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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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RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF  
ECOLOGY'S RESPONSE BRIEF

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ORIGINAL

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## I. INTRODUCTION

This is a water rights case involving an extraordinary approach to provide water for municipal needs while enhancing the environment. Appellant Sara Foster is challenging the Department of Ecology's (Ecology) approval of the City of Yelm's (Yelm) water permit and Mitigation Plan (Mitigation Plan). The Mitigation Plan involves the withdrawal of groundwater connected to streams and rivers of the Deschutes and Nisqually Basins. These surface waters are protected by minimum instream flows and basin closures established in Ecology rules to protect surface water levels and fish habitat.

To avoid harm to surface waters, the Yelm permit is conditioned upon the Mitigation Plan. Under the Mitigation Plan, Yelm is required to retire existing water rights (to offset the new water uses), reintroduce reclaimed water into the stream system, and directly enhance habitat to improve conditions for fish and other aquatic species. To ensure sufficient protection of fish habitat, the Mitigation Plan improves stream conditions and protects habitat with "out-of-kind" mitigation—measures that directly benefit fish habitat without direct augmentation of the stream flow.

After a hearing on the permit, including review of testimony from a fisheries expert, the Pollution Control Hearings Board (PCHB) found that the Mitigation Plan will provide a net ecological benefit throughout

the surface water system. In other words, while the quantity of water in each stream will be impacted by the water permit, the Mitigation Plan as a whole ensures that the *habitat value* of all streams will improve.

The Yelm permit will, however, result in some minor net effects on legally protected stream flows where the Mitigation Plan does not provide complete flow-related offsets. Because of this, Ecology relied on RCW 90.54.020(3)(a) in making its permit decision. This is the Water Code's exception to the general prohibition against the impairment of protected stream flows. The exception is available where "overriding considerations of the public interest" (OCPI) are demonstrated. The PCHB found that the Mitigation Plan provided appropriate grounds for the OCPI exception.

After the PCHB ruled, the Supreme Court announced its decision in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) (*Swinomish*). *Swinomish* rejected Ecology's use of OCPI to amend an instream flow rule in 2006 and create a basin-wide exception to an instream flow. While *Swinomish* describes a high standard for OCPI—a "very narrow" exception only applicable in "extraordinary circumstances"—it does not dictate reversal of the Yelm permit decision because the PCHB had already applied a stringent and rigorous test to Yelm's permit. The facts and conclusions by the PCHB

exemplify the “extraordinary circumstances” test described in *Swinomish*. The PCHB found that the Yelm permit reflected twelve compelling factors including: the exhaustion of every feasible flow related option to mitigate, wide stakeholder support that included neighboring Indian tribes, and an overall mitigation package that was more than sufficient to offset minor depletions of stream flow.

The PCHB found that Yelm’s Mitigation Plan will not prevent all impacts to protected stream flows, particularly during certain weeks in April and October on the Deschutes River. The question on appeal is not whether flows would be impacted, but whether Ecology correctly determined that application of the OCPI exception was warranted. Yelm’s permit is extraordinary because it results in extensive net ecological benefits in addition to serving municipal water needs. Yelm’s Mitigation Plan—referred to at hearing as a “gold-standard mitigation plan” (Tr. Day 2, 256, 9-13)—is desirable, ecologically sound, and satisfies the purpose and intent of instream flow protection laws. These extraordinary circumstances fully support use of the OCPI exception.

## II. ISSUES PRESENTED FOR REVIEW

Ecology restates the issues presented by the Appellant as:

1. Is Ecology authorized to apply the “overriding considerations of the public interest” exception,

RCW 90.54.020(3)(a), when it evaluates an individual water permit application?

2. On the facts of this case, did the Pollution Control Hearings Board lawfully uphold the approval of the City of Yelm's water permit application based on OCPI?

### III. STATEMENT OF THE CASE

#### A. Background On Washington Water Law

##### 1. Prior Appropriation

Ecology regulates the public waters of the state of Washington. All water rights, including groundwater, are subject to the doctrine of prior appropriation: a water right may only be acquired subject to existing rights. RCW 90.03.010; RCW 90.44.040; *Swinomish*, 178 Wn.2d at 589, *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

Ecology evaluates applications for groundwater permits pursuant to RCW 90.03.290, which requires a permit to satisfy a four-part test: (1) water is available for appropriation, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare. A water right permit for a beneficial use, such as municipal water supply purposes, maintains a priority date that relates

back to the date of filing the permit application. RCW 90.03.340.

The groundwater code recognizes that surface waters and groundwater may be in hydraulic continuity,<sup>1</sup> such that senior surface water rights cannot be impaired by subsequently established groundwater rights. RCW 90.44.030. Accordingly, when Ecology applies the four-part test to a groundwater permit application, it considers the interrelationship of groundwater with surface waters, and must determine whether surface water rights would be impaired by groundwater withdrawals. *Postema*, 142 Wn.2d at 80–81.

## **2. Instream Flow Protection**

In 1969, the Legislature authorized Ecology to establish, by rule, minimum instream flows or levels to protect wildlife, recreational, and aesthetic values of surface waters. RCW 90.22.010, .020. In 1971, the Legislature mandated protection of the “quality of the natural environment” through the retention of base flows in rivers and streams. RCW 90.54.020(3)(a).

The 1971 law also authorizes Ecology to establish, by rule, a comprehensive state water resources program for making future water allocation and use decisions. RCW 90.54.040. Pursuant to this authority, Ecology adopts rules that set minimum flows and close certain water

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<sup>1</sup> “Hydraulic continuity” is a scientific term that describes the interconnection between groundwater (aquifers) and surface water.

bodies to further use. WAC 173-500 (establishing a water resources management program); WAC 173-501 to WAC 173-591 (establishing water management rules in specific basins throughout the state). For the watersheds at issue in this case, Ecology adopted rules that close surface water bodies and hydraulically connected groundwaters, on either a year-round or seasonal basis. WAC 173-511 (Nisqually River Basin Rule); WAC 173-513 (Deschutes River Basin Rule).

