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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY; THE CITY OF  
YELM, and WASHINGTON POLLUTION CONTROL HEARINGS  
BOARD,

Respondents.

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APPELLANT'S ANSWER TO AMICUS BRIEF FILED ON BEHALF  
OF THE CITIES OF OLYMPIA AND LACEY

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 ORIGINAL

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## II. Introduction

Appellant, Sara Foster, files this answer to the amicus filed on behalf of the cities of Lacey and Olympia. The amici do not offer a perspective or argument that is unique or independent from those proffered by the Department of Ecology of the City of Yelm (Respondents). Instead, amici continue to extol the regional mitigation plan as evidence that the narrow exception found in RCW 90.54.020(3)(a) as delineated by this Court in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (Wash. 2013), is met in this instance. As a result, amici's arguments fail in the same manner as Respondents'.

First, there is no authority for Ecology to issue new water rights that will permanently impair existing instream flows using the OCPI exemption found in RCW 90.54.020(3)(a). Therefore, amici's claim that out of kind mitigation operates as a delegation of legislative authority to do so is unfounded.

Second, as the amicus brief details, Yelm's contribution to the regional mitigation plan is entirely financial, with most of its requirements

being already satisfied. The mitigation projects for which Yelm is solely responsible are merely a rehash of a floodwater management plan and fails to meet even the standards established by the Pollution Control Hearings Board, on which Respondents and amici place so much value.

As such, should the Supreme Court find for Ms. Foster, there would be no impact to amici. Perhaps this is why these parties did not intervene and instead sought amicus status. Therefore, the arguments put forth by amici simply echo those of Respondents, and fail to prove that the Pollution Control Hearings Board decision and Thurston County Superior Court found the narrow exception in RCW 90.54.020(3)(a) was properly applied for water right No. G2-29085.

### III. Argument

#### a. Amici's Argument that the Mitigation Plan Allows Ecology to Permanently Impair Instream Flows is Incorrect

In recent cases, the Supreme Court determined that instream flows are water rights like any other water right and therefore have the same rights and limitations as any other type of water right. *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000), *Swinomish*, 178 Wn.2d at 585. *Postema* and its progeny *Swinomish* mandate that Ecology has a duty to protect minimum flows, holding “a

minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired.” *Id.*

The statute in question is found in chapter 90.54 RCW and is therefore most instructive as to how the exemption should be applied. This chapter’s overall goals are public health, economic well-being, and “*preservation of natural resources and aesthetic values*”, which the *Swinomish* opinion states, “shows the legislature continued to recognize that retention of waters instream is as much a core principle of state water use as the other goals...” *Swinomish*, 178 Wn.2d at 594. (emphasis in original). It is important to note, as this Court did in *Swinomish*, that it is water kept instream that is a “core principle” of the state and not a “maximum net benefits” approach as proffered by Ecology and Yelm.

The amici cannot overcome this clear statement of legislative intent so they choose to ignore it. However, by doing so they commit the same error as Respondents, failing to acknowledge that there is no clear legislative intent to permanently reallocate water set for instream flows.

Instead the Legislature requires Ecology do the opposite of the authority they claim.

Perhaps in the most unambiguous statement possible the Legislature states, “Nothing in this act shall affect or operate to impair any existing water rights.” RCW 90.54.920(1). This declaration for protecting existing rights, which all parties agree include instream flows, is found in the same chapter as the OCPI exemption. There is no question that when the Legislature drafted RCW 90.54.920(1) it was aware of the narrow exemption it created in RCW 90.54.020(3)(a).

The instream flows that Ecology seeks to impair in this case have a priority date of 1981, as set when the instream flow rule was established. WAC 173-511-030, WAC 173-511-040. Importantly RCW 90.54.920(1), which prohibits any part of the act from affecting or operating to impair existing water rights, was enacted in 1989. Therefore, the water rights in question in this case, for the Nisqually and Deschutes Rivers, were in existence when RCW 90.54.920 was enacted.

b. Yelm’s Role in the Regional Mitigation Plan is Limited and Fails to Meet the Standards Amici Claim

The Mitigation Plan relied on by Respondents and amici does not allow Ecology to utilize the OCPI exemption to permanently impair

instream flows. However, even assuming a mitigation plan is sufficient to invoke the OCPI exemption to permanently impair instream flows, Yelm's mitigation actions under the plan are limited to financial contributions and a pre-existing Flood Hazard Management Plan. As such, these actions even fail the PCHB's rationale for finding Ecology acted lawfully.

Yelm Creek is a tributary to the Nisqually River and is closed year-round to any further water appropriations pursuant to WAC 173-511 and is therefore a senior right to the water right at issue in this case. The projected impact to Yelm Creek from Yelm's water right is much greater than for any other water body. The projected depletions to Yelm Creek are between 1.3 and 56 percent of the baseline discharge.<sup>1</sup> The mitigation for these significant impacts to a closed stream include the "possible" actions associated with the mitigation for the Nisqually River. These actions are:

Possible projects include:

- Creek channel restoration between 103<sup>rd</sup> Avenue and First Street, with meanders and in-stream habitat features,
- Create a continuous vegetated buffer along creek,
- Stream gage on Yelm Creek (per Watershed Plan), and
- Remove riprap weirs at pipeline crossing.<sup>2</sup>

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<sup>1</sup> Report of Examination (Bates No. 001328-001767).

