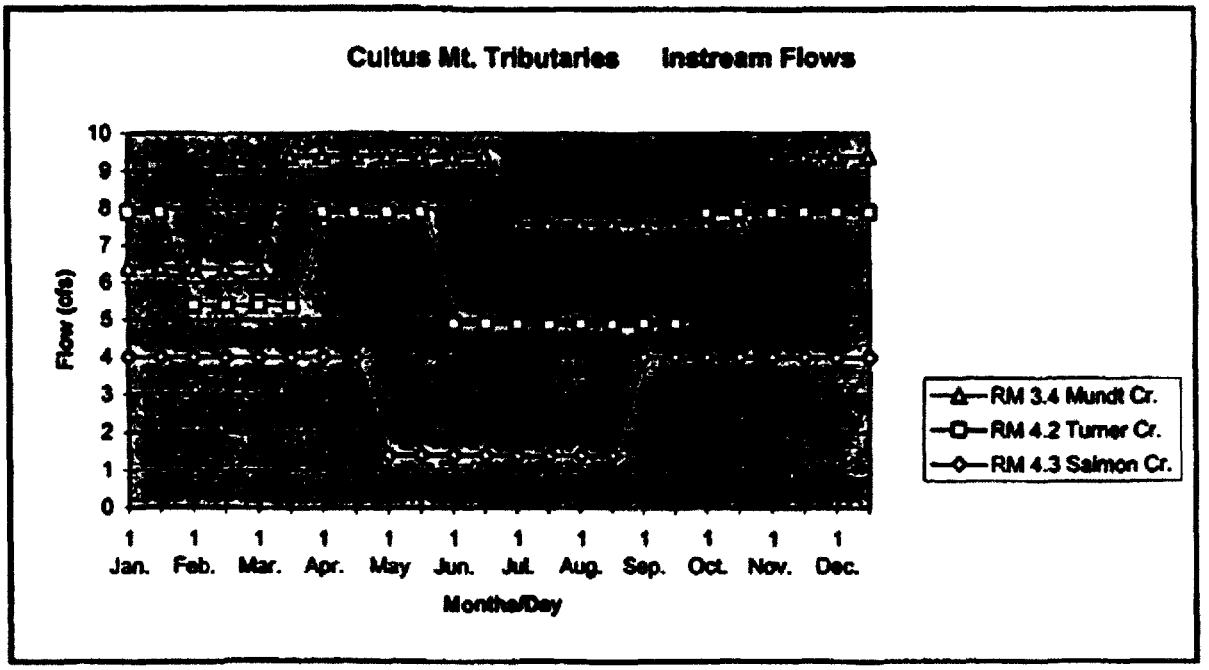
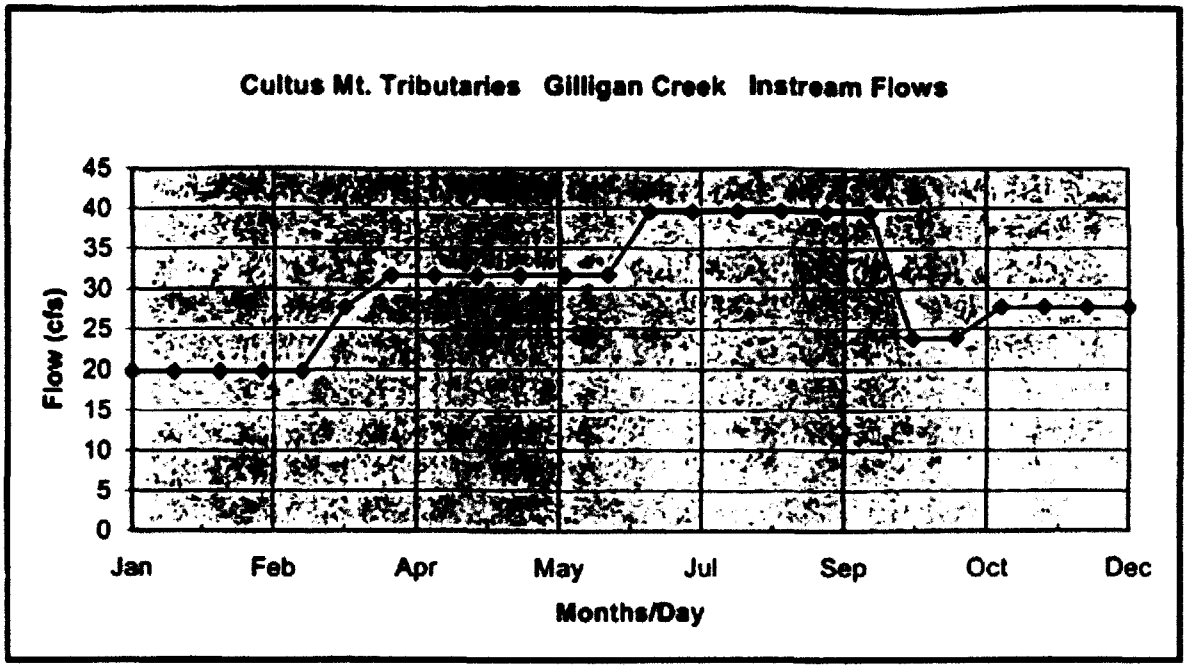