An instream flow established in a rule maintains a priority date that relates back to the effective date of the underlying rule. RCW 90.03.345. Once established, an instream flow water right may not be impaired by subsequent groundwater withdrawals. *Id.*; *Postema*, 142 Wn.2d at 82; *Swinomish*, 178 Wn.2d at 585. Further, a stream closure constitutes a determination that water is unavailable and the stream is closed to further appropriations in order to retain adequate “base flows” under RCW 90.54.020(3)(a). An exception to these rules concerning minimum and base flows is found in RCW 90.54.020(3)(a), which provides that withdrawals of water affecting 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 80. This is the OCPI exception at issue in this case.

## **B. The Mitigation Plan And Appeal**

In January 1994, Yelm filed an application for a new groundwater right permit to deliver potable water through its public water system. Ecology issued a decision in October 2011 approving Yelm's water right application as conditioned with terms and requirements contained in Yelm's Mitigation Plan.

Appellant appealed the Yelm permit to the PCHB, asserting standing as a neighbor and property owner in the area of Yelm's groundwater aquifer. The PCHB held an evidentiary hearing on December 17 through 19, 2012. The issues considered by the PCHB involved the adequacy of Yelm's Mitigation Plan, whether Ecology properly employed the statutory OCPI exception, and whether certain statutes and regulations pertaining to minimum instream flows and basin closures were violated by Ecology's approval of the water permit application.<sup>2</sup> AR 001284.<sup>3</sup>

On March 18, 2013, the PCHB issued its Findings of Fact, Conclusions of Law, and Order (Final Order) and ruled in favor of Ecology and Yelm on all issues and affirmed Ecology's approval of

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<sup>2</sup> The PCHB ruled on partial summary judgment in favor of Ecology and Yelm, rejecting Appellant's argument that the Yelm permit would impair her ability to pump water from her domestic well. AR 001234-1269. This ruling is not challenged here.

<sup>3</sup> AR 001270-1295 as cited throughout refers to the PCHB's Findings of Fact, Conclusions of Law, and Order (Final Order).

Yelm's water right application.<sup>4</sup> A copy of the PCHB's final order is provided in Appendix A. The PCHB concurred "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." AR 001294.

The PCHB found that Ecology properly considered potential impacts to instream flows through use of a conservative hydrological model and adequately addressed such impacts through mitigation. AR 001273. The majority of modeled depletions to flow are fully mitigated with water-for-water mitigation, through the acquisition of other water rights to replace flow, and the infiltration of reclaimed water to augment flow. Where predicted depletions are not directly mitigated with water-for-water mitigation, adequate mitigation is provided through "out-of-kind efforts that serve as a substantial and compelling basis for Ecology's OCPI determination." AR 001284. Out-of-kind mitigation enhances the instream habitat even though it does not directly replace the quantity of water attributed to flow reduction. This mitigation includes projects to restore and enhance streams and habitats in manners that will replace ecological values served by flows.

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<sup>4</sup> The PCHB final order included a modification of the permit to add a condition regarding stewardship group membership that is not relevant to this appeal. AR 001295.

In the Deschutes River, for example, irrigation water rights will be acquired to offset new water withdrawals that cancel out future impacts during the critical months from May to September. Stream flows will actually increase during the most critical times for returning Chinook salmon. AR 001279. However, since the stream is closed under WAC 173-513-030 from late April through October, the timing of the retired irrigation rights does not perfectly match the full period of time that the closure is in effect. During the “shoulder season,” or the weeks in April and October that are not covered in-time by the retirement of irrigation water rights, there will be minor reductions below the protected flow level. AR 001279-81. To compensate, historic farmland is being acquired and restored. The purchase of farmland allows for “the restoration of off-channel habitat, the addition of large woody debris, the reduction of erosion, and riparian enhancement.” This land will also be protected from future development that would otherwise prevent rainfall from being absorbed into the ground. AR 001279.

All aspects of out-of-kind mitigation, in both the Nisqually and Deschutes Basins, clearly benefit fish and the hydrology of the stream.<sup>5</sup> In

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<sup>5</sup> At times when hydrology is not improved in terms of flow level, certain out-of-kind actions can still improve overall hydrology by improving the velocity and direction of flow down a stream in a way that benefits fish. For example, the use of live cribwalls, which is a combination of logs and root wads with trees planted amongst them,

some instances, mitigation overcomes obstacles to fish even better than flow-related actions would alone. AR 001285. The combination of water-for-water and out-of-kind mitigation outweighs any negative effect Yelm's new withdrawals will have on instream values. AR 001279.

There are several additional factors that the PCHB also found compelling in determining that the OCPI exception was warranted. First, a larger, more robust mitigation plan was achieved by virtue of the cities of Olympia and Lacey coordinating with Yelm to manage water resources that flow across jurisdictional boundaries. AR 001217. Second, Yelm exhausted all feasible water-for-water solutions, and employed conservation measures, before turning to out-of-kind options. And third, there was wide stakeholder involvement at every stage of developing mitigation, including participation by the Nisqually and Squaxin Island Tribes. Further, the Mitigation Plan is also consistent with a locally adopted watershed plan. AR 001223–24.

For these reasons, the PCHB upheld the use of OCPI despite finding that the OCPI balancing test applied by Ecology (also known as the three-step test) was not a sufficiently "stringent test." AR 001291. The PCHB heard expert testimony, reviewed evidence and reached an independent conclusion that the Yelm permit met the "very narrow"

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will slow the river where erosion is occurring and direct the flow more towards the main channel. AR 001280.

standard for OCPI under RCW 90.54.020(3)(a). AR 001290-93. The PCHB's conclusion relied on twelve significant factors that support use of OCPI in this case:

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 conservative 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 bought 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.

AR 001292–93.

On May 16, 2013, Appellant filed a petition in Thurston County Superior Court for judicial review of the PCHB’s Final Order. While the case was pending, the Supreme Court issued its *Swinomish* decision. The superior court’s review of the PCHB’s decision included consideration of this recently issued case. The superior court rejected all of petitioner’s arguments and affirmed the PCHB’s decision. The Appellant filed a notice of appeal to the Supreme Court seeking direct review.

#### IV. STANDARD OF REVIEW

The Administrative Procedure Act (APA), RCW 34.05, governs this Court’s review of adjudicative proceedings before the PCHB. RCW 34.05.510; *Postema*, 142 Wn.2d at 77. On appeal, “the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a); *PT Air Watchers v. Dep’t of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014).

