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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 BRIEF

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M. Patrick Williams, WSBA #37063  
The Law Offices of M. Patrick Williams, PLLC  
600 N. 36<sup>th</sup> Street  
Suite 228  
Seattle, WA 98103

Attorney for Appellant Sara Foster

ORIGINAL

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I. Assignment of Error

Thurston County superior court erred in upholding the Pollution Control Hearings Board's ("Board") ruling that the Department of Ecology's ("Ecology") use of the narrow exemption found in RCW 90.54.020(3)(a) to issue a new, individual water right for out-of-stream uses, thereby reallocating water previously granted to an instream flow water right, was not contrary to law.

II. Issues Pertaining to Assignment of Error

- a. Did the Board err in ruling that Ecology's approval of Yelm's water right did not violate statutes, regulations, and case law pertaining to minimum instream flows or basin closures?
- b. Did the superior court err in finding the Board did not erroneously interpret or apply the exception in RCW 90.54.020(3)(a) as it existed before and after the *Swinomish Indian Tribal Community v. Washington State Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (Wash. 2013), decision?
- c. Did the superior court err in finding that Ecology has the authority to issue permits under the exception in RCW 90.54.020(3)(a)?

III. Facts

*Factual and Procedural History*

In January 1994, Yelm filed a water right application to withdraw 3,500 acre-feet of water per year at 3,000 gallons per minute for municipal

purposes. CP 251, Final Order at 3. In February 2011 these amounts were changed to 942 acre-feet per year and 2,100 gallons per minute. CP 251, Final Order at 3. Ecology determined Yelm's water right is in hydraulic connection to surface waters of the state that have instream flows set by rule or are closed to any further appropriations. CP 253, Final Order at 5. The Cities of Lacey and Olympia also have water right applications that will negatively impact instream flows and closed surface waters in the Nisqually and Deschutes River Basins. Ecology allowed the three cities to collectively create mitigation actions for the projected impacts to closed streams and senior instream flows. CP 252, Final Order at 5. However, each individual city has its own mitigation plan to offset its own specific impacts.

The surface waters in question include the Nisqually and Deschutes Rivers as well as Yelm Creek. CP 253, Final Order at 5. Ecology could not find "water for water" replacement for the impacts to instream flows. Therefore, Ecology relied on the overriding considerations of the public interest, or "OCPI" exemption found in RCW 90.54.020(3)(a) to issue the water right. CP 260, Final Order at 12.

The subsection states:

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

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for 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)

In 2012, Ms. Foster appealed Ecology's decision to issue Yelm's water right to the Pollution Control Hearings Board. A three-day hearing was held in December 2012 and the Board issued its ruling in March 2013.

The Board dismissed Issues 1, 2, 3, 4 and 6 on summary judgment motions and conducted a hearing on the remaining issues. These issues were:

5. Whether or not Ecology violated RCW 90.03.247, 90.44.040, 90.44.060, or 90.22.010, or WAC 173-511-020, 173-511-040(2), or 173-511-050 in issuing the Report of Examination.

- 7 Whether the City of Yelm's Mitigation Plan associated with Water Right No. G2-29085 is inadequate.
- 8 Whether it is improper for Ecology, under RCW 90.54.020(3)(a), to use overriding consideration of public interest to approve Water Right No. G2-29085?

CP 263 Final Order at 15.

The Board ruled Ms. Foster failed to meet her burden regarding Yelm's mitigation plan, which the Board determined were Issues 5 and 7. CP 263, Final Order at 15. The Board found that Yelm will mitigate the impacts to the instream flows with "in-kind mitigation, supplemented with out-of-kind actions to address the small amount of depletions in flow." CP 263-264, Final Order 15-16.

As to Issue 8, the Board held that minimum flows established by rule via RCW 90.22.010 and 90.52.040 are valid water rights with priority dates as of the date of the rule and they cannot be impaired by subsequent appropriations. CP 266-267, Final Order 18-19. The Board further held that streams closed to further appropriations must be protected from any future appropriation, which will have an effect on the flow or water body. CP 267, Final Order at 19. The Board cited *Postema v. Pollution Control*

*Hr'gs Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000), to explain that Ecology must deny an application for a water right if the proposed withdrawal would impair existing rights, including instream flows set by rule. CP 267, Final Order 19. The Board held Ecology was required to deny Yelm's application for this reason unless "it was clear that overriding considerations of the public interest would be served. RCW 90.54.020(3)(a)." CP 267, Final Order at 19.

