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SUPREME COURT OF THE STATE OF WASHINGTON

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SWINOMISH INDIAN TRIBAL  
COMMUNITY, a Federally Recognized  
Indian Tribe,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT  
OF ECOLOGY,

Respondent.

No. 87672-0

APPELLANT'S STATEMENT OF  
ADDITIONAL AUTHORITY [RAP 10.8]

Pursuant to RAP 10.8, Appellant, the Swinomish Indian Tribal Community, submits the attached Findings of Fact, Conclusions of Law, and Order in *Foster v. Washington State Department of Ecology*, PCHB No. 11-155 (Mar. 18, 2013). This additional authority is offered regarding Appellant's first assignment of error (*see* Opening Brief of Appellant at pp. 4-5), which involves the interpretation of the "overriding considerations of the public interest" provision in RCW 90.54.020(3).

Dated: April 2, 2013.

Respectfully submitted,



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POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

SARA FOSTER,

Appellant,

and

KERRI GOODWIN, KELLY VAN DUSEN,  
MELODY RAE, DON SCHMIDT,  
SANDRA PARENT, PATRICIA RICHKER,  
DIANE D'ACUTI, BOBYE CAIN, RAM  
JEYARAMAN, and MARGIE and JESS  
MAILLARD,

Appellant Intervenors,

v.

WASHINGTON STATE DEPARTMENT  
OF ECOLOGY; THE CITY OF YELM,

Respondent.

PCHB No. 11-155

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

Appellant Sara Foster filed an appeal with the Pollution Control Hearings Board (Board) challenging the Department of Ecology's (Ecology) approval of water right permit No. G2-29085 for the City of Yelm (Yelm). On January 30, 2012, the Board issued an Order Granting Intervention to eleven individuals: Kerri Goodwin, Kelly Van Dusen, Melody Rae, Don Schmidt, Sandra Parent, Patricia Richker, Diane D'Acuti, Bobye Cain, Ram Jeyaraman, and Margie and Jess Maillard (Appellant Intervenors).

The parties submitted cross-motions and related materials to the Board for its consideration. The parties were informed by letter prior to the hearing that the Board dismissed

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER  
PCHB No. 11-155

1 Issue 1 at the request of the parties, and granted summary judgment on Issues 2, 3, 4, and 6 in  
2 favor of the Respondents. The Board now also issues a separate Order Granting Partial  
3 Summary Judgment on those issues. Issues 5, 7, and 8 were held over for the hearing on the  
4 merits. The remaining issues pertain to the adequacy of Yelm's mitigation plan, whether  
5 Ecology properly employed an overriding consideration of public interest test in approving  
6 Yelm's water right, and whether certain statutes and regulations pertaining to minimum instream  
7 flows and basin closures were violated by Ecology's approval of the water right. The hearing on  
8 the merits was held in Tumwater, Washington on December 17-19, 2012.

9 Ms. Foster is represented by Attorney M. Patrick Williams. The Appellant Intervenors  
10 did not participate in the hearing. Yelm is represented by Attorneys P. Stephen DiJulio and  
11 Joseph A. Brogan. Ecology is represented by Assistant Attorney Generals Barbara Munson and  
12 Travis Burns. Kim Otis and Randi Hamilton of Olympia Court Reporters provided court-  
13 reporting services. Board members Bill Lynch, presiding, and Kathleen D. Mix, Chair, heard the  
14 appeal.<sup>1</sup> The Board received the sworn testimony of witnesses, admitted exhibits, and heard the  
15 arguments of the parties to the appeal. Having fully considered the record, the Board enters the  
16 following:

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21 \_\_\_\_\_  
<sup>1</sup> Board member Tom McDonald had previously recused himself from the appeal.

1 **FINDINGS OF FACT<sup>2</sup>**

2 [1]

3 Yelm’s water supply is currently supplied by two primary wells located in the downtown  
4 area. The wells are relatively shallow and draw water from the Qva aquifer. Water demand  
5 forecasts for the city show that Yelm will need to obtain additional water rights to meet potable  
6 water supply demand for projected population increases under the state Growth Management Act  
7 (RCW Ch. 36.70A). By 2028, Yelm will have a water deficit of approximately 942 acre feet per  
8 year (afy). As of November 30, 2012, Yelm only had 147 service connections remaining on its  
9 current Department of Health connection limit. *Badger Testimony.*

10 [2]

11 On January 10, 1994, Yelm filed an Application for a Water Right with Ecology seeking  
12 a water right permit to appropriate groundwater for municipal supply purposes. Yelm requested  
13 an instantaneous withdrawal rate (Qi) of 3000 gallons per minute (gpm), and a total annual  
14 withdrawal volume (Qa) of 3,500 afy. The application was subsequently modified in Yelm’s  
15 February 2011 Water Rights Mitigation Plan to a Qi of 2100 gpm, and a Qa of 942 afy. Yelm  
16 sought to obtain this water from a new well (SW Well 1A) which would draw from a deeper  
17 aquifer approximately 1.3 miles west of downtown Yelm. *Ex. A-1.*

18  
19  
20 <sup>2</sup> The Board’s Order Granting Partial Summary Judgment contains extensive factual findings within the Factual  
21 Background portion of the order. This decision will not repeat all of those findings, but instead, highlights certain of  
those findings for purposes of continuity and makes additional findings based upon testimony and evidence at the  
hearing.