When reviewing an administrative decision, an appellate court sits in the same position as a superior court, applying the APA’s standards of review directly to the agency decision and record. RCW 34.05.570(1),

(3); *Postema*, 142 Wn.2d at 77; *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Thus, this Court reviews the PCHB's decision for error, not the superior court findings or conclusions. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994); *see also* RAP 10.3(h) ("the brief of an appellant or respondent who is challenging an administrative adjudicative order under RCW 34.05 shall set forth a separate concise statement of each error which a party contends was made **by the agency issuing the order**, together with the issues pertaining to each assignment of error." (emphasis added)). Unchallenged facts are treated as verities on appeal. *Tapper*, 122 Wn.2d at 407. Where a party challenges the PCHB's application of the law to a particular set of facts, "the factual findings of the agency are entitled to the same level of deference which would be accorded under any other circumstance." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). The Court, however, reviews the interpretation of law de novo, which includes the process of applying the law to different or novel facts. *Id.*; RCW 34.05.574(1).

In this case, the Appellant asserts that the superior court "erroneously interpreted or applied the law," Appellant's Brief at 1, 9,

when it found that the OCPI exception is appropriate for the Yelm permit. RCW 34.05.570(3)(d).<sup>6</sup>

## V. SUMMARY OF THE ARGUMENT

In RCW 90.54.020(3), the Legislature has authorized Ecology to allow an exception to the protection of base flows where withdrawals of water would serve OCPI.

First, the Court recognizes that OCPI constitutes legal authority to approve water permits that would otherwise impair minimum instream flows or reduce flows in closed streams. This is clear in precedent of this Court from the *Swinomish* and *Postema* decisions, and in the plain language of the statute. If OCPI cannot apply to allow water permits such as Yelm's, it is essentially a meaningless provision that would have no purpose in the Water Code. Appellant argues that, notwithstanding the OCPI exception under RCW 90.54.020(3)(a), Ecology is never authorized to approve a "permanent withdrawal" of water in a basin protected by instream flow water rights. Contrary to the Appellant's categorical rejection of OCPI, the narrow OCPI exception clearly allows for the

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<sup>6</sup> At the superior court, the Appellant argued that the Board's decision should be reversed because of a lack of substantial evidence, RCW 34.05.570(e), and arbitrary and capricious decision-making, RCW 34.05.570(i). These arguments have not been raised on appeal. Further, as the Board's Final Order annotates all findings of fact to the testimony and exhibits in the hearing record, and the evidence presented at hearing by Ecology and Yelm was uncontroverted, Ecology will not address Appellant's now-abandoned claims that the PCHB's findings were not supported by substantial evidence, or that the PCHB's decision was arbitrary or capricious.

impairment of a previously-established instream flow, and specifically can be applied when Ecology considers a proposed new withdrawal of groundwater in the context of reviewing an individual application for a water right permit.

Second, the record shows that Ecology properly used OCPI authority here in the “extraordinary circumstances” of the Yelm water permit. The Mitigation Plan requires that, where water is withdrawn, Yelm must provide habitat enhancement and other measures that provide a net ecological benefit to the instream resource. As such, the Yelm permit meets the high standard for OCPI, namely the requirement that extraordinary circumstances must be present to warrant a withdrawal that would otherwise conflict with minimum instream flows. Appellant does not meet her burden to show that Ecology, as affirmed by the PCHB, exceeded OCPI statutory authority in approving Yelm’s water right application. The unchallenged facts found by the PCHB demonstrate that OCPI warranted the approval of Yelm’s water right application. This Court should affirm the PCHB’s ruling and conclude that the Yelm permit is authorized by the OCPI exception in RCW 90.54.020(3).

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## VI. ARGUMENT

### A. Ecology Has Authority To Approve Groundwater Permits Through Application Of The OCPI Exception (Issue No. 1)

#### 1. The Court Recognizes OCPI as an Exception to the Rule That Groundwater Withdrawals Cannot Impair Minimum Instream Flows

The OCPI exception provided under RCW 90.54.020(3) is available—in extraordinary circumstances, addressed below—to approve groundwater withdrawals that would otherwise conflict with base flows by impairing protected instream flows or reducing flows in a closed surface water body. The Court first recognized the existence of the OCPI exception in *Postema*; however, it was not until *Swinomish* that the Court was presented a case in which its use was tested.

Appellant argues that this Court’s rulings “forbade” Ecology’s issuance of a water right that would impair an established instream flow. Appellant’s Brief at 16. This describes the general rule, but neglects the rule’s exception: the clear language of the OCPI statute—as explained by the *Swinomish* decision itself—allows limited “withdrawals of water that would conflict with base flows.” RCW 90.54.020(3)(a). The Court held that, “[a]t the outset . . . [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.”<sup>7</sup>  
*Swinomish*, 178 Wn.2d at 580 (emphasis added). The *Swinomish* opinion cites *Postema*, which recognized OCPI as “the only exception” to the rule protecting surface water rights from impairment by junior groundwater users:

[A] minimum flow set 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 water which would conflict with the 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 80–81 (emphasis added). The Court repeatedly acknowledges that OCPI is an exception to the rule against impairment, referring to OCPI as the only “narrow exception” to the rule protecting minimum instream flows from impairment by future groundwater permits. *Postema*, 142 Wn.2d at 81, 90, 102 (citing King County Superior Court *id.* at 129 (Sanders, J., dissenting)).

*Postema*, like this case, involves permits for groundwater that is connected with protected surface waters. The *Postema* Court consolidated

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<sup>7</sup> The *Swinomish* Court here addressed an argument presented in an amicus curiae brief that “base flows,” which allowed an OCPI exception, are distinct from “minimum flows” which are established by rule. The Court deemed that these two terms are interchangeable in the context of RCW 90.54.020(3)(a).

several appeals of decisions denying permit applications in the Cedar River, Green River, and Snohomish River Basins, involving similar questions related to hydraulic continuity and the impairment test under RCW 90.03.290. The Court held as follows:

We hold that hydraulic continuity of an aquifer with a stream having unmet minimum flows is not, in and of itself, a basis for denial of a groundwater application, and accordingly affirm the superior courts. However, where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial is required.