Ecology utilized a "three-part test" to determine if issuing Yelm's water right and the subsequent impairment of the instream flows would be "in the overriding consideration of the public interest." The Board noted that Ecology does not have a rule or any written policy explaining the test it uses to determine whether Ecology can issue a water right permit using the OCPI exception. CP 269, Final Order at 21. Ecology's three-part test is:

1. Determine whether and to what extent important public interests would be served by the proposed appropriation. The public interests served may include benefits to the community at large as well as benefits to the river or other environmental resources;
2. Determine whether and to what extent the proposed appropriation would harm any of the public interests (fish, wildlife, scenic, aesthetic, and other environmental and

navigational values) protected by the closure and/or any other public interests; and

3. Determine whether the public interests served (as determined in Step 1) clearly override any harm (as determined by Step 2).  
CP 269, Final Order at 21.

The Board recognized that the three-part test was consistent with prior Board decisions, but concluded that the issues and context of Yelm's water right application required a "more stringent test." CP 270, Final Order at 22. The Board found that because Yelm's water right would permanently reduce instream flows, Ecology needed to look at other factors before making its OCPI determination. CP 270-271, Final Order at 22-23. The Board concluded that Ecology looked at 12 additional factors, beyond the three-part balancing test. These factors are:

1. Ecology will use the OCPI exception only when the water is to be used for a public purpose.
2. Ecology exhausted every feasible option to make sure that in-kind mitigation (water for water) was provided before turning to out-of-kind mitigation.
3. All depletions/impacts to the water bodies subject to the minimum flows or stream closures were fully mitigated and trackable over time.
4. 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.

5. The out-of-kind mitigation provided a permanent and net ecological benefit to the affected streams, and was more than sufficient to offset the minor depletion of water.
6. The potential impacts to water bodies were based upon a conservation hydrologic model.
7. The hydrologic model was prepared by an external consultant who is a professional modeler, and was subject to a rigorous peer review, and can be modified if needed.
8. The amount of water depletion was small so that there is no or only minimal impact to water resources.
9. Water can be added if feasible during critical times for fish, and should not be diminished during such critical times.
10. Stakeholders were brought into and supported the proposed project and mitigation.
11. Mitigation was consistent with adopted watershed plans.
12. Water conservation efforts will be utilized, which in this case includes the use of reclaimed water.

CP 271-272, Final Order at 23-24.

The Board held that because Ecology utilized these additional factors it did not improperly interpret or apply the OCPI exception or violate Chapter 90.54 RCW. CP 273, Final Order at 25. The Board also held Ms. Foster was unable to show that Ecology's decision violated "any of the statutes or regulations pertaining to minimum instream flows or basin closures...." CP 274, Final Order at 26

Ms. Foster appealed the Board's decision to Thurston County Superior Court. A hearing date and briefing schedule were established for

the appeal with Ms. Foster's opening brief filed October 1<sup>st</sup>, 2013. Two days later, on October 3<sup>rd</sup>, the Supreme Court issued its decision in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (Wash. 2013), which concerns Ecology's interpretation and application of the OCPI exception to amend an instream rule and applies directly to Ms. Foster's appeal.

All parties; Ms. Foster, Ecology, and Yelm, agreed that the ruling impacted the appeal and the superior court needed to be briefed on it. Therefore, Ms. Foster submitted an amended opening brief, which included a discussion of the *Swinomish* opinion and its direct impact on her appeal. Ecology and Yelm filed response briefs and Ms. Foster replied to those.

Oral argument was heard on May 8<sup>th</sup>, 2014 and the judge presented her bench decision that same day. The court ruled that the Board did not erroneously interpret RCW 90.54.020(3)(a) either before the Supreme Court handed down the *Swinomish* opinion or even retrospectively in light of the *Swinomish* opinion. RP 45: 7-11. The judge also dismissed Ms. Foster's argument that Ecology has no authority to issue a water right that

permanently impairs instream flows using the OCPI exception. RP 42: 8-15.

The court ruled the Board's finding of the 12 additional criteria, the low risk of minimum flow "infringement", and the mitigation plan authorized Ecology to utilize the OCPI exception. RP 44-45. Finally, the court ruled that the Board did not erroneously apply or interpret the law "as it existed on March 18, 2013 (when the Final Order was handed down) or in consideration of the decision set forth in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*." RP 45: 7-11.