Figure 3



(4) The instream flow hydrographs, as represented in Figures 1 through 3 in WAC 173-503-040(3) shall be used for identification of instream flows.

(5) Future consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, and withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be expressly subject to instream flows established in WAC 173-503-040 (1) through (3) as measured at the appropriate gage, and also subject to WAC 173-503-060.

(6) Future consumptive water rights issued to applications pending at the effective date of the regulation are superior in priority date but shall be conditioned on the instream flows established in WAC 173-503-040 (1) through (3). (RCW 90.03.247)

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-040, filed 3/14/01, effective 4/14/01.]

173-503-050
Water availability determination.

(1) The department has made a determination that two hundred cubic feet per second is available to be appropriated through groundwater withdrawal or surface water diversion for further instantaneous consumptive appropriation in the Lower and Upper Skagit watershed (WRIA 3 and 4). These waters are available for appropriation, subject to existing rights, exemptions in WAC 173-503-070, and instream flows in WAC 173-503-040(2). This determination was based upon review of existing water right records and existing water use, and is consistent with the findings section (WAC 173-503-030) of this regulation.

(2) The department advises that water rights issued to appropriate these waters determined to be available by this rule will be interruptible rights.

(3) After these instantaneous diversion or withdrawal of the 200 cfs quantities identified in subsection (1) of this section have been allocated by ecology, the Lower and Upper Skagit Watershed (WRIA 3 and 4) shall be withdrawn from further consumptive appropriations. This rule may be reopened to further consumptive appropriation only if further information demonstrates that such appropriations can be made consistent with the finding section (WAC 173-503-030) and the instream flow section (WAC 173-503-040). If further information demonstrates that the amount in the availability determination set forth in subsection (1) of this section should have been less than two hundred cubic feet per second, ecology will not be bound by the two hundred cubic feet per second number when processing individual water right applications.

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-050, filed 3/14/01, effective 4/14/01.]

173-503-060
Ground water.

If the department determines that there is hydraulic continuity between surface water and the proposed ground water source, a water right permit or certificate shall not be issued unless the department determines that withdrawal of ground water from the source aquifer would not interfere with stream flows during the period of stream closure or with maintenance of minimum instream flows. If such findings are made, then applications to appropriate public ground waters may be approved subject to the flows established in WAC 173-503-040(2).

[Recodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013); Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-060, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-060, filed 3/14/01, effective 4/14/01.]

Reviser's note: The Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013), invalidated the 2006 amendments to chapter 173-503 WAC, adopted by the department of ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006). See WSR 13-21-044, filed 10/9/13.

173-503-070
Exemptions.