*Postema*, 142 Wn.2d at 93. Moreover, impairment of surface waters by groundwater withdrawals can be demonstrated without showing that there will be a “direct, and measurable impact.” *Id.* at 86. This strong protection of instream flows is recognized under multiple statutory provisions: Ecology is required to protect “base flows” under RCW 90.54.020(3) by adopting rules under both RCW 90.54.040 (Ecology shall develop and implement a comprehensive state water management program to implement intent of Water Resources Act of 1971) and RCW 90.22.010 and .020 (authorizing Ecology to establish minimum water flows by rule). *Id.* at 81. Ecology also has authority to set minimum flows, levels, or restrictions under RCW 90.03.247. *Id.* at 95.

But *Postema* does not apply the OCPI exception of RCW 90.54.020(3) because it was not at issue for any of the permit decisions challenged in that case. Thus, although groundwater permits generally must be denied where groundwater is connected to protected surface waters and where impairment is shown, *Postema* also recognizes that under certain narrow circumstances, a water permit could be approved based upon the OCPI exception, even when surface waters are protected under RCW 90.22.010, .020, RCW 90.54.020, and RCW 90.03.247.

*Swinomish* emphasizes the ruling in *Postema* which stresses the general prohibition against impairment, but also recognizes that the Water Code includes the OCPI exception. *Swinomish*, 178 Wn.2d at 580–586. However, *Swinomish* declines to rely on *Postema* for purposes of applying the OCPI exception in the context of water reservations for multiple future uses set aside in the Skagit Basin. *Id.* at 586 (“[I]n *Postema* the overriding-considerations exception was not directly at issue, and we did not engage in a detailed examination of its language or the statutory context to determine its meaning.”).

Appellant also alleges error based on RCW 90.03.247 as an independent legal requirement. Appellant’s Brief at 13–15. RCW 90.03.247 requires that, where a permit application seeks to appropriate water from a water body with established minimum flows or

levels, a permit must be conditioned to protect the levels or flows. RCW 90.03.247. This statute restates the principles and authority of the other instream flow laws, and the rules themselves. Both *Swinomish* and *Postema* consider RCW 90.03.247 and other statutes that afford strong protection of instream flow rights, but still conclude that the OCPI exception is available. OCPI is an exception to the general rule against impairment imposed by statutory protections, including RCW 90.03.247.

Appellant's arguments fail because she relies on *Postema* for the prior appropriation rule, but neglects to acknowledge the rule's exception provided by the OCPI statute and recognized in case law. As a result, Appellant continually suggests that statements in *Postema* mandate denial of water permits in all instances, without any exception. Appellant's Brief at 14, 15, 21. Further, she confuses a quote from *Swinomish* where the Court notes that reservations are no different from individual applications "insofar as impairment of the minimum or base flows is concerned." Appellant's Brief at 19. Appellant argues that, in this statement, the Court bars the use of OCPI in **all** individual water permit application settings. But the Court was simply describing that whether through a reservation or a permit, both result in a "water right held by an individual to the detriment of the existing minimum flow water right," and are equally capable of impairment. *Swinomish*, 178 Wn.2d at 586. The Court in

*Swinomish*, however, did not consider whether or not the OCPI exception could apply for an individual permit application because the case involved reservations rather than permits.

*Postema* and *Swinomish* both recognize the general rule that withdrawals cannot impair minimum flows. But both cases also recognize that the OCPI exception could be employed in the context of an individual permit decision.

**2. *Swinomish* Does Not Bar the Application of OCPI to an Individual Water Permit**

*Swinomish* describes a high standard for a finding of OCPI—a standard that is met in this case—but the holding of the *Swinomish* decision does not preclude the application of OCPI for approval of a permit when extraordinary circumstances are present.

*Swinomish* arose out of the challenge to the Skagit Basin Rule. Minimum instream flows in the Skagit Basin were first established by Ecology in 2001. WAC 173-503. In 2006, Ecology amended the instream flow rule to set aside “reservations”—quantities of water approved for out-of-stream future uses, even though such uses would conflict with the 2001 instream flows. Ecology made a finding that OCPI justified these reservations, because the public would benefit from the substantial availability of water, while impacts to instream flows would be relatively

minimal. *Swinomish*, 178 Wn.2d at 578–79. The Court disagreed and invalidated the 2006 Amendment:

Ecology's Amended Rule, which made 27 reservations of water for out-of-stream year-round noninterruptible beneficial uses in the Skagit River basin and which would impair minimum flows set by administrative rule, exceeded Ecology's authority because it is inconsistent with the plain language of the statute and is inconsistent with the entire statutory scheme.

*Id.* at 602.

The Court explained that the OCPI exception “does not permit the Department of Ecology to reassess the relative merits of uses and reallocate water that is needed to maintain the instream flows through reservations of water for future beneficial uses.” *Id.*

The *Swinomish* opinion relates to the establishment of water reservations, but does not speak to the applicability of OCPI to individual water permit applications. Moreover, the decision did not analyze a detailed mitigation plan involving flow related and out-of-kind measures to offset impacts. Also, Yelm’s permit is for a single public purpose of use (municipal water supply) and from a single point of withdrawal. The proposed withdrawal was analyzed for potential impacts that are meaningfully addressed through mitigation. In stark contrast, the 27 wide-ranging reservations for future use invalidated in the *Swinomish* case

would occur year round and without any mitigation of environmental impact.

**3. The Language and Context of RCW 90.54.020(3)(a) Support the Application of OCPI to a Specific Water Right Application**

Where possible, a statute should be interpreted to give effect to the plain meaning of the language used, as that is the embodiment of legislative intent. *Dep't of Ecology v. Campbell & Gwinn L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). The pertinent language in RCW 90.54.020(3)(a) states as follows:

**Withdrawals of water** which would conflict therewith [with base flows] shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(Emphasis added.)

