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SUPREME COURT OF THE STATE OF WASHINGTON

SARA FOSTER,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT CITY OF YELM

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I. INTRODUCTION

For nearly two decades the City of Yelm (“City” or “Yelm”) has planned and worked towards meeting its obligations to plan for and meet its public water supply needs. The City’s needs are stark. The City’s State-approved Water System Plan identifies a need for 1,836 acre-feet of water to serve population demand through 2028. However, the City’s current water rights portfolio is only 894 acre feet, leaving a significant deficit of 942 acre-feet of demand. The City has only 147 connections remaining.

The City’s approved water right permit¹ (“Permit”) would bridge this significant public water supply gap while *fully* mitigating any impacts to instream resources, as confirmed by the Washington State Department of Fish and Wildlife (“WDFW”).

Yelm’s Permit is conditioned upon implementation of a unique set of in-kind and out-of-kind mitigation actions contained in the City’s Mitigation Plan. This mitigation was developed based on a conservative hydrologic groundwater model; and was developed in cooperation with the Washington State Department of Ecology (“Ecology”), WDFW, the Squaxin and Nisqually Indian Tribes, and the cities of Lacey and Olympia, who obtain their public water supply from the same watersheds. These entities collaborated under the terms of the Watershed Planning Act, Chapter 90.82 RCW, to develop a comprehensive strategy for balancing

¹ Water Right Permit G2-29085; Clerk’s Papers (“CP”) CP00174.

competing demands for water, while at the same time, preserving and enhancing the future integrity of the watershed.

Yelm's Mitigation Plan² is considered by WDFW the "gold standard" of mitigation plans for water rights.³ The Pollution Control Hearings Board ("PCHB" or "Board") and the Thurston County Superior Court properly determined that the "overriding considerations of the public interest" ("OCPI") statutory exception was clearly satisfied.

Appellant Sara Foster challenged Ecology's approval of the City's Permit and Mitigation Plan in *Foster v. Department of Ecology and City of Yelm*, PCHB No. 11-155.⁴ She claimed that the City's operation of its new well would impair her existing domestic well. She also argued that approval of the City's permit violated several statutes, including the OCPI statute. The Board dismissed the impairment claim on summary judgment. The Appellant advanced no expert testimony of her own. The Board held a hearing on the remaining issues (Issues 5, 7, and 8) and held that the Appellant failed to sustain her burden on all remaining claims.

In its Order upholding Ecology's Permit approval, the PCHB went beyond the methodology used by Ecology to apply the OCPI statute, applying, instead, 12 "more stringent" factors that it held supported

² City of Yelm Water Right Mitigation Plan, February 2011 ("Mitigation Plan") CP00183.

³ PCHB Transcript ("Tr.") 256:10-12.

⁴ Findings of Fact, Conclusions of Law and Order, PCHB No. 11-155, 2013 WL 1294428 (March 18, 2013) ("Order") CP00249-274.

issuance of the Permit and supported Ecology's use of the OCPI exception.

In fact, the PCHB forecast a policy argument later articulated by the *Swinomish*⁵ court, namely:

If a simple balancing test is used, environmental values, including those set out by way of instream minimum flow and stream closure regulations, can easily be dismissed because people need potable water for their homes. The very term "overriding consideration of the public interest" demands a more stringent test before Ecology, may, in effect, suspend rules which were carefully considered and adopted to protect a variety of values.

Order at 22:5-10; CP00270.

Soon after the PCHB ruled, this Court issued its decision in *Swinomish v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013). The Supreme Court recognized, as it did in *Postema v. Pollution Control Hearings Board*,⁶ that OCPI was an exception to the rule that water right permits could not impair senior instream flows or closures set by rule. The Court recognized that the OCPI statute was a "very narrow" exception, applicable in "extraordinary circumstances."⁷

The Appellant appealed the Board's Order to the Superior Court. The Superior Court determined that the record and the unrefuted expert testimony supported the use of OCPI, that *Swinomish* did not, in fact, dictate reversal of the PCHB's Order, and that the Appellant failed to meet

⁵ *Swinomish v. Department of Ecology*, 178 Wn.2d 571, 584, 311 P.3d 6 (2013).

⁶ *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000).

⁷ *Swinomish*, 178 Wn.2d at 576.

her burden of proof under any standard of review set forth in RCW 34.05.570. Superior Court Tr. at 45:7 – 46:16.

Here, Appellant strains to argue once again that this case is analogous to *Swinomish*. The cases couldn't be more different. In *Swinomish*, this Court rejected Ecology's use of the OCPI exception to create 27 new reservations of water that would guarantee the future availability of water for a wide range of future out-of-stream private and, potentially, public uses, including residential, commercial, stock-watering, agricultural, and industrial uses, notwithstanding that these might conflict with instream flows established in the original 2001 Skagit Instream Flow Rule. This was essentially a water grab. There was no mitigation whatsoever associated with 27 new reservations of water. Here, instead, the Court will recognize that the PCHB's analysis and approval of the use of OCPI focused almost exclusively on the existence of a comprehensive mitigation plan deemed the "gold standard" by WDFW. PCHB Tr. 256:10-12.

This Court has now recognized in both *Postema* and in *Swinomish* that the narrow OCPI exception clearly allows for the impairment of instream flows and specifically applies in the context of review of an application for a new water right permit. The Appellant's assertions to the contrary are simply unsupported in the law.

The unrefuted expert testimony and the record demonstrates that the *net* ecological benefits flowing from the City's exceptional Mitigation Plan, coupled with other public interest benefits, including provision of

public water supply, were compelling enough to be considered “extraordinary circumstances,” supporting use of the OCPI exception. As the PCHB noted in its Order, it is significant that the City, state agencies, and interested tribes did not pursue reliance upon OCPI at the outset of the permitting effort. “The OCPI determination was made only after exhausting all available in-kind mitigation.” Order at 25; CP00273. This exhaustive and measured approach recognized by the PCHB ensured that OCPI was applied in only the *narrowest* of circumstances, as later called for in *Swinomish*.

No party is arguing that the plain language of the OCPI statute is ambiguous. The statute has been twice recognized by this Court as a valid exception to impairment that applies in the context of instream flows and closures. The ordinary dictionary meaning of “overriding” is “to prevail over.”⁸ Here, the PCHB concluded that those overriding considerations of the public interest embodied in the Permit and Mitigation Plan were a “substantial and compelling basis” and, together with other stated public interests, supported use of the OCPI exception in this case. Order at 14; CP00262.

Those same public interest considerations also informed whether “extraordinary circumstances” were present, a standard later elucidated by the Court in *Swinomish*. The City has never argued that the “extraordinary circumstances” standard is achieved simply where there is a critical need

⁸ *Merriam-Webster.com* (transitive verb 3a: to prevail over: Dominate). <http://www.merriam-webster.com/wdictionary/overriding> (last visited Sept. 23, 2014).

for public water supply. The Water Resources Act itself sets forth two often competing public interests, i.e., to provide “[a]dequate water supplies . . . to meet the needs of the state’s growing population” and the acknowledgment that “[a]t the same time instream resources and values must be preserved and protected” for future generations. RCW 90.54.010(1)(a). The ordinary dictionary meaning of “extraordinary” is “going beyond what is usual, regular or customary, exceptional to a very marked extent.”⁹ Those terms describe the *net* ecological benefit to affected streams and rivers as a result of the City’s Permit and Mitigation Plan. Meeting critical public water supply needs while actually going *beyond* what is called for in the statute, creating *net* ecological benefits to water resources, and furthering other stated public interests of the Legislature, is what makes this case *extraordinary* and well within sideboards of the OCPI standard set forth in *Swinomish*.