1 [3]

2 Because the Cities of Yelm, Olympia, and Lacey had pending water right applications  
3 and changes that could impact water resources across jurisdictional boundaries, the cities  
4 developed a regional approach for managing and mitigating water resources across the affected  
5 basins. The cities entered into an Interlocal Agreement pursuant to RCW 39.34.010 and  
6 39.04.080 for a water rights acquisition strategy and implementation of a mitigation strategy.  
7 The joint effort included the development of a hydrologic model, in addition to development of  
8 inter-related mitigation strategies. The joint effort allowed development of mitigation that none  
9 of the cities could have accomplished had they acted alone. *Boessow Testimony; Gallagher*  
10 *Testimony; Exs. R-40-41.*

11 [4]

12 The groundwater model used to predict the impact to surface water bodies from the  
13 pumping of Yelm's SW Well 1A is based upon a model originally developed by the United  
14 States Geological Survey in 1999. This model has been further refined over time. The model  
15 was peer reviewed with input from both the Nisqually and Squaxin Island Tribes. The model  
16 covers about 15 miles from north to south, and about eight miles from east to west. The model is  
17 considered conservative because it will over predict potential depletions in surface waters within  
18 the modeled boundaries. The conservative nature of the groundwater model increased Ecology's  
19 confidence that there was complete mitigation of impacts in the modeled area. *Gallagher*  
20 *Testimony; Brown Testimony; Ex. R-51.* Ecology considers the groundwater model to be best  
21 available science. *Ex. A-1 at 7.*

1 [5]

2 The model predicted flow depletions in portions of the lower Nisqually and Deschutes  
3 watersheds for which mitigation is required under Ecology rules. The affected surface water  
4 bodies included Woodland Creek, the Tri-Lakes (Long, Hicks and Pattison Lakes), McAllister  
5 Springs and Creek, the Deschutes River (Upper and Middle Reaches, Silver Spring, and Lower  
6 Reach/Spurgeon Creek), and the Nisqually River (Upper and Middle Reaches, Yelm Creek and  
7 Lower Reach). The Cities of Yelm, Olympia, and Lacey met with the Squaxin Island Tribe,  
8 Ecology staff, and Department of Fish and Wildlife (WDFW) staff to discuss proposed  
9 withdrawals and the associated mitigation. Several reports, including reports developed by the  
10 Nisqually Watershed Planning Unit were considered in the development of the mitigation  
11 strategy. Yelm prepared the City of Yelm Water Right Mitigation Plan as a result of these  
12 efforts. Ecology made the fulfillment of the mitigation plan a condition for its approval of  
13 Yelm's water right. In evaluating Yelm's mitigation options, Ecology expected the cities to first  
14 provide "water for water, in time and in place," essentially substitution of depleted water with  
15 water from an alternative source. If that was not possible, Ecology expected water to be made  
16 available for critical periods on a river or stream. The last mitigation option was "out-of-kind"  
17 mitigation, such as projects to restore and enhance streams and habitats. *Loranger Testimony;*  
18 *Gallagher Testimony; Exs. A-1, A-2.*

19 [6]

20 Steven Boessow is employed as a water rights biologist by WDFW. In this capacity, he  
21 reviews water rights that Ecology is working on for potential impacts to fish. He reviews about

1 200 water right applications per year. Mr. Boessow became involved with Yelm's water right  
2 application in September 2005, and stayed involved with the application until the issuance of the  
3 Report of Examination. During this time he met with Ecology staff, the Cities of Yelm,  
4 Olympia, and Lacey, the Nisqually Tribe, and the Squaxin Island Tribe. He has visited all of the  
5 sites where mitigation actions are proposed under the Yelm mitigation plan, and is familiar with  
6 the specific details of the plan. *Boessow Testimony*.

7 [7]

8 The modeled impacts for the Nisqually basin from Yelm, Olympia, and Lacey are 4,625  
9 cfs (or 6.47 cubic feet per second (cfs)). *Ex. A-1*, at 14. The bulk of these impacts occur below  
10 River Mile (RM) 4.3, which is in the lower Nisqually River.<sup>3</sup> The Nisqually River below RM  
11 4.3 is not subject to the instream flow rule, but the area above that point is subject to instream  
12 flows. *Ex. A-2* at 8. There have only been a few occasions in the past 15 years when the  
13 minimum instream flows were not met in the Nisqually River. These occasions mostly occurred  
14 in January, which is not a high water demand time, as a result of an extreme drought year. On  
15 these rare occasions, up to a 0.32 cfs modeled depletion could occur at RM 4.3 when flows are  
16 not met on the Nisqually due to Yelm's pumping from its new well (SW Well 1A). *Ex. A-1*, p.  
17 20. Flows in the Nisqually River are controlled by the Alder and LaGrande Dams, which are  
18 operated by Tacoma Power. Tacoma Power must consult with the Federal Energy Regulatory  
19 Commission (FERC) and the Nisqually Tribe if it adjusts flows. The Nisqually Tribe is

20 <sup>3</sup> Mr. Gallagher testified that the bulk of the impacts were below RM 4.3, although his power point presentation  
21 suggested impacts just above RM 4.3. Mr. Boessow testified that the bulk of the impacts were below RM 4.6.  
There is agreement, however, that mitigation would be necessary for a depletion of 0.32 cfs at RM 4.3, which the  
Board finds to be the most relevant fact.