This plain language applies to “withdrawals of water” that would otherwise conflict with necessary base flows. In Washington law, the plain meaning of “withdrawal” is the taking or removal of water for specific application to a beneficial use. *Campbell & Gwinn*, 146 Wn.2d at 15–16. The Legislature uses the word “withdrawal” consistently throughout the Water Code to describe the permitting process necessary for using waters of the state. See RCW 90.44.050 (requiring a permit for a groundwater “withdrawal” ); RCW 90.42.040(2) (changes to “point of

diversion or withdrawal”); RCW 90.44.060 (requiring application to state specific location for “withdrawal” of groundwaters); RCW 90.66.040(8) (defining “withdraw” as “to withdraw groundwater or to divert surface water”); *see also* WAC 173-518-030, WAC 173-532-020, WAC 173-527-020, WAC 173-528-020 (defining “withdrawal” as the extraction of groundwater, or the diversion of surface water for beneficial use).

This is further apparent, as explained above, in the *Postema* decision, which repeatedly uses the term “withdrawal” to refer to the proposed appropriation of groundwater under authorization of a permit from Ecology. *Postema*, 142 Wn.2d at 76–78, 94. In its clearest sense, the way a prospective water user gains legal authorization to carry out a “withdrawal of water” is to apply for and obtain a permit from Ecology. Therefore, the express language of the OCPI statute necessarily applies when Ecology processes individual water right permit applications.

A key principle of statutory construction is that “[s]tatutes 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. Dep’t of Rev.*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). RCW 90.54.020(3)(a) unequivocally provides that withdrawals, even if conflicting with base flows, or minimum flows, “shall be authorized” in

the limited situation where “overriding considerations of the public interest will be served.”

Appellant appears to contend that the OCPI exception cannot “permanently impair instream flows,” but cites no authority that would distinguish “permanent” from other types of water permits. Appellant’s Brief at 16. This contention fails because nothing under RCW 90.54.020(3)(a) suggests that the OCPI exception is limited to temporary withdrawals or that overriding public interests can only be served if water use will be temporary and non-permanent. Appellant’s reading is contrary to the statute’s plain meaning. Appellant’s attempt to read terms (such as “temporary”) into a statutory provision that simply do not exist must be rejected.

**4. Ecology has Authority to Approve Out-of-Kind Mitigation, When Doing So is Supported by Various Provisions of the Water Code**

Appellant also challenges Ecology’s authority to consider out-of-kind mitigation measures, such as habitat enhancement, as provided in the Mitigation Plan. Appellant’s Brief at 14.

As an initial matter, this argument is not appropriate for review by this Court. 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.”<sup>8</sup>

Further, this argument about Ecology’s statutory authority was not presented to the PCHB, and therefore cannot be raised on judicial review. “Issues not raised before the agency may not be raised on appeal.” RCW 34.05.554. Appellant generally contested the “adequacy” of the Mitigation Plan at the PCHB, but she did not challenge Ecology’s underlying statutory authority to accept or approve certain categories or types of mitigation, such as “out-of-kind” mitigation, in the Mitigation Plan.<sup>9</sup>

If Appellant’s argument about out-of-kind mitigation is considered by the Court, her argument still fails. Ecology’s authority to consider water permit applications arises out of RCW 90.03.290, which provides that an application cannot be approved if it would “impair existing rights

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<sup>8</sup> The only mention of this argument at the superior court was in briefing submitted by amicus Center for Environmental Law and Policy (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).

<sup>9</sup> Appellant’s issue related to mitigation is stated as follows in the PCHB’s amended prehearing order: “Whether the City’s Mitigation Plan associated with Water Right No. G2-29085 is inadequate?” AR 000086–93.

or be detrimental to the public welfare.” Ecology has clear authority to condition permits as necessary to assure a water right will not impair other water rights or be detrimental to the public welfare. *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 597, 957 P.2d 1241 (1998) (“an agency which has authority to issue or deny permits has authority to condition them.”). Moreover, in situations where impairment is evaluated in considering whether the OCPI exception is warranted, it is appropriate for Ecology to consider a wide range of qualifying “public interests.” RCW 90.54.020(3)(a); *Swinomish*, 178 Wn.2d at 587–88 (“public interests” in the exception is not equivalent to “beneficial uses.”). Out-of-kind mitigation directly improves the ecological value of our public’s shared streams. As a matter of common sense, and the Legislature’s plain language, this serves the “public interest” of the OCPI exception. Accordingly, Ecology has implied authority under RCW 90.03.290 to consider whether out-of-kind mitigation conditions would reduce impairment of other water rights, or harm the public welfare.<sup>10</sup> Further, Ecology has authority under RCW 90.54.020(3)(a) to consider out-of-kind

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<sup>10</sup> In a recent decision (not involving OCPI) the PCHB ruled that “as a matter of law, out-of-kind mitigation is not per se unlawful.” *Okanogan Wilderness League v. Dep’t of Ecology*, PCHB No. 13-146, at 32 (Order on Motions for Summary Judgment, (July 31, 2014). In that decision, the PCHB pronounced that “[w]hile mitigation with like-quantity and quality of water is easily implemented, [RCW 90.03.290] does not limit the protection of rights to one form of mitigation. There is nothing in law that precludes mitigation with other than wet water. . . .” *Id.* at 31.

mitigation conditions in determining whether a water permit application qualifies for the OCPI exception.

**B. The PCHB's Decision Upholding The Approval Of The City's Water Permit Application Based On The OCPI Exception Was Lawful Under The Facts Presented In This Case (Issue No. 2)**

Because Ecology is authorized to apply OCPI in the context of water right permitting, the remaining question is posed by Issue No. 2: whether the OCPI authority was properly applied to approve the Yelm permit. The PCHB, "constru[ing] the OCPI exception narrowly," found that the limited use of OCPI was justified by the facts found by the PCHB after a full hearing. AR 001294-95. As described by *Swinomish*, OCPI is a narrow exception warranted only when **"extraordinary circumstances" are present.** *Swinomish*, 178 Wn.2d at 576 (emphasis added). The PCHB issued its Final Order before the *Swinomish* ruling, but it applied a "more stringent test" than was used by Ecology in the *Swinomish* scenario. AR 001291. As shown below, the Mitigation Plan meets the "extraordinary circumstances" standard.