II. ISSUES PRESENTED FOR REVIEW

The City responds to and restates the Appellant’s Statement of Issues as follows:

1. Ecology is authorized under statute and applicable Supreme Court precedent to apply the “overriding considerations of the public interest” (OCPI) statutory exception to water permit applications that may impair minimum instream flows. RCW 90.54.020(3)(a). Did the PCHB err in applying OCPI to the City’s Permit?

⁹ *Merriam-Webster.com*. <http://www.merriam-webster.com/dictionary/extraordinary> (last visited Sept. 23, 2014).

2. The PCHB upheld approval of the City's Permit in reliance upon the City's Mitigation Plan, its *net* ecological benefits, the City's ability to also meet critical public water supply needs, and other overriding public interest considerations. Did the PCHB err in evaluating net ecological benefits to the watershed in its approval of the City's Permit?

III. STATEMENT OF THE CASE

3.1 Yelm's Water Needs

Since the 1950s, Yelm's water has been supplied by two primary wells located in the downtown area of Yelm. Both wells are relatively shallow (less than 100 feet deep) and draw water from the Advance Vashon Outwash (Qga) aquifer.¹⁰ Water demand forecasts, completed as part of the update to Yelm's Water System Plan show the City needs to secure additional water rights to meet its current and future water supply obligations. The current long-term demand projection for potable water supply is estimated to be 1,836 ac-ft/yr, occurring in approximately 2028.¹¹ The City's existing water rights authorize total annual pumping of 894 ac-ft/yr, leaving 942 ac-ft/yr of new water rights that are required to serve demand through 2028. As a result, the City sought a new appropriation of 942 ac-ft/yr to meet its public water supply obligations consistent with Growth Management Act ("GMA") mandates.¹²

¹⁰ CP00142; CP00190.

¹¹ CP00142; CP00191.

¹² CP00142; CP00191.

3.2 Regional Cooperation/Analysis of Impacts

Given that the predicted impacts of pumping groundwater at the newly-planned SW Well 1A would cross jurisdictional boundaries, Yelm collaborated with the Cities of Olympia, Lacey, and the Nisqually Indian Tribe to form a multi-party approach to managing and mitigating water resources across affected basins. The Cities of Lacey and Olympia had water right applications and/or changes pending that could impact water resources in the Nisqually and Deschutes River Basins.¹³ The Cities worked in consultation with the Nisqually and Squaxin Island Tribes to update and refined a hydrologic model for purposes of conducting a hydrologic impact analysis in the Nisqually and Deschutes watersheds. Groundwater model changes were peer reviewed through a regional process and coordinated closely to ensure any subsequent runs of the model accommodated the new data.¹⁴

Model refinements were made to better reflect known conditions:

- Updating the hydrogeologic interpretation based on new boring logs;
- Representing the actual elevation of hydrogeologic units in the model;
- Modeling the aquifers for both saturated and unsaturated conditions (variable saturation);

¹³ CP00142.

¹⁴ CP00142; CP00197.

- Refining the model grid for more accuracy in model results particularly in the area of pumping wells;
- Updating pumping rates for the Cities of Olympia, Lacey, and Yelm;
- Representing the Middle Reach of the Deschutes River as in contact with the regional aquifer;
- Adding hydrologic features not included in the USGS model including Kalama Spring, Silver Springs, Silver Creek, and Yelm Creek; and
- Calibration of the model to steady-state and transient data.¹⁵

The changes resulted in a more realistic and reliable model for making estimates of potential impacts of pumping on surface water bodies. The Cities further consulted with Golder Associates, S.S. Papadopulous & Associates (“SSPA”), and Shannon & Wilson to evaluate the cumulative predicted impacts from future pumping. The groundwater modeling identified potentially impacted water bodies for which mitigation is required by the Washington Administrative Code. Chapter 173-511 WAC (Nisqually River Watershed – WRIA 11) contains regulations addressing closures of surface water bodies in the basin as well as instream flow regulations pertaining to new appropriations. These regulations are separated by reach and are summarized in Table 3-1 in the City’s Mitigation Plan.¹⁶

¹⁵ CP00143; CP00197-98.

¹⁶ CP00143; CP00196.

Chapter 173-513 WAC (Deschutes River Watershed – WRIA 13) also contains regulations addressing closures of surface water bodies in that basin as well as instream flow regulations pertaining to new appropriations. These regulations are also separated by reach and are summarized in Table 3-1 in the City’s Mitigation Plan.¹⁷

3.3 Use of a Conservative Groundwater Model to Predict Impacts

The Cities’ consultants advised that the numerical groundwater model represented the best available science for analyzing the effects of groundwater pumping and making water rights decisions for large water right requests within the model’s boundaries. Ecology and the Tribes concurred. However, for many of the hydrologic features, the predicted effects are very small compared with the flow of groundwater not only through the entire hydrogeologic system, but compared to the baseline discharge to the specific feature.¹⁸

The City’s experts (SSPA, Golder Associates, and Shannon & Wilson) defined the accuracy limit for the hydrogeologic model. The conservative construction of the model leads to *over-prediction* of depletions along much of the model boundaries, which includes the Deschutes and Nisqually Basins. As a result, actual surface water depletions may not, in fact, occur. The accuracy limit adopted in the Mitigation Plan is as follows:

¹⁷ CP00143; CP00196.

¹⁸ CP00144; CP00198.

Predicted depletions that are 1 percent or less of the total groundwater flow rate at a surface water body should be considered as beyond the accuracy limit of the model.¹⁹

The City applied the modeling results in the development of mitigation strategies proposed in the City's Mitigation Plan. Depletions that are potentially above the model accuracy are applied to provide a margin of safety and more mitigation is imposed. Ecology's own experts supported the model in approving the Permit.²⁰

3.4 Mitigation Measures Supporting Plan

The City's approach to the overall mitigation package includes targeting flow augmentation through water rights acquisition as far upstream as possible during closure periods to maximize the environmental benefits of flow mitigation. In addition, land acquisition and habitat restoration projects (again in conjunction with Olympia and Lacey) will be completed to offset impacts during the non-closure periods.²¹

The City met on a regular basis with the McAllister-Yelm Sub-basin Technical Subcommittee of the Nisqually Watershed Planning Unit to discuss the proposed withdrawals and associated mitigation issues. Staff from the Cities also regularly met with the Squaxin Island Indian Tribe to discuss regional water management efforts, modeled impacts within the Deschutes Watershed, and specific mitigation strategies. The

¹⁹ CP00144; CP00198.

²⁰ CP00144.

²¹ CP00145.