#### IV. Appellate Review Standard

The Supreme Court reviews the Board's decision by applying the standards of review in RCW 34.05.570 directly to the agency record. *Postema*, 142 Wn.2d at 77. The Court can reverse an agency's decision if the agency "has erroneously interpreted or applied the law, the agency's order is not supported by substantial evidence, or the agency's decision is arbitrary and capricious." *Id.* (internal cites omitted). When review concerns statutory interpretation the error of law standard applies. *Id.* citing RCW 34.05.570(3)(d). This standard allows the Court to overturn the agency's interpretation and substitute its own. *Id.* citing *R.D. Merrill v.*

*Pollution Control Hr'gs Bd.*, 137 Wash.2d 118, 142-43, 969 P.2d 458 (1999). Provided the statute is both ambiguous and within the agency's expertise, this Court gives the agency's interpretation great weight, unless the interpretation conflicts with the statute. *Id.* (internal cites omitted). It is the role of the Supreme Court to determine the legislative purpose and meaning of a statute. *Id.* citing *City of Redmond v. Central Puget Sound Growth Mgt. Hr'gs Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998).

V. Argument

- a. The Board erred in ruling that Ecology's approval of Yelm's water right did not violate statutes, regulations, and case law pertaining to minimum instream flows or basin closures.

Washington, predating statehood, has used the prior appropriation doctrine for water management. This is also known as the "first in time first in right" doctrine. This system is unequivocal in its basic concept. The doctrine mandates that those water right holders who first appropriate and beneficially use water have a superior right to use the water over subsequent users. Therefore, priority, or date of when the water right comes into existence is of utmost importance in this system. Without the guarantee of the reliance on priority dates, water users would have no confidence in the integrity of their water right.

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*, 142 Wn.2d at 81. *Postema* established 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.*

In enacting RCW 90.03.247, the legislature placed limits on Ecology’s ability to impair instream flows set by rule. This statute states, “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.” RCW 90.03.247. The act continues by mandating that “[t]he 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.” RCW 90.03.247.

In 1981 Ecology established minimum flows and closed certain water bodies to further appropriation in the Nisqually River basin pursuant

to WAC 173-511. The rules establish minimum instream flows for the Nisqually River in various reaches of the river as well as closes certain tributaries of the Nisqually, including Yelm Creek. WAC 173-511-030, WAC 173-511-040. The Nisqually Instream Flow Rules were promulgated pursuant to chapter 90.54 RCW, wherein the OCPI exception resides, and chapter 90.22 RCW, and chapter 173-500 WAC, the water resources management program. WAC 173-511-010.

When Yelm applied for its new water right hydrologic reports indicated pumping of groundwater would impact the minimum flows in the Nisqually and Deschutes rivers and closed streams in the basin. CP 238-240, Report of Examination at 14-16. Ecology determined that exercise of Yelm's proposed water right would deplete flows in the Nisqually by up to 0.32 cfs or 197 acre-feet per year. CP 244, Report of Examination at 20. Impacts will also occur to the Deschutes, which has instream flows and is also closed during October. CP 244, Report of Examination at 20. These impacts were modeled to be .24 cfs or 131 acre-feet per year. CP 244, Report of Examination at 20. Therefore, Ecology was required to either deny Yelm's application or condition it to protect

the existing instream flows in the Nisqually and Deschutes rivers and the streams closed to further appropriations in the basin.

Instead Ecology relied on the exception in RCW 90.54.020(3)(a) to issue Yelm's water right permit. Ecology, applying the same exception and balancing test used to create the reservation of water in the Skagit River Rule amendment subsequently overturned by the *Swinomish* decision, weighed the benefits of the municipal water supply and the mitigation plan against the harm of taking water from the instream flow right and found that it was in the overriding consideration of the public interest to do so. CP 241-245, Report of Examination at 17-21.

The Board issued its ruling prior to the Supreme Court's examination of the OCPI exception in the *Swinomish* decision. Ms. Foster's appeal before the Board argued Ecology violated RCW 90.03.247 and the rules establishing instream flows and closed streams in WAC 173-511. The Board found that Ecology did not violate RCW 90.03.247 or the instream flow rules in WAC 173-511. CP 274, Final Order at 26. The Board concluded, "The Appellant was unable to show that any of the statutes or regulations pertaining to minimum instream flows or basin closures was violated." CP 274, Final Order at 26.