As a threshold matter, it does not matter that the OCPI standard under *Swinomish* was established after the PCHB issued its ruling. "The process of applying the law to the facts . . . is a question of law and is subject to de novo review." *Tapper*, 122 Wn.2d at 403; *see also Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings*

*Bd.*, 160 Wn. App. 250, 259–60, 255 P.3d 696 (2011) (Once the Court authoritatively construes a statute, the legislation is “considered to have always meant that interpretation.”). Thus, all relevant legal authorities must be reviewed, including precedential cases like *Swinomish* where, despite the application of law to separate facts, the court is interpreting a common statute, RCW 90.54.020(3)(a), that is at issue in both cases.<sup>11</sup>

The unrefuted facts found by the PCHB show that the mitigation offered is both “excellent” and crafted in an unprecedented manner. AR 001285. The PCHB’s unchallenged findings show that net ecological benefits, coupled with other public benefits, are compelling enough to be considered “extraordinary circumstances” under the standard set in *Swinomish*.

**1. The Appellant Fails to Challenge the PCHB’s Findings and Conclusions Related to Net Ecological Benefits**

The PCHB considered expert testimony at trial and determined that Yelm’s municipal water needs, along with exceptional environmental benefits that will result from implementation of a “gold standard” mitigation plan (Tr. Day 2 256, 9–13), combine to justify the use of the OCPI exception. “The board concurs in the use of OCPI by Ecology

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<sup>11</sup> The Appellant applies the law “prior to *Swinomish*” and “post-*Swinomish*” under separate headings in her brief. Appellant’s Brief 16–22. Although there is nothing incorrect about considering both relevant law established before and after *Swinomish*, it is a distinction without a meaning because this Court’s de novo review is not limited to either.

because there is a net ecological benefit to the streams and rivers from the mitigation package as well as municipal water supply benefits.” AR 001294. Although Appellant objects to the use of OCPI to secure the benefits of public water supply, she raises no challenge to the bulk of the PCHB’s findings and conclusions, which describe the ecological benefits resulting from the Mitigation Plan. Nowhere in her brief does she contest the factual evidence in support of net ecological benefits (which was uncontroverted at hearing), or how such public benefits resulting from mitigation are significant and compelling for purposes of OCPI. The PCHB’s findings and conclusions related to key public benefits arising from mitigation are verities on this review.

The PCHB agreed with Appellant (and anticipated the *Swinomish* opinion) by concluding, on its own, that a municipality securing water to serve projected population growth cannot meet the high OCPI standard without something more. AR 001294. The PCHB concluded “the OCPI exception would not be sustainable were it based merely on the need to serve additional population.”<sup>12</sup> *Id.* Although Appellant takes issue with the value of public water supply benefits, she sidesteps the crux of the

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<sup>12</sup> Like the PCHB did in its own independent decision, the *Swinomish* court subsequently rejected any test that merely weighs the relative economic values of competing “beneficial uses.” *Swinomish*, 178 Wn.2d at 586–588 (rejecting the “weighing” of “benefits flowing from ‘beneficial uses’” as opposed to “public interests”); *Swinomish*, 178 Wn.2d at 600 (“economic gains alone to not justify using RCW 90.54.020(3)(a)”).

PCHB's decision as it relates to benefits to the environment: "[I]n any case involving the use of OCPI, the primary focus is on the mitigation that is being provided to offset the reduced flows." AR 001291. Appellant ignores the most important PCHB findings that show how Yelm's permit and Mitigation Plan provide extraordinary mitigation that meets the OCPI standard, where the 27 general future reservations of water in the Skagit Rule failed.

Instead, Appellant attempts to challenge Ecology's underlying *authority* to consider or accept out-of-kind elements as provided in the Mitigation Plan. Appellant's Brief at 14. However, as discussed above, her challenge to Ecology's authority to accept mitigation is outside the scope of this appeal and is without legal merit. The Mitigation Plan is a required condition of the Yelm water permit. The value of this mitigation—in particular, the magnitude of ecological benefits—must be considered by this Court to determine whether the OCPI exception should apply to the Yelm permit.

**2. Ecological Benefits That Will Be Realized From the Mitigation Plan Are Extraordinary**

The PCHB's findings and conclusions of law describe a mitigation plan that is both "excellent and effective" in addressing ecological needs. AR 001285. Yelm worked in concert with the cities of Lacey and

Olympia to develop a comprehensive plan to offset the predicted stream impacts. The Mitigation Plan was developed with the input of Ecology, the Department of Fish and Wildlife, the Nisqually and Squaxin Island Tribes, and other stakeholders. AR 001275.

The Mitigation Plan fully mitigates for “the majority of depletions to various affected surface water bodies” with water-for-water mitigation. AR 001283.<sup>13</sup> While the retired rights do not fully align with the time periods of closures and instream flows set by rule, the water-for-water mitigation will result in a net increase in water in-stream during fish-critical times. The Mitigation Plan will also increase fish productivity by enhancing habitat, adding vegetative buffers and acquiring riparian lands for stabilization. AR 001277, 79–80. This will serve non-flow needs that are vitally important for salmon recovery. These “out-of-kind” enhancements compliment the “water-for-water” elements in the Mitigation Plan. They ensure that, despite the few instances where water-for-water mitigation does not fully offset withdrawals, the Mitigation Plan will “clearly benefit fish and the hydrology of the water body” (AR 001285) and “provide a permanent and net ecological benefit to the affected streams.” AR 001292.

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<sup>13</sup> To the extent groundwater withdrawals are mitigated “water-for-water,” the permit will not impair instream flows. As such, the OCPI exception is only implicated where water-for-water mitigation is *not* available.

After making detailed factual findings, the PCHB concluded that the coordinated mitigation plan serves “as a substantial and compelling basis for Ecology’s OCPI determination.” AR 001283. The Yelm permit meets the narrow and stringent OCPI exception, as clearly exhibited in the hearing record, because of the wide-ranging environmental benefits developed by neighboring cities, tribes, and state agencies.