Cities also regularly met with staff from Ecology's Southwest Regional Office and WDFW.²²

Based on the level of impact to the environment, mitigation sequencing priorities, information gathered, and ideas shared, a set of mitigation alternatives was defined for each surface water body potentially impacted by the City's SW Well 1A. Seven (7) criteria were defined to determine those mitigation alternatives with the greatest merit.

- Direct versus indirect offset of depletion
- Technical feasibility
- Permitting feasibility
- Programmatic feasibility
- Certainty of desired results
- Cost effectiveness
- Listed in watershed plan, or other significant planning document²³

Following the initial screening process, and after meeting with stakeholders, the list of potential mitigation actions was further refined and developed. Additional consideration was given to the cumulative impacts of the Cities' hydrogeologic impacts.²⁴ The following sections summarize model results and mitigation offered in each affected subbasin.

²² CP00145.

²³ CP00145; CP00204.

²⁴ CP00145; CP00189.

Nisqually River

Chapter 173-511 WAC established minimum in-stream flow (“MISF”) requirements at two control points on the Nisqually River (RM 4.3 and RM 21.8). Although this WAC references a RM 4.3 control point, no permanent flow gage has been established at or near this location. Therefore, any mitigation of Yelm’s impacts on the Nisqually River due to pumping are only required when Ecology MISFs are not met at RM 4.3. A USGS gage station does exist at RM 21.8 (McKenna; 12089500). Yelm’s predicted depletion of the groundwater discharge to the Nisqually River upstream from RM 4.3 and RM 21.8 will be up to 0.32 cfs and 0.11 cfs, respectively (both in August). During no month will the depletions exceed one percent of the simulated Baseline discharge for the Nisqually River at either MISF control point.²⁵

The lower mainstream of the Nisqually River is open year-round to appropriation, subject to seasonal instream flows for RM 4.3 that are regulated in WAC 173-511-030. Currently there is no flow gage at RM 4.3 for documenting whether instream flows are met at this control point. Flows in the Nisqually River are mainly controlled by operation of the Alder/La Grande dams by Tacoma Power, and the river diversion through the Centralia City Light power project. These projects are regulated by the Federal Energy Regulatory Commission (“FERC”) and are required to

²⁵ CP00146; CP00205.

be operated at a level that ensures sufficient instream flows for fish in the river.²⁶

Given that water from the lower reach of the Nisqually River is available for appropriation and that Yelm's predicted impacts are less than 1% of the baseline flow, Yelm proposed and the Permit approved voluntary out-of-kind mitigation actions in the Nisqually Basin in the form of habitat restoration for Yelm Creek.²⁷

Yelm Creek

Yelm Creek is a tributary stream to the Nisqually River. Chapter 173-511 WAC lists the creek as closed as a surface water source year-round. The Permit is predicted to result in groundwater discharge to Yelm Creek decreasing by between 0.04 and 0.06 cfs (maximum in April). These depletions equate to between 1.3 and 56 percent of the simulated Baseline discharge. Therefore, all predicted monthly depletions are above the model's one percent accuracy limit.²⁸ Under the Permit, the City will mitigate any impacts on Yelm Creek with both in-kind and out-of-kind measures.²⁹

The City engaged Phillip A. Brown, a registered geologist and licensed hydrogeologist with over 24 years of experience in groundwater and surface water hydrology. Mr. Brown testified that he had completed between 40 and 60 aquifer tests during the course of his career.

²⁶ CP00146; CP00205.

²⁷ CP00146; CP00206.

²⁸ CP00147; CP00206.

²⁹ CP00147; CP00206.

Mr. Brown was retained by the City to assist with various hydrogeologic investigations associated with evaluating the feasibility of developing new water supply from a deeper groundwater source and preparing groundwater-flow-model-derived estimates of hydraulic effects of pumping deeper sources.³⁰ Mr. Brown characterized the model results for Yelm Creek as follows:

Counsel for Yelm:

Q: Okay. So, Mr. Brown, could you elaborate for us on this depletion range expressed here between 1.3 and 56 percent of the simulated discharge as it relates to significance for flow for Yelm Creek?

Mr. Brown:

A: Yes. This wide range of percent of the impact is a function primarily of the wide range of flow in Yelm Creek. The actual predicted impacts occur across a very narrow range, from .04 cfs to .06 cfs, so that range of impact is very small. But because the creek is assigned a flow that's very high in the winter and tails off to almost nothing in the summer, the percentage of that .04 to .06 cfs can vary as a function of those flows. So the 56 percent of simulated baseline discharge occurs in June when the flow in Yelm Creek is simulated to be .09 cfs. It's a very small portion of a very small number.

PCHB Tr. at 401:20 – 402:11; CP00147-48.

The City recharges the shallow aquifer system to the benefit of Yelm Creek with reclaimed water at Yelm's Cochrane Park Memorial Park ("Cochrane Park"), located less than one mile from Yelm Creek. The

³⁰ CP00147.

City recharges 56 ac-ft/yr at the facility, with a uniform year-round rate (equivalent to 0.08 cfs). Ecology clarified at the PCHB hearing that it expects Yelm to infiltrate 56 acre-feet per year to mitigate for the Permit in addition to the 56 acre-feet it is obligated to infiltrate as mitigation for an earlier water right approval.³¹ PCHB Tr. at 151:4-8.

In addition, Yelm will complete out-of-kind mitigation projects for Yelm Creek. The projects include:

- Creek channel restoration between 103rd 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.

These projects, or their equivalent, are mandated in Ecology's Report of Examination approving the Permit.³² PCHB Tr. at 78:16-23.

McAllister Springs and McAllister Valley

McAllister Creek is a tributary to Puget Sound. Flows in McAllister Creek are closed to further appropriation year-round (Chapter 173-511 WAC). Olympia monitors its withdrawals at McAllister Springs and discharge from a pond at the headwaters of McAllister Creek. No other stream gage exists along the creek. The groundwater modeling analysis predicts that the proposed pumping of SW Well 1A alone will result in groundwater discharge depletion to McAllister Creek at the

³¹ CP00148.

³² CP00148; CP00206.

confluence with Medicine Creek by between 0.14 and 0.21 cfs. The highest seasonal depletion will occur in August and September. All depletions are less than one percent of the modeled baseline discharge.³³

As part of the regional planning and mitigation in the McAllister Creek system, Olympia will transfer its water rights and withdrawals from McAllister Springs to its new McAllister wellfield. This regional mitigation action originated as a recommendation in the *Nisqually Watershed Management Plan* (Golder Associates, 2003), and is anticipated to occur in 2014, prior to SW Well 1A being on line. When Olympia ceases its withdrawals from McAllister Springs and moves its withdrawals to the McAllister wellfield, flow in McAllister Creek will increase and any predicted impacts from all Cities will be fully mitigated. Yelm's required infrastructure improvements at SW Well 1A will coincide with Olympia's transition from McAllister Springs to the McAllister Wellfield.³⁴

Woodland Creek Basin

Yelm's predicted depletion to Woodland Creek at Henderson Inlet is between 0.1 and 1.7 percent of the Baseline discharge, exceeding the model accuracy criteria of one percent of the Baseline discharge rate only during the month of October. Yelm's impacts are small and do not consistently exceed the accuracy limit that indicates impacts are likely

³³ CP00149; CP00207.