1 requesting an agreement with Tacoma Power to keep 10 cfs on reserve at Alder Dam for flow  
2 augmentation to protect against low flow conditions. *Gallagher Testimony; Boessow Testimony;*  
3 *Exs. R-51, A-2* at 8.

4 [8]

5 Flow in the lower Nisqually River is not a limiting factor to Chinook salmon recovery in  
6 the Nisqually Basin. *Gallagher Testimony; Ex. R-51.* Pumping Yelm's SW Well 1A produces  
7 very little, if any, impacts to fish in the lower part of the Nisqually River because it is primarily  
8 an intertidal area of a large body of water. If a single low-flow event occurred again, it would  
9 not affect overall habitat for the Nisqually River. The main stem is not a primary spawning area.  
10 The restoration activities on the Nisqually River system are focused in the tributaries and  
11 upstream of the modeled impacts. If tributaries can be enhanced and restored, then there is better  
12 fish production and a better response, especially from anadromous fish like salmon. *Boessow*  
13 *Testimony.*

14 [9]

15 Yelm Creek is a tributary to the Nisqually River and is closed as a surface water source  
16 year-round. The predicted decrease in discharge to Yelm Creek due to pumping from (SW Well  
17 1A is approximately 38 afy (or 0.05 cfs), with the maximum depletion occurring in April. The  
18 flows in Yelm Creek vary quite a bit during the year because it virtually dries up in the summer  
19 and flows during the winter. Yelm's mitigation plan calls for Yelm to recharge the shallow  
20 aquifer system to the benefit of Yelm Creek with 56 afy of reclaimed water at Yelm's Cochrane  
21 Memorial Park. *Gallagher Testimony; Boessow Testimony; Exs. R-51, A-2.* Reclaimed water

1 infiltrated at Cochrane Memorial Park goes to a surficial aquifer, which is separated from the  
2 aquifer that Yelm's current wells pump from by a confining layer. Yelm's current wells also  
3 have very small cones of depression when they are pumping. The infiltrated water tends to stay  
4 in the upper aquifer and flow towards Yelm Creek instead of being captured by the existing  
5 wells. Ecology expects Yelm to infiltrate 56 afy to mitigate for its new water right in addition to  
6 the 56 afy it is obligated to infiltrate as mitigation for the transfer of the McMonigle water right.  
7 *Gallagher Testimony.*

8 [10]

9 Yelm's mitigation plan also states that it will work with the Nisqually Tribe to complete  
10 out-of-kind mitigation projects for Yelm Creek. It lists four possible projects: creek channel  
11 restoration between 103<sup>rd</sup> Avenue and First Street, creation of a continuous vegetated buffer  
12 along the creek, placement of a stream gauge on the creek, and removal of riprap weirs at the  
13 pipeline crossing. *Ex. A-2.* Yelm Creek is severely degraded. It is located in a very flat area and  
14 is choked with weeds such as reed canary grass, so water moves through the creek very slowly –  
15 even at high water. If natural plantings along the side were able to choke out weeds, a more  
16 gravel-based substrate was established, and the stream was allowed to meander more naturally, it  
17 would enhance fish habitat in the creek. The mitigation on Yelm Creek will produce a gain of  
18 fish habitat on the creek. *Boessow Testimony.* Yelm Creek becomes very thin in several places  
19 and spreads out across fields, which increases both infiltration and evaporation. Channelization  
20 projects will probably keep water in the channel for a greater distance longer in the year. *Brown*  
21 *Testimony.* Although the out-of-kind mitigation lists *possible* projects, it is Ecology's position

1 that Yelm must complete those particular projects or their equivalent in order to be in  
2 compliance with their permit. *Gallagher Testimony.*

3 [11]

4 The mitigation for impacts on McAllister Creek, which is part of the Nisqually River  
5 Watershed, is being provided by the City of Olympia. Olympia is terminating its withdrawals  
6 from McAllister Springs, and will move to a new wellfield. This will increase stream flows  
7 between 9 to 17 cfs in McAllister Creek, significantly improving flows to the creek and more  
8 than offsetting the depletions to the Creek from increased well withdrawals by the cities. These  
9 increased flows will allow for recharge of the banks, and will provide off-channel and side-  
10 channel habitat for fish. The benefits will be seen from the headwaters all the way down to the  
11 Nisqually Wildlife Refuge. *Gallagher Testimony; Boessow Testimony.*

12 [12]

13 Yelm's impact on Woodland Creek, which is part of the Deschutes River Watershed, is  
14 below the threshold of the model to accurately predict except for the month of October. During  
15 the month of October, the predicted impact from Yelm's pumping SW Well 1A is approximately  
16 14.6 afy. The estimated drawdown in the Tri-Lakes (Pattison Lake, Long Lake, and Hicks Lake)  
17 as a result of Yelm pumping SW Well 1A is between a quarter and one-half inch, which is within  
18 the 1.5 to 4 foot fluctuation normally seen in those lakes. Consequently, there will be no impact  
19 on the fish or recreation in those lakes. *Boessow Testimony.*