The Board ruled that Yelm's out-of-kind mitigation was enough to overcome the fact that use of Yelm's water right will violate RCW 90.03.247 and the instream flow rules for the Nisqually and Deschutes rivers. CP 265, Final Order at 16. This is so despite the fact that there is no statute or rule allowing for out-of-kind mitigation to replace the requirements found in RCW 90.03.247. However, even if there were, the statute requires that other statutes, which would include RCW 90.54.020(3)(a), may not be interpreted as being inconsistent with its requirements. RCW 90.03.247.

Moreover, the Board failed to follow the holding of *Postema* as to Ecology's intent and reasoning in setting instream flows. In *Postema*, the superior court found Ecology's intent in setting instream flows "was and is to prevent interference with instream flows." *Postema*, 142 Wn.2d at 89. This particular issue concerned the amount of the impairment and whether a small depletion to the instream flow was contrary to the rule. The Supreme Court agreed and concluded that "it would not take many such withdrawals before a stream could be depleted a result at odds with Ecology's intent, and, more importantly at odds with the relevant statutes and the obvious legislative intent manifested in them." *Id.*

The same reasoning applies to the Board's decision to allow for impairment to instream flows to be offset by out-of-kind mitigation. Out-of-kind mitigation, by definition, does not replace the water lost to the instream flow right. Therefore, the Board's decision that Ecology did not violate statutory law in approving Yelm's water right is an erroneous interpretation and application of the law. The *Postema* decision, RCW 90.03.247 and WAC 173-511 prohibited Ecology from approving the water right and the Board erred in not vacating the permit on these grounds.

Even before the *Swinomish* decision, the Supreme Court held in *Postema* the exception to impairing instream flow rules found in RCW 90.54.020(3)(a) is a "narrow exception" and concluded that a minimum flow water right "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. *Postema*, 142 Wn.2d at 81-82. In *Postema*, as in this case, an individual water right permit was the issue.

In March 2013, when the Board heard and decided Ms. Foster's appeal of Yelm's water right, both legislative mandate and the Supreme

Court through the *Postema* decision forbade Ecology's issuance of a water right that would permanently impair an existing instream flow right.

Therefore, when the Board ruled against Ms. Foster's claims that Ecology violated RCW 90.03.247 and the instream flow rules found in WAC 173-511, both statutory and case law, in fact, required that Ecology could not issue a new water right that would permanently impair existing instream flows. The Board's conclusion is an erroneous interpretation and application of the law.

- b. The superior court erred in finding the Board did not erroneously interpret or apply the exception in RCW 90.54.020(3)(a) as it existed before or after the *Swinomish Indian Tribal Community v. Washington State Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (Wash. 2013), decision.

*The Law Prior to Swinomish*

The superior court erred in holding that it did not find "that the Pollution Control Hearings Board erroneously applied or interpreted the law as it existed on March 18, 2013 or in consideration of the decision set forth in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*." RP 45: 7-11. The court incorrectly relied on the Board's "more stringent test" and Yelm's mitigation plan to justify the use of the exception and allow for permanent impairment of instream flows. RP 44: 12-16, 19-22. There is no statute or case law allowing for Ecology

to replace the statutes and rules establishing instream flows and to reallocate water through a test or with out-of-kind mitigation. The superior court, like Ecology and the Board, found the OCPI exception could be utilized to permanently impair instream flows. However, this is an erroneous interpretation and application of this exception.

As stated above, *Postema*, RCW 90.03.247 and WAC 173-511, all prohibit the use of the narrow exception in RCW 90.54.020(3)(a) to issue a water right that would reallocate water from an instream flow established by rule. This was so prior to the Supreme Court's *Swinomish* decision. It is true there was no definitive ruling on the OCPI exception at that point, however; it was not ambiguous that the exception was very narrow and that statutory limitations existed to prevent an expanded use. *Postema*, 142 Wn.2d at 81. Therefore, the superior erred in holding the Board's decision to uphold Ecology's approval of Yelm's water right was consistent with the law at the time of the decision.

#### *The Law Post-Swinomish*

After the Supreme Court released its decision in *Swinomish* any confusion as to whether Ecology can use the OCPI exception to permanently impair instream flows was resolved. The Supreme Court

examined Ecology's authority under RCW 90.54.020(3)(a) and concluded that, "the overriding-considerations exception cannot reasonably be read to replace the many statutes that pertain to appropriation of the state's water and minimum flows." *Swinomish* 178 Wn.2d at 598.