³⁴ CP00149; CP00207.

to occur. Again, mitigation is part of a regional solution.³⁵ Yelm's contribution to Lacey's and Olympia's Woodland Creek mitigation program will be out-of-kind (financial) participation in the land acquisition for riparian preservation. The predicted impacts associated with Yelm's pumping will occur only after Yelm's pumping at SW Well 1A increases substantially. The Cities will jointly purchase approximately 20 acres of property or conservation easements along Woodland Creek to increase the amount of undeveloped and protected land along the creek. This will augment 498 acres of existing buffers, parks, and protected open space in the Woodland Creek basin.³⁶

For mitigating water rights, WDFW recommends combining stream flow augmentation with riparian land reserves. Riparian land protection will supplement the mitigation provided by the infiltration of reclaimed water for winter months, and since the benefits will be year-round, this will further increase summer mitigation. As stated by WDFW:

The purpose of riparian land reserves is to maintain structural integrity of the stream channel and protect groundwater-stream interactions. Maintaining vegetation and trees will provide a source of large woody debris (LWD), which is important in dissipating energy of flood waters, thereby reducing erosion and stream widening. LWD also increases depth and provides cover, as well as substrate for benthic insect production. Vegetation protects soil from rills during high rainfall, thus reducing fine

³⁵ Appellant did not challenge either Lacey's Water Rights Permit or Olympia's Water Rights Permit arising out of the same regional mitigation program.

³⁶ CP00149; CP00208-209.

sediment input. The reserves serve as groundwater recharge areas.³⁷

Deschutes River and Tributaries

The predicted groundwater discharge depletion to the Deschutes River above Tumwater in 2028 ranges from 0.15 to 0.24 cfs. The maximum monthly depletions occur in February and March (outside the closure period). The maximum depletion during the closure period ranges from 0.15 to 0.19 cfs. Most of the total depletion to the Deschutes River will occur upstream of where Silver Creek enters the river. The monthly depletions exceed one percent of the Baseline discharge only during the months of September and October.³⁸

Consistent with the approved regional planning effort, any Deschutes River depletions are addressed collaboratively by the Cities as shown in Table 4-4 in the Mitigation Plan. The volume of depletions in acre-feet was split between the closure period and the non-closure period because the regional flow mitigation program will focus flow replacement during the closure period. In accordance with Chapter 173-513 WAC, the Deschutes River is closed to further appropriation from April 15 to November 1. The Cities proposed to provide mitigation for the closure period by purchasing irrigation water rights and either placing those water rights into the State's water trust program or retiring the water rights. Actual water would thereby be returned to the river during the low-flow

³⁷ CP00150; CP00209.

³⁸ CP00150; CP00210.

closure periods to mitigate any predicted impacts of the Cities' water right applications. A significant amount of work and coordination for implementing in-kind mitigation has already been completed, including the purchase of water rights. This demonstrates the feasibility of this mitigation approach and the Cities' commitment to providing in-kind mitigation.³⁹

During the non-closure period, which is regulated by established in-stream flows, the Cities provide substantial "non-flow" mitigation which would benefit salmonid habitat year-round and not exacerbate winter high-flow conditions.⁴⁰

The Cities' uncontested reports demonstrate the river meets or exceeds the established in-stream flow more than 70% of the time during the non-closure (or "winter") period. Water is theoretically available for appropriation during these periods when in-stream flows are met. When the river fails to meet minimum in-stream flows (approximately 30 percent of the non-closure period), mitigation was warranted to offset predicted winter impacts.⁴¹

The Cities faced two principal challenges in providing flow mitigation of winter low flow periods: 1) the lack of active water rights with winter time use that can be purchased and retired, and 2) the inability to predict low flows and time mitigation actions so as to address low flows and not exacerbate high flows/flooding. As a result, land acquisition and

³⁹ CP00150-00151; CP00210-212.

⁴⁰ CP00151; CP00212.

⁴¹ CP00151; CP00212-213.

habitat restoration was the most appropriate strategy for “winter” impacts. These actions can have greater biological benefits during the winter than flow mitigation. For example, in the Deschutes Basin, one of the primary limiting factors for fish in the winter is the availability of off channel rearing habitat and/or large woody debris that provide protection from high main stream flows. In addition, the Cities’ restoration actions will have year-round (high flow and low flow) benefits.⁴²

The Cities contracted with Anchor QEA to conduct an acquisition and restoration assessment of the Smith Ranch which is located in the upper reaches of the Deschutes River. The consultants reported that the Ranch is uniquely situated to provide habitat restoration benefits as noted in the Anchor QEA report:

The Smith Ranch property is an appropriate site to acquire in order to meet desired outcomes for mitigation associated with the Cities’ proposed water rights applications. The Smith Ranch is an ideal location to provide mitigation for predicted flow depletions to all the downstream segments of the river. In this way, the benefits derived from property acquisition, cessation of intensive agricultural land practices, and recommended restoration actions will benefit the full extent of the watershed that is predicted to be impacted by the water withdrawals.⁴³

Based on this report, the City purchased the Smith Ranch to mitigate for the non-closure period. The Cities Mitigation/Restoration for the Deschutes River include the following:

- Acquire the Smith Ranch and cease farming activities;

⁴² CP00152; CP00213.

⁴³ CP00152; CP00213.

- Reshape existing channel from Main Spring;
- Re-establish the wetland around smaller springs on the ranch;
- Construct a small live crib wall to address erosion along the Deschutes River;
- Replant high density 50-foot riparian buffer and install buffer fence along the river; and
- Replant low density 50 to 200 feet riparian buffer along the Deschutes River.⁴⁴

The City's consultant, Anchor, concluded:

These recommended actions were selected because each action makes significant contributions to address the habitat limiting factors, immediately address some of the most impactful alterations resulting from the intensive agricultural practices, and set the stage for future restoration. The benefits of these actions would extend far beyond the boundaries of the property, thereby significantly contributing the restoration of the Deschutes River watershed.⁴⁵

Net Ecological Improvements

Steven Boessow, a fisheries biologist with WDFW, evaluated the net effect of mitigation for each individually impacted stream, looking at both water-for-water and out-of-kind offsets. Mr. Boessow testified before the PCHB that despite minor reductions in flow, the mitigation would result in *net ecological improvements*.⁴⁶ PCHB Tr. at 247:7 – 249:6 (discussing “net positive effects” due to enhancement of year-round

⁴⁴ CP00152; CP00214.

⁴⁵ CP00152-00153; CP00214.

⁴⁶ CP00153.

flows on McAllister Creek); PCHB Tr. at 249:7 – 253:19 (discussing “a net positive effect” to fish and other instream values for the Deschutes River); PCHB Tr. at 237:24 – 242:8 (discussing a “net gain in fish habitat” for Yelm Creek); PCHB Tr. at 243:10 – 245:22 (discussing “2-1 mitigation value” from acquisition of riparian lands on Woodland Creek). Mr. Boessow’s unrefuted testimony was accepted as expert testimony and referenced by the PCHB throughout its Order. PCHB Order, CP00249-00274. WDFW concluded that the joint effort between the Cities and key stakeholders allowed development of mitigation that none of the Cities could have accomplished alone. PCHB Order, CP00265.