1 [13]

2 Yelm is partnering with Olympia and Lacey to purchase 20 acres along Woodland and  
3 Fox Creek as out-of-kind mitigation for the small depletions on streamflows in Woodland Creek  
4 and the Tri-Lakes area from pumping SW Well 1A. Preserving this land from development will  
5 benefit the chum salmon, coho salmon, and sea run cutthroat that use the streams. Allowing  
6 rainfall to be absorbed into the ground and slow its discharge into the creeks will help protect the  
7 fish using the creeks. The rainfall storage and release provides a two to one mitigation value for  
8 the slightly lesser flows. *Boessow Testimony*. In addition, as part of Lacey and Olympia's  
9 mitigation plans, a reclaimed water infiltration facility will be built to infiltrate reclaimed water  
10 into Woodland Creek during May through October. *Boessow Testimony; Gallagher Testimony;*  
11 *Exs. A-2, R-18.*

12 [14]

13 The Cities of Yelm, Olympia, and Lacey purchased two summertime irrigation rights in  
14 the upper Deschutes Basin and will retire these water rights as part of the in-kind mitigation for  
15 depletions on the Deschutes River during portions of the closure period on that river. The  
16 acquisition of previously committed water for the Deschutes River will increase stream flows  
17 during critical times for returning Chinook salmon. Chinook salmon return back to the river in  
18 mid- to late August, and continue through September. There will be more water upstream, and  
19 the water will be colder because it will be coming from springs from the Smith Farm. The  
20 purchase of the Smith Farm also allows for the restoration of off-channel habitat, the addition of  
21 large woody debris, the reduction of erosion, and riparian enhancement. One of the important

1 mitigation features is the installation of a live cribwall, which is a combination of logs and root  
2 wads with trees planted amongst them. The cribwall will slow the river at a particular spot  
3 where erosion is occurring, will allow the capture of fine sediment, and direct the flow more  
4 towards the main channel. *Boessow Testimony.*

5 [15]

6 Although the purchase of the Smith Farm and Jensen irrigation rights will offset the  
7 depletions to the Deschutes River for part of the summer months, a “shoulder” period on each  
8 end of these rights is not fully mitigated with in-kind water, including depletions during April  
9 and October. The closure period for the Deschutes River is from April through November 1<sup>st</sup>.  
10 The water rights that are being retired allow irrigation from May 1<sup>st</sup> through either September  
11 15<sup>th</sup> or September 30<sup>th</sup>. At Ecology’s insistence, Yelm sought to purchase other water rights to  
12 cover this shoulder period, but was unable to find any such rights available. *Loranger*  
13 *Testimony.*

14 [16]

15 From the perspective of fish protection, less flow in the Deschutes during the month of  
16 April is unlikely to have any impact on fish because April is a rainy month and there would not  
17 be any adult salmon in the Deschutes River or any spawning or migration happening at that time.  
18 The month of October is a more critical time, however, because that is the end of Chinook  
19 spawning, and it is important to keep the redds covered with water. Because of the many year-  
20 round benefits provided by the other beneficial aspects of the Deschutes mitigation package, Mr.  
21 Boessow considered the depletions to the Deschutes River to be fully mitigated from a fish and

1 wildlife perspective, even in April and October, with more habitat being available for fish.

2 *Boessow Testimony.*

3 [17]

4 RCW 90.54.020(3)(a) authorizes withdrawals of water which would impact minimum  
5 flows established by Ecology or closed streams in those situations where it is clear that  
6 overriding considerations of the public interest (OCPI) would be served. Ecology did not start  
7 discussing the use of OCPI in this case until it reviewed the mitigation plans. Ecology  
8 recognizes that OCPI, like mitigation, is a case-by-case determination based upon site specific  
9 information.

10 [18]

11 It is the small, but modeled depletions of water in the Nisqually River watershed, as well  
12 as the depletion of water for parts of the year in the Deschutes River, and Woodland Creek, not  
13 mitigated with in-kind water, that led Ecology to employ the OCPI test to determine if the water  
14 right should be allowed despite the depletion of water. Ecology relied on the OCPI  
15 determination even though both the agency and other interested parties considered that the  
16 combination of in-kind and out-of-kind mitigation outweighed any impact to the stream and river  
17 flows. It also did so despite the assumption that the groundwater model had over-predicted the  
18 small depletions in these watersheds. Stakeholder buy-in of the total package was an important  
19 factor in Ecology's decision to approve the Yelm water right. *Gallagher Testimony.*

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[19]

The interlocal effort of the three Cities of Yelm, Olympia, and Lacey is a considered preferential approach to management of water resources because it allows for a larger single package of mitigation that is all connected. The Report of Examination requires monitoring in the form of a joint mitigation summary report to be prepared by Yelm and submitted to Ecology annually. *Boessow Testimony; Ex. A-1.*

[20]

The Department of Fish and Wildlife is not specifically listed in the mitigation plan as part of the stewardship group for projects in the Deschutes and Woodland Creek basins to help move the mitigation projects forward. WDFW has participated in similar committees in the past, and would participate if requested. *Boessow Testimony; Ex. A-2.*

[21]

The Appellant offers no expert testimony challenging the adequacy of the mitigation provided by Yelm or the other cities, nor did the Appellant offer any other testimony other than that of Ecology and WDFW witnesses, all of whom testified to the adequacy of the mitigation plan to address modeled stream and river depletions. The Appellant was able to get some greater clarification of how Ecology interprets the Report of Examination, but the Board finds that the Appellant has failed to show that the mitigation provided by Yelm is inadequate.