To attack the PCHB’s conclusion, Appellant relies on several erroneous conclusions in her brief. First, she claims the PCHB erred when it considered the relative size of stream impacts in applying the OCPI test to Yelm’s permit application. Appellant’s Brief at 21–22. Appellant argues that this is an insufficient basis for an OCPI finding. In this case, however, the degree of stream reduction relative to the amount of mitigation directly determines the significance of ecological benefits. Yelm’s minor impacts to streamflow, when coupled with the entire Mitigation Plan, yield the net ecological benefit that is so important in considering whether an OCPI exception is justified.

Second, Appellant asserts that Ecology’s test should be rejected because it “favors out-of-stream water rights to serve future growth” and “fails to give effect to the Legislature’s determination to protect and preserve instream resources.” Appellant’s Brief at 20–21. But the PCHB found that this **does** protect and preserve instream resources; this is not a

simple case where the value of water use outweighed the value of water in stream. Because Yelm's Mitigation Plan addresses and offsets any potential adverse impacts to the instream flow water right, the "instream resource" is protected—in fact, it is enhanced.

Finally, the findings show that Yelm's application does not favor one beneficial use over another, or involve any "wide-ranging reweighing or reallocation of water" deemed problematic in *Swinomish*. *Swinomish*, 178 Wn.2d at 585. To the contrary, most of Yelm's Mitigation Plan directly allocates water back to the stream through water right transfers, reclaimed water, and acquisition of irrigation rights that are senior in priority to the instream flow. Thus, for the most important times of year, affected streams will actually experience more water than they did before. Then, when timing is an issue, the significant out-of-kind measures come into play. Finally, the findings show that it is only during shoulder seasons, or to cover periods of uncertainty, when potential impairment is expected to occur. In sum, OCPI is narrowly applied. Yelm's Plan is carefully crafted to improve the targeted needs of each stream. It removes broader impediments to successfully recovering salmon and promotes stream values deemed important by the Legislature.

**3. Net Ecological Benefits Are Compelling Because They Satisfy the Legislature's Goals and Intent Under the Water Resources Act**

Yelm's Mitigation Plan also meets the statutory authority as interpreted in *Swinomish* because it provides a wide range of benefits, including habitat benefits, which enhance the natural resource to a degree that goes *beyond* protection. Yelm's Mitigation Plan squarely fits within Ecology's directive from the Legislature that "[i]n managing the waters of the state, Ecology must protect, and where possible enhance, the natural environment." RCW 90.54.020(3); AR 001287.

By replacing and enhancing environmental values through mitigation, Yelm's water right follows two significant tenets of *Swinomish*. First, an array of benefits, including ecological benefits, demonstrate a depth and breadth of OCPI that exceeds the balance of "beneficial uses" against environmental values found problematic by the Court. *Swinomish*, 178 Wn.2d at 586–87. Although *Swinomish* recognized that "[e]conomic benefits are undoubtedly of importance in allocating available waters for beneficial uses," it went on to find that economic gains cannot alone satisfy OCPI. *Id.* at 598–99. Yelm's water permit application, coupled with its robust Mitigation Plan that will provide net ecological benefits, serves the public interest beyond just the economic benefits that are derived from Yelm's out-of-stream water use.

The PCHB's findings and conclusions are consistent with the holding of *Swinomish*.

Second, taking steps to protect or enhance instream values addresses a fundamental goal of the Water Resources Act, which is to preserve the value of instream resources for future populations. The Court in *Swinomish* deemed the underlying goals and principles of the act to be of particular importance in limiting the OCPI power. *Id.* at 585 (interpreting RCW 90.54.010(1)(a) of the Water Resources Act of 1971),<sup>14</sup> Ecological benefits serve the Legislature's purpose for enacting the actual provisions that are at issue in this case, RCW 90.54.020(3) and the exception under (3)(a). RCW 90.54.020(3) directs "[t]he quality of the environment shall be protected and, where possible, enhanced as follows." Whether the broader directive under section (3) is achieved by protecting stream flows under subsection (3)(a), or the OCPI exception under the same subsection, ultimately the Legislature's underlying intent to protect the "quality of the environment" is satisfied. In fact, the exception as applied to Yelm's permit serves to satisfy the Legislature's highest aspirational goal to provide an "enhanced" quality of our shared environment.

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<sup>14</sup> RCW 90.54.010(1)(a) states: "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."

Yelm's permit embodies a narrow and incisive use of the exception. Without the OCPI exception, the permit does not comply with the instream flow rules because the withdrawal would impact protected stream levels. Since the Mitigation Plan protects the instream values (fish and habitat) **better than** would an instream flow alone, OCPI is justified. The PCHB found that "the values articulated in chapter 90.54 RCW are upheld" by the Mitigation Plan. AR 001294. This is consistent with the principles and language of the *Swinomish* decision.

Finally, Ecology's use of OCPI, as upheld by the PCHB, gives meaning to the OCPI statute while following the general rule of thumb that "statutory provisions are narrowly construed in order to give effect to legislative intent." *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999). Moreover, approving an individual permit that offers an extraordinary and unprecedented package of mitigating actions is not only a narrow exercise of authority, it is also a reasonable application of Ecology's scientific expertise which the agency is relied upon to exercise.<sup>15</sup>

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<sup>15</sup> *Port of Seattle*, 151 Wn.2d at 595 (deferring generally to Ecology's technical expertise in administering a statute); *see also Schuh v. Dep't of Ecology*, 100 Wn.2d 180, 667 P.2d 64 (1983) (deferring to Ecology's technical expertise in determining the "public welfare" in the context of a water right transfer decision).

4. **The PCHB's "Twelve Compelling Factors" Further Support OCPI and Show That Yelm's Permit is Both Extraordinary and Narrowly Crafted**

In addition to the uncontroverted net ecological benefits resulting from Yelm's Mitigation Plan, the PCHB found that several other compelling aspects of Yelm's permit application further supported the use of OCPI on the side of overriding public interests. These additional favorable aspects were summarized by the PCHB as follows:

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 water depletion was small, and the value of 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 an 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 maximized management of regional water resources** that crossed jurisdictional boundaries provided an additional benefit in this case.

AR 001294 (emphasis added): First, the PCHB properly concluded "municipal supply benefits" are compelling when taken in combination with environmental benefit. Appellant claims "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.” Appellant’s Brief at 24. This argument wrongly attempts to extend *Swinomish* beyond its holding without addressing the key distinctions between this case and *Swinomish*.