Because not all the mitigation offered by Yelm provided year-round in-kind (water-for-water) offsets to stream flow, Ecology determined that the minor modeled reductions in stream flows at certain limited times of the year could potentially conflict with minimum instream flows. Therefore, Ecology believed it was required to apply the OCPI exception. Yelm’s water right package (as well as those of Lacey and Olympia) were approved under the finding that any potential harm to the streams would be clearly outweighed by public interest benefits, including the “net ecological benefits” to the very same water resources and public water supply. PCHB Tr. 34:19–36:11; CP00153.

3.5 The PCHB Upholds Ecology’s Decision Using a Narrower, More “Stringent” Set of OCPI Factors.

On March 18, 2013, the PCHB issued its Order affirming Yelm’s Water Right Permit No. G2-29085. Through its de novo review, the

PCHB went beyond Ecology's OCPI test and applied a "more stringent" set of 12 OCPI factors to evaluate whether OCPI was justified in this case.

The Board concluded the following:

The Board finds that the majority of depletions to various affected surface water bodies from Yelm pumping of SW Well 1A are fully mitigated with in-kind water, and those that are not fully mitigated with in-kind water, have been mitigated with out-of-kind efforts that serve as *a substantial and compelling basis for Ecology's OCPI determination.*⁴⁷ (emphasis added).

The PCHB commented favorably on the Cities' regional approach for managing and mitigating water resources across affected basins, recognizing that the Cities entered into interlocal agreements to develop a hydrologic model, pursue water rights acquisitions, and implement a joint mitigation strategy.⁴⁸ "The joint effort allowed development of mitigation that none of the cities could have accomplished had they acted alone." (citing Boessow Testimony, PCHB Tr. at 255 7-19); CP00252.

The PCHB relied upon the conservative nature of the hydrologic model "because it will over predict potential depletions in surface waters within the modeled boundaries." Further, "[t]he conservative nature of the groundwater model increased Ecology's confidence that there was complete mitigation of impacts in the modeled area." CP00252. The PCHB squarely addressed the issue of Yelm's obligation to mitigate impacts to Yelm Creek through recharge of 56 acre-feet per year of reclaimed water at Yelm's Cochrane Park. The Board was satisfied, based

⁴⁷ CP00262.

⁴⁸ CP00252.

on Ecology and the City's testimony, that Ecology expects Yelm to infiltrate 56 af/yr to mitigate for its new water right *in addition to* the 56 af/yr it is obligated to infiltrate as mitigation for the transfer of a separate and unrelated water right transfer known as the McMonigle water right. (*citing* Gallagher Testimony); CP00256.

The PCHB observed that the very small modeled depletions of water in the Nisqually River watershed, as well as the depletion of water for parts of the year in the Deschutes River, and in Woodland Creek, led Ecology to employ OCPI. CP00260. The Board noted that Ecology did so even though the agency, WDFW, and Yelm's experts considered that the combination of in-kind and out-of-kind mitigation outweighed any impact to stream and river flows. It also did so despite the assumption that the groundwater model had over-predicted the small depletions in these watersheds. CP00260.

With regard to the Appellant's challenges to the adequacy of the mitigation provided by Yelm and the other cities, the PCHB noted:

The Appellant offers no expert testimony challenging the adequacy of the mitigation provided by Yelm or the 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 the modeled stream and river depletions. The Appellant was able to get some greater clarification with how Ecology interprets the Record of Examination, but the Board finds that the Appellant has failed to show that the mitigation provided by Yelm is inadequate.

Order at 13:13-18; CP00261.

Applying the general rule in *Postema*, the PCHB observed that “Ecology was required to deny Yelm’s water right if the facts informed it that there was impairment or water was unavailable unless it was clear that overriding considerations of the public interest would be served.” CP00267. Although the PCHB found Ecology’s OCPI balancing test “generally consistent” with the Board’s previous OCPI decisions, “the Board conclude[d] that, by definition and in the context of the current case, a more stringent test is required.” CP00270.

The PCHB went beyond Ecology’s balancing test and set forth a more stringent set of standards against which to measure application of the OCPI statute to Yelm’s application.

1. Ecology will use the OCPI exception only when 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 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. If 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 conservative hydrologic model.
7. The hydrologic model was prepared by an external consultant who is a professional modeler, and was subject to rigorous peer review, and can be modified, if needed.

8. The amount of water depletion was so small so that there is no or only minimal impact to water resources.
9. Water can be added if feasible for 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.

PCHB Order at 23:7-24:8; CP00271-00272.

The Board then applied each of the 12 criteria above to Ecology's decision, finding that the agency had, in fact, properly considered each of these 12 factors in reaching its OCPI determination. PCHB Order at 24:21 – 25:20; CP00272-00273.

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

crossed jurisdictional boundaries provided an additional benefit in this case.

By establishing these sidebars and limitations on the use of OCPI for situations involving normal population growth, the Board also concludes that the Washington Supreme Court's dictate in *Postema*, which requires us to construe the OCPI exception narrowly, is met and the values in Chapter 90.54 RCW are upheld.

CP00272-3.

The PCHB held that "Ecology established through testimony sufficient criteria to guide the use of OCPI, as set forth above, thereby justifying its use in this case...." CP00272.

3.6 The Superior Court affirms the PCHB.

The fundamental legal issue before the Superior Court was whether the PCHB, after applying a "more stringent" OCPI test than Ecology's, properly found that the application of OCPI fit within the narrow exception recognized in both *Swinomish* and *Postema*.

In this regard, the Superior Court correctly concluded as follows:

I do not read this case [*Swinomish*] to say that the Department of Ecology can never use an overriding consideration of the public interest in a situation such as the one before the court on the Yelm request for the water permit. I do not believe that the ruling is that broad or that ultimately was the ruling in *Swinomish*. As I indicated, it's clear though that the overriding consideration of the public interest is a narrow exception, and it should not be used as perhaps it was used in the past by the Department of Ecology. Interestingly enough from my perspective, the Pollution Control Hearings Board also before the *Swinomish* decision was ever issued, they rejected the

Department of Ecology's balancing test in their de novo review, and the Pollution Control Hearings Board said there has to be more stringent test in a situation like this.

The Pollution Control Hearings Board did not rely on the Department of Ecology's balancing test, and they specifically set forth in their ruling twelve other factors which all weighed in favor of granting the overriding consideration of the public interest exception.⁴⁹

IV. ARGUMENT

4.1 Standard of Review

When reviewing a decision of the PCHB, this Court sits in the same position as the Superior Court, applying the Administrative Procedures Act's standards of review. RCW 34.05.570(1), (3); *Postema*, 142 Wn.2d at 77; *Tapper v. Employment Security Department*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The appellate court looks to the PCHB's decision, not that of the Superior Court. *Waste Management of Seattle, Inc. v. Utilities & Transportation Commission*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994). The court considers only the evidence, findings, and conclusions in the PCHB's record. *Public Utility District No. 1 of Pend Oreille Co. v. Department of Ecology*, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002).