[22]

Ecology believes that the process and review utilized in approving Yelm’s water right application provides important limitations and sidebars regarding Ecology’s exercise of

1 discretion in the use of the OCPI exception. These factors are set forth further in the Conclusions  
2 of Law. *Gallagher Testimony; Loranger Testimony.*

3 [23]

4 The Appellant contests the use of OCPI by Ecology as not meeting the statutory standard  
5 and is also concerned with Ecology's use of this tool to justify expansion of municipal water  
6 service. The Appellant points to some elements in the mitigation plan, such as the provision  
7 regarding establishing a continuous vegetated buffer along Yelm Creek, as being so vague and  
8 practically unachievable as to be meaningless. The Appellant argues that it was not until the  
9 hearing commenced that Ecology articulated how it made its OCPI determination, and that this  
10 after-the-fact justification robs the public from the opportunity to ensure the decision was  
11 properly made.

12 [24]

13 The Board finds that the majority of depletions to various affected surface water bodies  
14 from Yelm pumping of SW Well 1A are fully mitigated with in-kind water, and those that are  
15 not fully mitigated with in-kind water, have been mitigated with out-of kind efforts that serve as  
16 a substantial and compelling basis for Ecology's OCPI determination.

17 [25]

18 Any conclusion of law deemed to be a finding of fact is adopted as such.  
19  
20  
21

1 **CONCLUSIONS OF LAW**

2 [1]

3 The Board has jurisdiction over the subject matter and the parties pursuant to RCW  
4 43.21B.110. The Board reviews the issues raised de novo. The person appealing the issuance of  
5 a permit has the initial burden of proof before the Board. WAC 371-08-485. Reports of  
6 Examination issued by Ecology are deemed prima facie correct and the burden of proving them  
7 to be erroneous is on the party attacking them. *Burke v. Ecology*, PCHB No. 03-155 (Order  
8 Granting Motion for Summary Judgment, May 21, 2004).

9 [2]

10 The legal issues remaining for the hearing on the merits are as follows:

- 11 5. Whether or not Ecology violated RCW 90.03.247, 90.44.040, 90.44.060, or  
12 90.22.010, or WAC 173-511-020, 173-511-040(2), or 173-511-050 in issuing the  
13 Report of Examination.
- 14 7. Whether the City's Mitigation Plan associated with Water Right No. G2-29085 is  
15 inadequate.
- 16 8. Whether it is improper for Ecology, under RCW 90.54.020(3)(a), to use overriding  
17 consideration of public interest to approve Water Right No. G2-29085?

18 [3]

19 With respect to the adequacy of Yelm's mitigation plan (Legal Issues No. 5 and 7), the  
20 Board concludes that the Appellant has failed to meet her burden of proof. The evidence  
21 provided by experienced experts demonstrates that Yelm will fully mitigate any impacts from  
pumping SW Well 1A with in-kind mitigation, supplemented with out-of-kind actions to address

1 the small amount of depletions in flow. When mitigation is provided out-of-kind, close scrutiny  
2 is required to ensure that this mitigation does, in fact, provide enhanced value to fish habitat and  
3 the values of the particular water body. Respondents demonstrated that the amount of value  
4 provided by the out-of-kind mitigation in this case will clearly benefit fish and the hydrology of  
5 the water body, and in some instances will address limiting factors that have been identified as  
6 barriers to salmon recovery. Indeed, the only evidence before the Board was that the mitigation  
7 plan offered by the cities was large in size and scope, feasible and funded as a single, inter-  
8 connected package, and overall, excellent and effective. *Boesseow Testimony*. The in-kind  
9 mitigation includes increasing the amount of water available in the Deschutes River during a  
10 critical life stage of Chinook salmon when water levels are generally lower, direct infiltration of  
11 water to the ground for recharge (Yelm Creek), and increased flow to surface waters due to  
12 changed well-pumping (McAllister Creek).

13 [4]

14 Concerns raised by the Appellant regarding the adequacy of mitigation were also fully  
15 answered by the Respondents' witnesses. The variable impact to Yelm Creek, for example, can  
16 be explained by the fact that it is an intermittent stream that goes dry part of the year. Ecology  
17 also interprets the mitigation plan as requiring Yelm to complete the specific projects listed  
18 under out-of-kind mitigation for Yelm Creek, or to complete projects that are equivalent to those  
19 specific projects, in order to be in compliance with their permit. The Board agrees with  
20 Ecology's interpretation of the mitigation plan and concludes that the out-of-kind mitigation  
21 projects for Yelm Creek are required and not permissive. Respondents also clarified that the

1 infiltration of 56 afy of reclaimed water at Cochrane Memorial Park is in addition to any other  
2 obligations Yelm may have to provide reclaimed water at that site. The Report of Examination  
3 also requires monitoring in the form of an annual report that Yelm must submit to Ecology. With  
4 these clarifications, the Board concludes that the mitigation provided under this permit is as  
5 strong as feasible.