<sup>2</sup> Id

During the PCHB hearing, testimony from Ecology and Yelm's witnesses established that these four possible projects were not specially created to offset Yelm's projected 56 percent depletion of Yelm Creek. In fact, these four projects were originally created as part of the Yelm Creek Comprehensive Flood Management Plan in 2001.<sup>3</sup> These projects were and are designed to "provide improvements to Yelm Creek that would aid in flood hazard."<sup>4</sup> Yelm actually received a \$10,000 grant from Ecology in 2005 to survey these sites and develop a construction plan for these projects. However, Yelm never completed them.<sup>5</sup> The reason Yelm never completed these projects, which were deemed as important flood safety issues, was because they changed their mind and decided to use these projects for mitigation for their water right instead.<sup>6</sup> However, these projects were not initially designed for mitigation for depleted stream flows to Yelm Creek nor were they clearly established through sound science for this purpose.

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<sup>3</sup> Testimony of Yelm Administrator Shelly Badger, Day 2 page 344 Lines 16-17.

<sup>4</sup> Id

<sup>5</sup> Id

<sup>6</sup> Id. pg 344 11-19.

The mitigation for Yelm Creek is so lacking in scientifically sound out-of-kind mitigation that it does not meet the criteria established by the PCHB and therefore must be rejected on the basis that it is not supported by substantial evidence pursuant to RCW 34.05.570(3)(e).

Of the twelve factors listed by the PCHB that it believes Ecology considered in making its OCPI determination at least two are not supported by the facts. They are:

1. **Ecology exhausted every feasible option to make sure that in-kind mitigation (water for water) was provided before turning to out-of-kind mitigation.** (Emphasis added).
2. If out-of-kind mitigation was relied on, the benefits to fish and stream habitat, and to the values of the water body, **were significant and clearly established through sound science.** (Emphasis added).<sup>7</sup>

The PCHB found Ecology considered the 12 factors listed above, although Ecology did not argue it did anything other than apply the “three-part test” in its OCPI determination. Despite this, the PCHB held that Ecology and “not the Board, should establish the framework of a policy or rule for the use of OCPI.”<sup>8</sup> It seems as though either Ecology or the PCHB created rules that future municipalities should follow when

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<sup>7</sup> Findings of Fact, Conclusions of Law, and Order pg. 23-24. (Bates No. 001270-001295).

<sup>8</sup> Id

seeking an OCPI determination from Ecology. Either way it is improper. It is either *ultra vires* for the PCHB or improper rulemaking procedure for Ecology.

It is doubtful Ecology “exhausted every feasible option to make sure that in-kind mitigation...was provided for **before** turning to out-of-kind mitigation” for Yelm Creek. Had Ecology exhausted every feasible option the 56 acre-feet of reclaimed water would be in the Mitigation Plan. Instead this option was brought in after the decision in order to justify it. By doing so, it is apparent Ecology did not fully consider infiltrating an additional 56 acre-feet of reclaimed water.

Next, facts established at the hearing prove the out-of-kind mitigation that might possibly occur along Yelm Creek does not meet the criteria established in the Board’s Order. The possible projects on Yelm Creek are far too vague and speculative and are not “significant and clearly established through sound science.”

Appellant proved during the hearing that these four projects were actually devised for Yelm’s Flood Hazard Management Plan several years prior to the development of the Mitigation Plan.

Finally, the PCHB's finding that these out-of-kind mitigation measures are "required and not permissive" is simply not true.<sup>9</sup> The PCHB's own factual findings conclude that Ecology and Yelm do not even have to complete the vague projects listed in the Mitigation Plan. These projects can change, without any public oversight, if Ecology or Yelm instead choose to "complete projects that are equivalent to those specific projects, in order to be in compliance with their permit."<sup>10</sup> The phrase "equivalent to those specific projects" is undefined and therefore open to nearly unlimited definitions or public oversight. Without any criteria or factors this phrase has no meaning. As such, the PCHB's reliance on these plans as "required and not permissive" is factually unfounded and therefore not supported by any, much less, substantial evidence.

#### IV. Conclusion

For the forgoing reasons, Ms. Foster respectfully requests the Supreme Court reverse the ruling of the PCHB and rescind Water Right Permit No. G2-29085.

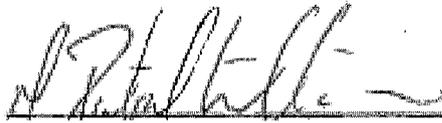
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<sup>9</sup> Final Order pg. 16. (Bates No. 001270-0012995)

<sup>10</sup> Id.

Dated this 6th day of May 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Patrick Williams", written over a horizontal line.

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IN THE SUPREME COURT OF WASHINGTON

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WASHINGTON DEPARTMENT OF  
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OF YELM

Respondents.

No. 90386-7

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On May 6<sup>th</sup>, 2015, I e-filed Appellant's Answer to the Amicus Brief with the  
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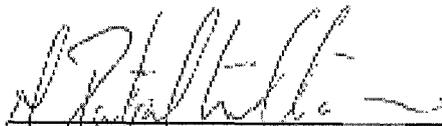
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I declare under penalty of perjury in accordance with the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of May 2015 at Seattle, WA.



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Attached is Appellant's answer to the amicus filed on behalf of the Cities of Lacey and Olympia.

Thank you,

Patrick Williams

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