Consistent with applicable APA standards of review, this Court may not reverse the PCHB's decision unless it finds the agency "has erroneously interpreted or applied the law, the agency's order is not

⁴⁹ Superior Court Transcript of Proceedings, pp. 43-44.

supported by substantial evidence, or the agency's decision is arbitrary and capricious." RCW 35.04.570; *Postema*, 142 Wn.2d at 77. The Appellant appeals to this Court under RCW 34.05.570(3)(d), asserting that when review concerns statutory interpretation, the error of law standard applies. Appellant's Brief at 1, 9. The Appellant makes no argument to this Court in her brief that the substantial evidence or arbitrary and capricious standards apply.

4.2 The PCHB lawfully applied the OCPI statutory exception to the City's Permit consistent with WA Supreme Court precedent. (Issue No. 1)

A. *Postema* previously recognized that OCPI is an exception to the rule that groundwater withdrawals cannot impair minimum instream flows.

The PCHB lawfully applied a long recognized statutory exception to impairment of instream flows. Nearly 14 years ago in *Postema*, this Court recognized the intersection of minimum flow rights and the OCPI statute. In review of several water right permits, the *Postema* court addressed hydraulic continuity between surface and groundwaters and the impairment test under RCW 90.03.290, and set out several "general water law principles." The Court's first principle is application of the Prior Appropriation Doctrine. The Court explained that when a party seeks to appropriate groundwater, Ecology must satisfy the 4-part test set forth in RCW 90.03.290(3). The Court then outlined the statutory scheme creating minimum instream flow rights, noting that RCW 90.03.345 provides that once established, a minimum flow right constitutes an appropriation with a

priority date as of the effective date of the rule establishing the minimum flow. This Court's holding states that "where there is hydraulic continuity and withdrawal of groundwater that would impair existing surface water rights, including minimal flow rights, then denial is required." *Postema*, 142 Wn.2d at 93. But, the Court then explained:

Thus a minimum flow right by rule is an existing right which may not be impaired by subsequent groundwater withdrawals. RCW 90.03.345; RCW 90.44.030. **The narrow exception to this rule is found in RCW 90.54.020(3)(a), which provides that withdrawals of groundwater which would conflict with base flows "shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served."**

Postema, 142 Wn.2d at 81-82 (emphasis added).

The Appellant cannot dispute that this Court recognizes that the OCPI statute permits impairment of minimum instream flows in certain circumstances. Nevertheless, the Appellant advances contradictory arguments, arguing first, incorrectly, that *Postema* "prohibit[s] 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." Appellant's Brief at 17. Conversely, Appellant later argues that *Swinomish* "does require that before Ecology can contemplate using it [OCPI], and impair instream flows, there must exist extraordinary circumstances." Appellant's Brief at 23 (emphasis added). Coupled with Appellant's incorrect argument at pp. 11 and 14 that RCW 90.03.247

prohibits application of the OCPI exception, Appellants' arguments must be rejected.⁵⁰

The *Postema* court did not further interpret or apply OCPI, but, the Court acknowledged the OCPI exception as a "general water law principle." The OCPI statute reflects the Legislature's policy choice that instream flows can be affected, in limited circumstances, by other uses that serve the public interest. However, as recognized by the PCHB, Ecology's discretion is not unlimited and may not be used broadly to appropriate water **unconditionally**, as Ecology did in *Swinomish*. Thus, after *Postema* and *Swinomish*, Ecology can continue to apply the OCPI statute to determine whether it can approve individual applications in a scenario where a permit may impact minimum base flows or closures established by rule. Despite Appellants attempt to amend the law, the Legislature has never changed water law in this regard, pre or post-*Swinomish*. OCPI remains available in this context.

⁵⁰ Appellant also challenges Ecology's authority to consider out-of-kind mitigation. Appellant's Brief at 14. This is a "claim of error which was not raised in the trial court" which should be refused by the Court under RAP 2.5. New legal arguments cannot be used for the first time on appeal unless they are under an exception of RAP 2.5(a). This is not a jurisdictional argument under RAP 2.5(a)(1) or a constitutional challenge under RAP 2.5(a)(3). Appellant does not argue that Ecology fails "to establish facts upon which relief can be granted" under RAP 2.5(a)(2). Nor was this error raised "by another party on the same side of the case." The only mention of this argument at the superior court was in briefing submitted by amicus CELP. An amicus is not a party. *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007) (court does not consider issues raised first and only by amici).

The PCHB's application of OCPI in this case was in accord with *Postema* and the Supreme Court's holding in *Swinomish*, which followed soon after the Board issued its Order.

B. The *Swinomish* case is factually inapposite and its holding is narrowly crafted.

The PCHB forecasted what would later be the *Swinomish* court's interpretation of the OCPI exception. On no less than six occasions in its opinion the *Swinomish* majority recognized that OCPI, while a limited exception, permits impairment of minimum flows. On the very first page of the opinion, the Court states "[t]his statutory provision [OCPI] allows impairment of instream flows when overriding considerations of the public interest are served." *Swinomish*, 178 Wn.2d at 576. The Court repeats this, recognizing "[t]he exception is very narrow, however, and requires extraordinary circumstances before the minimum flow water right can be impaired." *Swinomish*, 178 Wn.2d at 576. The Court finds again that "[a]lthough the term 'minimum flow' does not appear in RCW 90.54.020(3)(a), we have already determined that the overriding-considerations exception is applicable to minimum flows." *Swinomish*, 178 Wn.2d at 580.⁵¹

The *Swinomish* case supports Yelm's Permit. *Swinomish* involved Ecology's creation of 27 new reservations of water with *no mitigation whatsoever*. *Swinomish* was essentially an unmitigated water grab

⁵¹ The applicability of the OCPI exception to minimum flows is stated several more times in the Court's opinion at 584, 585, and in its Conclusion at 602.

allowing hundreds of new points of withdrawal in no less than 27 Skagit River subbasins. In stark contrast, Yelm's OCPI determination was founded on a comprehensive mitigation plan, a plan that WDFW testified provides "*net* ecological benefits" to the resource and represents the "gold-standard" of mitigation plans.

In *Swinomish*, the specific number of future groundwater withdrawals, as well as the location and impacts of any such withdrawals was left completely unknown, yet future water users, public or private, were free to access the 27 reservations to demonstrate adequate water supply at the building permit stage, whether or not actual impairment might be result. *See Swinomish*, 178 Wn.2d at 589. In contrast, the uncontested record here shows the single groundwater source developed by the City was drilled, tested, analyzed through peer-reviewed, scientific models, and mitigated, where appropriate.

In *Swinomish*, Ecology relied upon OCPI and made a finding that the economic value of a reliable source of water for out-of-stream uses outweighed the resulting harm caused by minor impacts to the streams. This was not the basis for the PCHB's Order in this case. Here, the Court recognizes that the PCHB fully measured the City's Permit and Mitigation Plan and included exhaustive discussion of the various public interest considerations mandated by the OCPI statute. Order at 22-26; CP00270 – CP00274.