6 [5]

7 The Board also specifically upholds the regional approach undertaken by the Cities of  
8 Yelm, Olympia, and Lacey. By pooling resources, these cities have been able to coordinate their  
9 efforts at managing and mitigating water resources that cross their jurisdictional boundaries to an  
10 extent that could not be done if they acted alone. The cities were able to avoid bidding against  
11 each other for mitigation opportunities, and instead, were able to produce a joint mitigation plan  
12 that is logically inter-connected. So long as depletions are fully mitigated, it does not matter  
13 which jurisdiction is furnishing what particular mitigation. The Board decides Issue 7 in  
14 Respondents' favor.

15 [6]

16 The Board concludes a small addition needs to be made to Section 4.2 of the Mitigation  
17 Plan with respect to membership on the stewardship group for projects within the Deschutes and  
18 Woodland Creek basins. Although the cities would work with Ecology and the Squaxin Island  
19 Tribe to determine membership, the Board believes that the presence of both Ecology and  
20 WDFW is required to ensure that coordination continues and the joint mitigation proceeds. A  
21 deadline for the establishment of the stewardship group should also be established.

1 [7]

2 With respect to Legal Issue No. 8 and Ecology's use of an OCPI analysis to justify small  
3 depletions to some surface waters, the Board is guided by several principles. In managing the  
4 waters of the state, Ecology must protect, and where possible enhance, the natural environment.  
5 Perennial rivers and streams of the state are to be retained with base flows necessary for the  
6 preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational  
7 values. Withdrawals of water which would conflict with these values shall only be authorized in  
8 those situations where it is clear that overriding considerations of the public interest (OCPI)  
9 would be served. RCW 90.54.020(3)(a).

10 [8]

11 RCW 90.22.010 authorizes Ecology to establish minimum flows or water levels for  
12 streams, lakes, or other public waters to protect fish, game, birds, or other wildlife, or  
13 recreational or aesthetic values of these waters when it is in the public interest. Ecology may  
14 also establish such flows or levels when requested by the WDFW to protect fish, game or other  
15 wildlife resources. In addition Ecology may establish minimum flows or levels as are required to  
16 protect the resource or to preserve water quality. Ecology established instream flows for both the  
17 Deschutes River and Nisqually River watersheds.

18 [9]

19 Minimum flows established by rule pursuant to RCW 90.22.010 and 90.54.040 are  
20 treated as appropriations with priority dates as of the dates the minimum flows were established.  
21 RCW 90.03.345, 90.44.030; *Hubbard v. Department of Ecology*, 86 Wn. App. 119, 124-25, 936

1 P.2d 27 (1997). RCW 90.03.290 does not differentiate between impairment of existing rights  
2 based on whether the impairment is de minimus or significant. *Postema v. Pollution Control*  
3 *Hearings Board*, 142 Wn.2d 68, 90, 11 P.3d 726 (2000).

4 [10]

5 A stream closure is not an appropriation, but a determination by Ecology that the water  
6 instream is insufficient to meet existing rights and provide adequate base flows. A stream  
7 closure by rule indicates that Ecology has determined water is not available for further  
8 appropriation. Because water availability is a requirement for the granting of a new water right,  
9 a proposed withdrawal of groundwater in a hydraulic continuity with a closed water body must  
10 be denied if the withdrawal will have any effect on the flow or level of the surface water.

11 *Postema* at 95. See also *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (2006).

12 [11]

13 “Under RCW 90.03.290, Ecology must deny an application where a proposed withdrawal  
14 of groundwater would impair existing rights, including minimum flows, and must deny an  
15 application where water is unavailable.” *Postema* at 110. Thus, Ecology was required to deny  
16 Yelm’s water right if the facts informed it that there was an impairment or water was  
17 unavailable, unless it was clear that overriding considerations of the public interest would be  
18 served. RCW 90.54.020(3)(a).

19 [12]

20 There are only a few cases when the use of OCPI has come before the Board. In *Black*  
21 *Diamond Associates v. Ecology*, PCHB No. 96-90 (1996), Appellant filed a water rights

1 application to withdraw groundwater to irrigate a golf course. Ecology denied the permit  
2 because base flows of the Green River consistently were not being met, particularly in the  
3 summer and fall. The groundwater was in hydraulic continuity with the surface waters, and the  
4 Board concluded that the application would impair the existing rights of the flows. The  
5 Appellant argued that the permit should be approved under OCPI.

6 [13]

7 Examining the language of RCW 90.54.020(3), the Board in *Black Diamond Associates*  
8 concluded that the OCPI exception must be narrowly construed, which is consistent with the  
9 subsequent *Postema* decision. *Postema* at 81. The Board stated that the burden of proving  
10 entitlement to the exception is on the party asserting the entitlement, and that the exception is  
11 applied on a case-by-case basis. The Board found that under the first prong of the exception, the  
12 proposed appropriation must serve a public, rather than a private interest. Under the second  
13 prong, the Board stated that the public interest must be so great as to override the harm to other  
14 public interests, and that this is done through a balancing test.