The Supreme Court further held, "[i]n other words, a minimum flow or level cannot impair existing water rights and a later application for a water permit cannot be approved if the water right sought would impair the minimum flow or level." *Swinomish* 178 Wn.2d at 593. This simply means, "[m]inimum flow rights established by rule are treated as other water rights." *Id.*

In 1971, the Legislature enacted the Water Resources Act. This Act sought the "promotion of public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values." RCW 90.54.010(1)(a). The Water Resources Act is a comprehensive plan for water resource management that seeks to protect instream flows and values and ensure water is wisely managed. The Act provided additional authority for adoption of instream flows as rules, including the Nisqually and Deschutes River minimum instream flows. The Act also contains the OCPI exception found in RCW 90.54.020(3)(a).

Ecology utilized the OCPI exception to approve Yelm's new water right because water is not available for new appropriations otherwise. However, the *Swinomish* ruling held there is no suggestion that "the importance of minimum flow rights is diminished by either the '[m]aximum net benefits' or overriding-considerations provisions in RCW 90.54.020(2) and (3)(a)." *Swinomish*, 178 Wn.2d at 595.

The superior court made no ruling that the *Swinomish* opinion does not apply in this instance because Ms. Foster is appealing an individual water right and *Swinomish* concerned a reservation of water. However, Ecology and Yelm both maintain that *Swinomish* is distinguishable for this very reason. However, the *Swinomish* opinion does apply to individual water right permits. The Supreme Court held, "[w]e see no meaningful difference between water reservations that reserve water for future individual applicants to obtain the right to put water to those beneficial uses and individual applicants who presently seek to appropriate water for the same beneficial uses, insofar as impairment of the minimum or base flows is concerned. In both instances, the result is a water right held by an individual to the detriment of the existing minimum flow water right." *Swinomish*, 178 Wn.2d at 585-586. The holding in *Swinomish* does not

distinguish between future reservations and those applicants presently seeking an individual water right. Neither situation is allowed under the Water Code.

The *Swinomish* decision specifically rejected the superior court's ruling that the risk of "minimum water flow infringement is low" and the "public importance of resolving the deficiency in potable water for Yelm residents is great" and therefore the OCPI exception was proper. RP 44:17-22. Continued population growth is unquestioned, as is the problem of limited water availability. However, this cannot be an "overriding consideration" because the Legislature has already concluded in RCW 90.54.010(1)(a) that:

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

*Swinomish*, 178 Wn.2d at 587. (emphasis original).

Therefore, Ecology's "test" to determine overriding considerations of public interest – which favors out-of-stream water rights to serve future growth -- fails to give effect to the Legislature's

determination to protect and preserve instream resources. Under Ecology's test, water for population growth would always trump instream resources as a "public interest." The *Swinomish* opinion holds that not only is this improper, but that Ecology is essentially using the OCPI exception "as a way to reallocate water supply and priority of rights...[and] nothing in the limited number of words in the exception can be said to grant such expansive power." *Swinomish*, 178 Wn.2d at 588.

As argued *infra*, *Postema* requires denial of a water right if it will take water from a pre-existing instream flow water right. This is so even if the amount of water in question is small. The *Swinomish* opinion reinforces this ruling stating, "regardless of the amount of water at issue in this case, Ecology's reading of the statute results in considerable authority to reevaluate and reallocate water through reservations of water from streams with minimum flows set by rule." *Swinomish* 178 Wn.2d at 597-598. In a footnote, the Court reaffirms this concept in holding, "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 598 fn 14. The superior court's finding

that the risk of infringement is low and is therefore allowable is contrary to *Postema*.

Therefore, the superior court erred in ruling that the Board did not erroneously interpret or apply RCW 90.54.020(3)(a) in light of the *Swinomish* opinion.

- c. The superior court erred in finding that Ecology has the authority to issue water right permits using the exception in RCW 90.54.020(3)(a).

The superior court's conclusion that Ecology has authority to utilize the exception in RCW 90.54.020(3)(a) is an erroneous interpretation and application of the law. The superior court correctly identified the "main argument"; namely, "whether or not the overriding consideration of public interests exception is applicable, whether or not the Department of Ecology had the authority to issue the permit under the exception and whether or not the hearings board properly ruled on it." RP 42: 8-13. Ms. Foster's earlier arguments, *infra*, concerned whether OCPI exception was not applicable and that the Board did not properly rule on it. Now Ms. Foster turns now to Ecology's authority to use the OCPI exception to reallocate water by issuing water rights that will permanently impair instream flows and closed streams.