In support of its holding, the *Swinomish* court looked to legislative intent and the water resource statutory scheme, finding that the Legislature

places particular emphasis on the protection of environmental values when it adopted RCW 90.54 (Water Resources Act of 1971), RCW 90.22 (Minimum Flows and Levels Act), and Fish Passage Act (RCW 77.57.020). *Id.* at 14-23. The Court struck down the 2006 Skagit River rule amendment, noting “[t]he exception in RCW 90.54.020(3)(a) is a narrow exception, not a device for wide ranging reweighing or reallocation of water **through water reservations** for numerous future beneficial uses.” *Swinomish*, 178 Wn.2d at 585. Thus, the holding in *Swinomish* focused squarely on the following point: “[W]e do not believe the legislature has extended broad authority to Ecology in RCW 90.54.020(3)(a) to make this development possible through water reservations.” *Swinomish*, 178 Wn.2d at 598-599. Yelm’s Permit does not involve creation of reservations of water without attention to the location, quantity, and impact of such withdrawals. Instead, it fully addresses all the issues and incorporates mitigation, where appropriate.

The *Swinomish* holding also focused on Ecology’s use of a balancing test to determine if “total benefits from beneficial uses of water outweighed the harm resulting from impairing instream flows.” *Swinomish*, 178 Wn.2d at 586. Ecology’s test was properly *rejected* by the PCHB in this case. Instead, the PCHB applied a “more stringent” test consistent with the statute and this Court’s holdings. Order at 22; CP00270.

What informs this case is the *Swinomish* court’s pronouncement that OCPI is a “narrow exception,” and requires “extraordinary

circumstances before the minimum flow right can be impaired.” *Swinomish*, 178 Wn.2d at 576. Here, the PCHB properly recognized that the City and state agencies did not turn to the use of OCPI until it was clear that exhaustive efforts had been made by the City to mitigate impacts through water-for-water or in-kind mitigation.

In stark contrast to the facts in *Swinomish*, Ecology, in consultation with WDFW, found there to be “net ecological benefits” as result of implementation of a mitigation plan, one that WDFW considered the “gold standard” of mitigation plans. The Appellant offered no evidence whatsoever to the contrary. The PCHB characterized the Plan’s effect as “substantial” and “compelling” and “a significant benefit to the public and the environment.”⁵² These public interest considerations were notably absent in *Swinomish*.

What has changed as a result of *Swinomish* is that Ecology’s past practice of balancing out-of-stream beneficial uses against the economic value of keeping water instream cannot be supported. Also, that Ecology’s narrow OCPI authority must be exercised in “extraordinary circumstances,” such as those present in Yelm’s Permit, as recognized by the PCHB.

⁵² CP00262.

4.3 The City’s Permit was lawfully supported by OCPI based on the plain meaning of the statute and the facts and unrefuted expert testimony in the record. (Issue No. 2).

A. The PCHB properly considered overriding considerations of the public interest based on the plain meaning of the OCPI statute.

Where possible, courts give effect to the plain meaning of the language used as the embodiment of legislative intent. *Swinomish*, 178 Wn.2d at 581. The pertinent language at issue in this case states:

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) (emphasis added).

“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *G-P Gypsum Corp. v. Department of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). RCW 90.54.020(3)(a) unequivocally provides that “withdrawals of water” that conflict with base flows, or minimum flows, “shall be authorized” in those situations where “overriding considerations of the public interest will be served.” The Court must reject Appellants’ attempt to render this plain language meaningless. The *Swinomish* court recognized that the Minimum Water

Flows Act was enacted after RCW 90.54.020, and that it “contains no qualification that *the importance* of minimum flows is reduced by RCW 90.54.020(2) and (3)(a).” This acknowledgement by the Court that minimum flows have an “important” place in the statutory scheme cannot be extended to mean that the “importance” of the Minimum Water Flows Act now renders superfluous a clear and unambiguous exception to impairment of base flows, RCW 90.54.020(3)(a). In fact, the *Swinomish* court makes this abundantly clear in its Conclusion:

RCW 90.54.020(3)(a) provides that perennial streams and rivers must be retained with base flows sufficient to preserve fish and wildlife, scenic, aesthetic and other environmental values, and navigation. **A narrow exception is found in the statute that permits impairment of minimum flows set by rule in situations where it is clear that overriding considerations of the public will be served.**

Swinomish, 178 Wn.2d at 602.

The plain meaning of the OCPI statute underscores that the PCHB correctly applied the statute consistent with *Swinomish*. The Court recognizes that no party argues that the plain language of the OCPI statute is ambiguous. The ordinary dictionary meaning of “overriding” is to “to prevail over.”⁵³ Here, the PCHB applied no less than 12 factors, many of them express statements of the public interest, to evaluate and support the

⁵³ *Merriam-Webster.com* (transitive verb 3a: to prevail over: Dominate). <http://www.merriam-webster.com/wdictionary/overriding> (last visited Sept. 23, 2014).

use of OCPI. Order at 23; CP00271. The Board held that the Mitigation Plan served as a “substantial and compelling basis” for the OCPI determination. Order at 14; CP00262. The PCHB recognized that the *net* ecological benefits of the Mitigation Plan to those streams and rivers having minimum flows “prevailed over” the potential for small modeled flow depletions to those same resources.

Those same public interest considerations also informed whether “extraordinary circumstances” were present. The existence of extraordinary circumstances is not simply achieved because of a critical need for public water supply. The Water Resources Act itself sets forth two, often competing, public interests, i.e., to provide “[a]dequate water supplies... to meet the needs of the state’s growing population” and the acknowledgment that “[a]t the same time instream values and resources must be preserved and protected” for future generations. *See* RCW 90.54.010(1)(a). The ordinary dictionary meaning of “extraordinary” is “going beyond what is usual, regular or customary, exceptional to a very marked extent.”⁵⁴ Those terms precisely describe the *net* ecological benefit to affected streams and rivers as a result of the City’s Permit and Mitigation Plan. Meeting the City’s critical public water supplies while actually going beyond what is called for in the statute, creating *net* ecological benefits to water resources and furthering other stated public interests of the Legislature, as further explained below, is what makes this

⁵⁴ *Merriam-Webster.com*. <http://www.merriam-webster.com/dictionary/extraordinary> (last visited Sept. 23, 2014).

case fit well within sideboards of the OCPI standard set forth in *Swinomish*.