(1) Nothing in this chapter shall affect existing water rights, including perfected riparian rights, federal Indian and non-Indian reserved rights, or other appropriative rights existing on

the effective date of this chapter, nor shall it affect existing rights relating to the operation of any hydroelectric or water storage reservoir or related facilities.

(2) Nonconsumptive uses which are compatible with the intent of this chapter may be approved.

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-070, filed 3/14/01, effective 4/14/01.]

173-503-080
Policy statement for future permitting actions.

(1) No rights to divert or store public surface waters of WRIA 3 and 4 which would conflict with the provisions of this chapter shall hereafter be granted, except as provided in RCW 90.54.020 (3)(a).

(2) Consistent with the provisions of chapter 90.54 RCW, it is the policy of the department to preserve an appropriate minimum instream flow in all perennial streams and rivers as well as the water levels in all lakes in the Lower and Upper Skagit watershed (WRIA 3 and 4) by encouraging the use of alternative sources of water which include:

(a) Reuse;

(b) Artificial recharge and recovery;

(c) Conservation; and

(d) Acquisition of existing water rights.

[Recodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013); repealed by WSR 06-11-070 (Order 05-15), filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-080, filed 3/14/01, effective 4/14/01.]

Reviser's note: The Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013), invalidated the 2006 amendments to chapter 173-503 WAC, adopted by the department of ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006). See WSR 13-21-044, filed 10/9/13.

173-503-090
Enforcement.

In enforcement of this chapter, the department of ecology may impose such sanctions as appropriate under authorities vested in it, including, but not limited to, the issuance of regulatory orders under RCW 43.27A.190 and civil penalties under RCW 43.83B.335, 90.03.400, 90.03.410, 90.03.600, 90.44.120 and 90.44.130.

[Recodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013); Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-090, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-090, filed 3/14/01, effective 4/14/01.]

Reviser's note: The Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013), invalidated the 2006 amendments to chapter 173-503 WAC, adopted by the department of ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006). See WSR 13-21-044, filed 10/9/13.

173-503-100
Regulation review.

Review of the rules in this chapter may be initiated by the department of ecology whenever new information is available, a change in conditions occurs, or statutory modifications are enacted that are determined by the department of ecology to require review.

[Recodified by WSR 13-21-044, filed 10/9/13, by order of the Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013); Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. WSR 06-11-070 (Order 05-15), § 173-503-100, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. WSR 01-07-027 (Order 99-05), § 173-503-100, filed 3/14/01, effective 4/14/01.]

Reviser's note: The Supreme Court in the matter of *Swinomish Tribal Comm'y v. Dep't Ecology*, Supreme Court of the State of Washington No. 87672-0 (October 3, 2013), invalidated the 2006 amendments to chapter 173-503 WAC, adopted by the department of ecology Order No. 05-13, WSR 06-11-070 (May 15, 2006, effective June 15, 2006). See WSR 13-21-044, filed 10/9/13.

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

RICHARD A. FOX and MARNIE B. FOX, husband and wife,

Appellants,

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 below.

NO. 733150-I

PROOF OF SERVICE

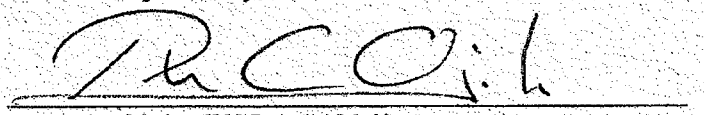
OF APPELLANT'S PETITION FOR REVIEW TO SUPREME COURT

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 PETITION FOR REVIEW was placed in the U.S. Mail, postage prepaid, on May 11, 2016, 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 11th day of May, 2016.



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FAX COVER SHEET

TO	Karen
COMPANY	WA Court of Appeals Div I
FAXNUMBER	12063892613
FROM	Thomas M. Pors
DATE	2016-05-12 17:13:21 GMT
RE	Fox v. Skagit County, et al., Case No 73315-0-I

COVER MESSAGE

Attached please find the proof of service of the Petition for Review in the action, which was effected yesterday, May 11, 2016. My apologies for the omission with my letter and filing yesterday.

Tom Pors