15 [14]

16 Black Diamond Associates argued that the use of water for a golf course and residential  
17 use fulfilled the goals and purposes of the Growth Management Act (GMA). Black Diamond  
18 Associates did not propose any mitigation to offset the impacts caused by the use of this water.  
19 The Board stated that “[t]he GMA does not create a categorical exemption to the base flow  
20 requirements of the Water Code.” The Board declined to sanction the use of OCPI under these  
21 circumstances and affirmed Ecology’s denial of the permit.

1 [15]

2 In an unusual case, the Board used the same test articulated in *Black Diamond Associates*  
3 to allow OCPI for the use of water to irrigate athletic fields by the Auburn School District. The  
4 Board observed that physical education is an inherent part of the education system. *Auburn*  
5 *School District No. 408 v. Ecology*, PCHB 96-91 (1996). The *Auburn School District* decision  
6 should be limited to the facts in that case and is not instructive in the current appeal.

7 [16]

8 Ecology testified that it used a three-step balancing test in deciding whether there has  
9 been a demonstration of OCPI under RCW 90.54.020(3)(a). Ecology does not have a written  
10 policy or rule explaining criteria or the manner in which it will analyze OCPI. At hearing,  
11 Ecology articulated this three step balancing test for use of OCPI, as follows:

- 12 1. Determine whether and to what extent important public interests would be served by  
13 the proposed appropriation. The public interests served may include benefits to the  
14 community at large as well as benefits to the river or other environmental resources;
  - 15 2. Determine whether and to what extent the proposed appropriation would harm any of  
16 the public interests (fish, wildlife, scenic, aesthetic, and other environmental and  
17 navigational values) protected by the closure and/or any other public interests; and
  - 18 3. Determine whether the public interests served (as determined in Step 1) clearly  
19 override any harm (as determined by Step 2).
- 20  
21

1 [17]

2 Although Ecology's articulation of its three-part test appears to be generally consistent  
3 with the Board's decision in *Black Diamond Associates*, the Board concludes that, by definition  
4 and in the context of the current case, a more stringent test is required. The conflict between  
5 population growth and the lack of available water will only continue to grow in coming years. If  
6 a simple balancing test is used, environmental values, including those set out by way of in-  
7 stream minimum flow and stream closure regulations, can easily be dismissed because people  
8 need potable water for their homes. The very term "overriding consideration of public interest"  
9 demands a more stringent approach before Ecology may, in effect, suspend rules which were  
10 carefully considered and adopted to protect a variety of values.

11 [18]

12 Ecology clearly established through its witnesses that in any case involving the use of  
13 OCPI, the primary focus is on the mitigation that is being provided to offset the reduced flows  
14 where Ecology has already established minimum flows or basin closures by rule. Because the  
15 present case involves a permanent reduction in streamflow to salmon-bearing streams, any  
16 balancing test requires more substantial mitigation than if a temporary reduction in streamflow is  
17 sought. As the Legislature recognized in the Water Resources Act of 1971:

18 Adequate water supplies are essential to meet the needs of the state's growing  
19 population and economy. At the same time instream resources and values must  
20 be preserved and protected so that future generations can continue to enjoy  
21 them.

RCW 90.54.010(1)(a).

1 [19]

2 Although Ecology presented a balancing test as the basis for its analysis of OCPI,  
3 testimony also established that Ecology considered and applied a number of additional factors in  
4 its decision as to whether minimum in-stream flows or closures could be overridden in the  
5 granting of Yelm's water right. Among the additional factors considered by Ecology were the  
6 following:

- 7 1. Ecology will use the OCPI exception only when the water is to be used for a public  
8 purpose.
- 9 2. Ecology exhausted every feasible option to make sure that in-kind mitigation (water  
10 for water) was provided before turning to out-of-kind mitigation.
- 11 3. All depletions/impacts to the water bodies subject to the minimum flows or stream  
12 closures were fully mitigated and trackable over time.
- 13 4. If out-of-kind mitigation was relied on, the benefits to fish and stream habitat, and to  
14 the values of the water body, were significant and clearly established through sound  
15 science.
- 16 5. The out-of-kind mitigation provided a permanent and net ecological benefit to the  
17 affected streams, and was more than sufficient to offset the minor depletion of water.
- 18 6. The potential impacts to water bodies were based upon a conservative hydrologic  
19 model.
- 20 7. The hydrologic model was prepared by an external consultant who is a professional  
21 modeler, and was subject to a rigorous peer review, and can be modified if needed.

1 8. The amount of water depletion was small so that there is no or only minimal impact  
2 to water resources.

3 9. Water can be added if feasible during critical times for fish, and should not be  
4 diminished during such critical times.

5 10. Stakeholders were bought into and supported the proposed project and mitigation.

6 11. Mitigation was consistent with adopted watershed plans.

7 12. Water conservation efforts will be utilized, which in this case includes the use of  
8 reclaimed water.