B. The PCHB's test supports the requisite "narrow" application of OCPI as called for in *Swinomish*.

The PCHB was not limited by Ecology's permitting decision or the record developed by Ecology in making its decision. The findings upon which Ecology based its decision were supplemented through testimony before the PCHB. See WAC 371-08-485(1); *Northwest Aquatic Ecosystems v. Department of Ecology*, PCHB Nos. 05-087, 05-088, 2005 WL 3520473 at 5 (Dec. 16, 2005). Through its de novo review, the PCHB set aside Ecology's "OCPI balancing test," in favor of weighing a list of 12 "more stringent" factors to justify the application of OCPI to Yelm's application. The PCHB concluded that OCPI was properly applied in this case as both the agency record and testimony clearly demonstrated that the agency had, in fact, considered the more stringent factors. Substantial evidence was presented and properly accepted by the PCHB to support findings for each of the 12 factors, as follows:

1. Ecology will use the OCPI exception only when the water is to be used for a public purpose. PCHB Tr. at 326:6 – 17.
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. PCHB Tr. at 191:24 – 193:23; PCHB Tr. at 327:19 – 328:11.
3. All depletions/impacts to the water bodies subject to the minimum flows or stream closures were fully mitigated and

trackable over time. PCHB Tr. at 326:18 – 327:2; PCHB Tr. at 78:16 – 23.⁵⁵

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. PCHB Tr. at 277:3 – 279:16.; PCHB Tr. at 238:12 – 253:19.
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. *Id.*
6. The potential impacts to water bodies were based upon a conservative hydrologic model. PCHB Tr. at 50:16 – 51:14; PCHB Tr. at 397:12 – 398:11.
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. PCHB Tr. at 47:18 – 48:21.
8. The amount of water depletion was small so that there is no or only minimal impact to water resources. PCHB Tr. at 241:10 – 253-20.
9. Water can be added if feasible during critical times for fish, and should not be diminished during such critical times. PCHB Tr. at 249:14 - 25.
10. Stakeholders were bought into and supported the proposed project and mitigation. PCHB Tr. at 25:20 – 26; PCHB Tr. 38:15 – 39:10; CP00260.
11. Mitigation was consistent with adopted watershed plans. Ecology ROE at 12 - 13; CP00236-237.

⁵⁵ This standard is in sharp contrast to Ecology's failed efforts regarding the Skagit River rule amendment addressed in *Swinomish*.

12. Water conservation efforts will be utilized, which in this case includes the use of reclaimed water. PCHB Tr. at 54:4-11.

The PCHB properly relied upon substantial evidence and concluded that application of the narrow OCPI exception was warranted based on the significant environmental and public interest benefits resulting from Yelm's Mitigation Plan. The Plan provides for habitat enhancement, such as vegetative buffers and preservation of riparian lands, providing for increased fisheries productivity in the area. As a result, water use under the Mitigation Plan will have minimal impacts to the stream flows and result in a more productive ecosystem for fisheries.

Yelm's Permit is conditioned upon an enforceable suite of mitigation actions. The uncontested expert evidence of the State shows that mitigation provides "net ecological benefits" and represents the "gold standard" of mitigation plans. PCHB Tr. at 247:7 – 249:6 (discussing "net positive effects" due to enhancement of year-round flows on McAllister Creek); PCHB Tr. at 249:7–253:19 (discussing "a net positive effect" to fish and other instream values for the Deschutes River); PCHB Tr. at 237:24 – 242:8 (discussing a "net gain in fish habitat" for Yelm Creek); PCHB Tr. at 243:10 – 245:22 (discussing "2-1 mitigation value" from acquisition of riparian lands on Woodland Creek).

Yelm's Permit and Mitigation Plan serves the public interest well beyond whatever economic benefits may be derived from any out-of-stream uses. By replacing environmental values through environmental

mitigation, Yelm's Permit squarely addresses what the Court found lacking in *Swinomish*.

The PCHB's 12 factors also tested and verified the presence of "extraordinary circumstances" called for by the *Swinomish* majority. Yelm is faced with a critical water shortage. The City exhausted every feasible option to pursue water-for-water mitigation; it worked in a regional coalition with neighboring cities; it achieved the support of area Indian tribes; and, effectively incorporated water conservation and water reuse as part of its mitigation strategy. It spent years developing a mitigation plan in conjunction with neighboring cities and tribes. The Mitigation Plan, under uncontested expert evidence, results in *net* environmental benefits, far beyond the traditional compensatory mitigation standard.

Yelm's Mitigation Plan includes groundwater recharge associated with two reclaimed water facilities on Yelm and Woodland Creeks. The public interest benefits of these actions are specifically recognized and supported by the Legislature in the Reclaimed Water Use statute, Chapter 90.46 RCW.

It is hereby declared that *the people of the state of Washington have a primary interest in* the development of facilities to provide reclaimed water to replace potable water in nonpotable applications, to supplement existing surface and groundwater supplies, and to assist in meeting the future water requirements of the state.

RCW 90.46.005 (emphasis added).

Not only the Mitigation Plan itself, but the *collaborative process* undertaken by the City to develop its Mitigation Plan serves other public interests. The Water Resources Act specifically provides as follows: “*All citizens of Washington share an interest in the proper stewardship of our invaluable water resources.... Through a comprehensive process that includes state, Indian tribes, local governments and interested parties, it is possible to make better use of available resources.*” RCW 90.54.010(1)(b) (emphasis added).

Although Yelm’s Permit must fit within the OCPI exception because of the potential for very small (modeled) reductions in stream flow in certain subbasins, the Mitigation Plan allows achievement of what might otherwise be considered competing goals in RCW 90.54.010(a). That is, Yelm’s Permit is a unique example of where public water system needs may be met *and* net benefits to instream resources can be achieved.

V. CONCLUSION

The Appellant failed to advance any expert testimony or evidence of her own to refute the substantial evidence properly relied on by the PCHB. She also failed to sustain her burden based on the Supreme Court’s explicit recognition in both *Postema* and *Swinomish* that OCPI remains a recognized (albeit narrow) exception allowing impairment of instream flows when overriding considerations of public interest are served. Here, the PCHB placed clear sideboards on the application of the OCPI statute. The Appellant fails in the absence of any fact or law to show that the PCHB erred.

The City respectfully requests that this Court affirm the PCHB's
Order affirming Yelm's Permit.

DATED this 24th day of September, 2014.

FOSTER PEPPER PLLC

s/ Joseph A. Brogan

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on September 24, 2014, I caused to be served a copy of the Response to Appellant's Brief in the above-captioned matter upon the parties herein as indicated below:

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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 Wednesday, September 24, 2014, in Seattle, Washington.

s/ Erin E. Cline

Erin E. Cline, Legal Assistant



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July 2, 2014

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RE: *Sara Foster v. Washington State Department of Ecology, et al.*
Case No. 90386-7

Dear Parties:

This confirms the agreement by the parties that documents filed in the above-referenced matter will be served on the parties by electronic mail without any need to serve duplicate hard copies via United States mail or other means. It has also been agreed to that all documents served will be in pdf format. Electronically served documents received after 5:00 p.m. on a business day, or on a weekend or holiday, will be considered served on the next business day.

For purposes of official service on Ecology, please serve all documents at the following office email address (this address should not be used for correspondence that does not require official service):

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Please also serve the following email addresses:

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ATTORNEY GENERAL OF WASHINGTON

Parties
July 2, 2014
Page 2

Please let me know immediately if you have a different understanding of the agreements described in this letter or if the email address listed for you is incorrect.

Sincerely,

A handwritten signature in black ink, appearing to read 'Travis H. Burns', written over a light blue horizontal line.

TRAVIS H. BURNS
Assistant Attorney General
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THB/RAF

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Received 9/24/14

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Subject: Response to Appellants Brief - City of Yelm, Respondent

Good afternoon:

Please file the attached Response to Appellants Brief with the Court. A copy of the E-Service Agreement by the parties to serve electronically is attached for your information.

Thank you in advance for your assistance. Please feel free to contact me with any questions.

Sara Foster v. Washington State Department of Ecology, et al.
Case No.: 90386-7

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