The *Swinomish* ruling does not hold that Ecology can never use the OCPI exception and Ms. Foster is not arguing that Ecology is forbidden from utilizing it. However, the ruling does require that before Ecology can contemplate using it, and impair instream flows, there must exist “extraordinary circumstances.” *Swinomish*, 178 Wn.2d at 576. Therefore, Ecology has authority to utilize the exception but it cannot use it as “a device for wide-ranging reweighing or reallocation of water...” *Swinomish*, 178 Wn.2d at 585. Unfortunately, as in the *Swinomish* case, this is exactly what Ecology did.

The need to plan for future population growth by municipalities is not an “extraordinary circumstance.” It is, in fact, a very ordinary and inevitable process. It is a process that is mandated by law via the Growth Management Act. Chapter 36.70A RCW. The fact that cities and counties throughout the state will experience population increases is incontrovertible and not controversial. Therefore, Ecology cannot claim that securing water for projected future population growth is an “extraordinary circumstance.” The *Swinomish* decision supports this conclusion.

In *Swinomish*, Ecology argued the need for uninterrupted water supply was greater than the harm caused by “small” impacts to instream flow rights. *Swinomish*, 178 Wn.2d at 597. Ecology further claimed that without the future use of the noninterruptible water development in certain areas of the basin could be harmed. *Id.* This Court ruled that Ecology’s belief in the potential harm to development may be legitimate, but still held that narrow exception in RCW 90.54.020(3)(a) cannot be used to rectify this problem. *Id.* at 598-599. Ecology simply does not have the authority to reallocate water presently appropriated for instream flows via RCW 90.54.020(3)(a).

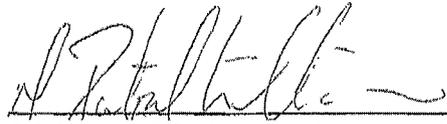
There is no difference between water set aside for future rural residents, as in the facts found in the *Swinomish* case, and water set aside for future municipal customers insofar as RCW 90.54.020(3)(a) is concerned. Ecology’s authority under RCW 90.54.020(3)(a) does not turn on whether the reallocation of water is for a reservation of water or for municipal use. The issue is whether RCW 90.54.020(3)(a) gives authority to Ecology to reallocate water from an instream flow water right and give it to a junior user. The answer to this is no.

VI. Conclusion

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

Dated this 25th day of August 2014.

Respectfully submitted,

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

M. Patrick Williams, WSBA No. 37063  
Attorney for Plaintiff  
600 N. 36<sup>th</sup> Street, Suite 228  
Seattle, WA 98103  
206-724-2282

IN THE SUPREME COURT OF WASHINGTON

SARA FOSTER,

Appellant,

v.

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

Respondents.

No. 90386-7

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

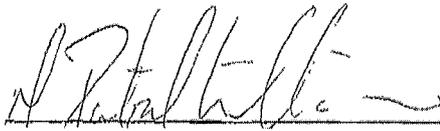
On August 25<sup>th</sup>, 2014, I e-filed Appellant's Opening Brief with the Washington State  
Supreme Court and served a copy of the appeal via email to:

Joseph Brogan  
Foster Pepper  
1111 Third Ave., Suite 3400  
Seattle, WA 98101  
Via email to: [brogj@foster.com](mailto:brogj@foster.com)  
*Via email*

Travis Burns, Attorney for Ecology  
P.O. Box 40117  
Olympia, WA 98504-0117  
Via email to: [TravisB@atg.wa.gov](mailto:TravisB@atg.wa.gov)  
*Via email*

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 25th day of August 2014 at Seattle, WA.

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

M. Patrick Williams, WSBA No. 37063  
600 N. 36<sup>th</sup> Street, Suite 228  
Seattle, WA 98103  
206-724-2282

## OFFICE RECEPTIONIST, CLERK

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**Subject:** Appellant's Brief 90386-7, Foster v. Ecology, et al.

Attached is Appellant Sara Foster's Opening brief in the above titled action.

Please contact me if you have any questions or concerns.

Thank you,

Patrick Williams

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