9 [20]

10 Ecology, not the Board, should establish the framework of a policy or rule for the use of  
11 OCPI. The Board is reluctant to use an adjudicatory process to define the limits or requirements  
12 for use of OCPI, and is hampered in this case by Ecology's lack of a policy or rule in this area.  
13 Given the demands of population growth on limited water resources, Ecology should develop a  
14 policy or rule to address situations such as this. Despite this difficulty, the Board concludes  
15 Ecology established through testimony sufficient criteria to guide the use of OCPI, as set forth  
16 above, thereby justifying its use in this case without the promulgation of a rule or adoption of a  
17 policy.

18 [21]

19 In the present case, Ecology correctly concluded that "overriding considerations of public  
20 interest" allow withdrawals of water from the affected streams beyond that allowed by in-stream  
21 flow and closure rules. Ecology correctly concluded that the additional mitigation, in the form of

1 many out-of-kind efforts, offered significant benefit to the public and the environment. The  
2 Board concurs in the use of OCPI by Ecology because there is a net ecological benefit to the  
3 streams and rivers from the mitigation package as well as municipal water supply benefits. It is  
4 important that the modeled water depletion was small, and the value of the mitigation high, with  
5 water conservation as an element, and support from multiple sectors and parties. Additionally,  
6 we sustain Ecology's decision because the OCPI determination was made only after exhausting  
7 all available in-kind mitigation, and after an assessment of the scope of water depletion through  
8 sound science and a conservative hydrologic model. There remains the option to add additional  
9 water at critical times (Nisqually dams), and the mitigation efforts were consistent with  
10 developed watershed plans. The additional factors relied upon by Ecology have been recognized  
11 by experts as being both significant and achievable. The multi-jurisdictional effort which  
12 maximized management of regional water resources that crossed jurisdictional boundaries  
13 provided an additional benefit in this case.

14 Use of the OCPI exception would not be sustainable were it based merely on the need to  
15 serve additional population with increased water supplies, nor where the mitigation offered was  
16 frail in comparison to the effects on instream flows and closures. However, by establishing these  
17 sidebars and limitations on the use of OCPI for situations involving normal population growth,  
18 the Board also concludes that the Washington Supreme Court's dictate in *Postema*, which  
19 requires us to construe the OCPI exception narrowly, is met, and that the values articulated in  
20 Chapter 90.54 RCW are upheld. Furthermore, by requiring mitigation to justify the use of OCPI,  
21 Ecology's decision is consistent with the Board's previous decision in *Black Diamond*

1 *Associates*. The Board concludes that Ecology's limited use of OCPI for this major project is  
2 justified. The Board decides Issue 8 in the Respondents favor.

3 [22]

4 The Appellant was unable to show that any of the statutes or regulations pertaining to  
5 minimum instream flows or basin closures was violated. The Board decides Issue 5 in  
6 Respondents favor.

7 [23]

8 Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

9 **ORDER**

10 Water Right Permit No. G2-29085 issued for the City of Yelm is AFFIRMED with the  
11 following modification:

- 12 1. Section 4.2 of the Mitigation Plan, with respect to membership on the stewardship  
13 group for projects within the Deschutes and Woodland Creek basins, shall include a  
14 representative of the Department of Ecology and the Department of Fish and  
15 Wildlife.

16 SO ORDERED this 18<sup>th</sup> day of March, 2013.

17 **POLLUTION CONTROL HEARINGS BOARD**

18

19 WILLIAM H. LYNCH, Presiding

20

21 KATHLEEN D. MIX, Chair

SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

SWINOMISH INDIAN TRIBAL  
COMMUNITY, a Federally Recognized Indian  
Tribe,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT  
OF ECOLOGY,

Respondent.

No. 87672-0

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on April 2, 2013, I served Appellant's Statement of Additional Authority and this Certificate of Service on all parties and amici curiae in the above-captioned matter by email at the email addresses listed below:

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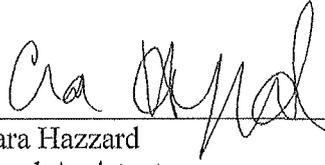
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: April 2, 2013, in Seattle, Washington.

A handwritten signature in cursive script, appearing to read "Cara Hazzard", written over a horizontal line.

Cara Hazzard  
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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**To:** Cara Hazzard  
**Cc:** Marc Slonim; Joshua Osborne-Klein  
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Rec'd 4-2-13

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**From:** Cara Hazzard [<mailto:chazzard@zcvbs.com>]  
**Sent:** Tuesday, April 02, 2013 9:42 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Marc Slonim; Joshua Osborne-Klein  
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Good morning,

Please find attached the documents listed below for filing in Swinomish Indian Tribal Community, Appellant v. Washington State Department of Ecology, Respondent; Cause No. 87672-0.

Appellant's Statement of Additional Authority  
Certificate of Service

These documents are filed by Marc Slonim, [mstonim@zcvbs.com](mailto:mstonim@zcvbs.com), WSBA #11181 and Joshua Osborne-Klein, [joshok@zcvbs.com](mailto:joshok@zcvbs.com), WSBA #36736 of Ziontz, Chestnut, Varnell, Berley & Slonim; 206-448-1230.

Thank you,

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