Municipal water supply benefits cannot simply be lumped with rural water supply, “a private use, generally speaking, not a public use,” as described in *Swinomish*. *Swinomish*, 178 Wn.2d at 587. Unlike rural water users with privately owned wells that are pumped without a permit under RCW 90.44.050, municipal water is public in nature and thereby beneficial to the public interest under OCPI. Under the Water Resources Act, “development of water supply systems . . . which provide water to the public generally in regional areas within the state shall be encouraged.” RCW 90.54.020(8). Thus, the Legislature clearly encourages regional water systems, such as Yelm’s, and considers municipal systems as serving the “public generally.” *Id.*

Second, it is significant that Yelm, along with interested tribes and state agencies, did not pursue OCPI as a solution from the beginning of the water planning process, but only relied on the exception as a last resort. “[T]he OCPI determination was made only after exhausting all available in-kind mitigation.” AR 001294. In other words, Yelm avoided as many

impacts as possible through water-for-water solutions and conservation before applying for an exception. This cautious and deliberate approach ensures OCPI is narrowly applied as an exception and not as a first resort.

Third, it is also significant that Yelm's water right application process involved multiple parties and local interests in a thoroughly coordinated manner. Involving important stakeholders and interested tribes early in the process ensures the public interest is ultimately served by a final plan. Moreover, mitigation that is consistent with adopted local watershed plans, furthers yet another legislative directive for Ecology to use watershed plans as "the framework for making future water resource decisions." RCW 90.82.130(4).

And fourth, Yelm was able to accomplish such exceptional results in large part because of the extraordinary approach it adopted in cooperation with neighboring cities. By pooling resources and coordinating efforts, the cities of Yelm, Lacey, and Olympia were able to more effectively leverage a more meaningful, feasible, and larger scale environmental plan that crossed jurisdictional boundaries. AR 001286. This situation exceeds expectations of an ordinary municipal water permit application because the cities went outside of jurisdictional boundaries in order to maximize water management on behalf of the public they serve.

Their joint effort allowed development of mitigation that none of the cities could have accomplished had they acted alone. AR 001273.

In sum, Yelm's permit application is unprecedented and narrowly crafted in its pursuit of collaboration, wide public involvement, and its exhaustion of other feasible options before relying on the OCPI exception. Yelm's permit meets the "extraordinary circumstances" standard in *Swinomish* because environmental and municipal benefits are impressively high, important ecological values are enhanced, and Yelm did it in a way that serves as a leading example outside of the norm.

**5. In Interpreting OCPI, the PCHB Applied a "More Stringent" Standard That Satisfies the Rule of *Swinomish***

As explained above, the PCHB's Final Order is the "agency action" reviewed in this appeal. The PCHB's decision to affirm Ecology's approval of Yelm's water right should be upheld because it effectively applied the high standard established in *Swinomish*.

As in *Swinomish*, the PCHB made clear that what has been described as Ecology's simple balancing test (or three-part test) is not, on its own, a stringent enough approach. AR 001290–91. The PCHB found that, in fact, Ecology considered and applied a number of additional factors beyond the three-part test. AR 001292. The PCHB ruled that these twelve factors, taken together, justify an OCPI determination.

AR 001294. “The very term ‘overriding consideration of public interest’ demands a more stringent approach before Ecology may, in effect, suspend rules which were carefully considered and adopted to protect a variety of values.” *Id.* The PCHB reasoned that “[i]f a simple balancing test is used, environmental values, including those set out by way of in-stream minimum flow and stream closure regulations, can easily be dismissed because people need potable water for their homes.” AR 001291. This is the very same reasoning used in *Swinomish*, where a similar balancing test was rejected because “[u]nder the balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values.” *Swinomish*, 178 Wn.2d 571.

Thus, the PCHB concluded that Yelm’s water right met the high OCPI standard only after Ecology demonstrated that the high bar was met through expert testimony and other evidence. In the end, **more** than a “simple balancing test” justifies use of OCPI in this case, as supported in the PCHB’s twelve factors that recognize net ecological benefits and other compelling facts. AR 001292. Unlike the facts in *Swinomish*, Yelm’s effective mitigation, developed with “sidebars and limitations,” led the PCHB to conclude “the values articulated in Chapter 90.54 RCW are upheld.” AR 001294.

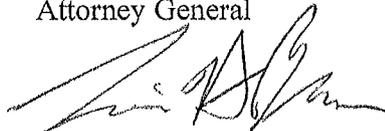
In sum, the PCHB properly evaluated the use of OCPI to affirm Ecology's approval of Yelm's water right. Its interpretation is narrowly applied stream-by-stream in Yelm's case, and is not relied upon to cover wide-ranging and year-round reductions in stream flows—the approach rejected in *Swinomish*. Its interpretation relies on Yelm's unique Mitigation Plan that provides net ecological benefits that coupled with municipal benefits clearly outweigh minor reductions of stream flows. The PCHB's decision to affirm OCPI should be upheld because Yelm's permit is both out of the ordinary and exceptional in terms of value, and thereby meets the "extraordinary circumstances" test.

## VII. CONCLUSION

For the foregoing reasons, Ecology asks the Court to affirm the PCHB's decision and uphold the validity of Yelm's water right permit.

RESPECTFULLY SUBMITTED this 24 day of September  
2014.

ROBERT FERGUSON  
Attorney General



TRAVIS H. BURNS, WSBA #39087  
ROBIN G. McPHERSON, WSBA #30529  
Assistant Attorneys General  
Attorneys for Respondents  
State of Washington  
Washington State Department of Ecology

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, I certify that on the 24th day of September 2014, I caused to be served Respondent State of Washington, Department of Ecology's Response Brief in the above-captioned matter upon the parties herein as indicated below:

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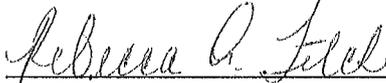
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of September 2014, in Olympia,  
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REBECCA A. FELCH  
Legal Assistant

# APPENDIX A

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

SARA FOSTER,

Appellant,

and

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

Appellant Intervenors,

v.

WASHINGTON STATE DEPARTMENT  
OF ECOLOGY; THE CITY OF YELM,

Respondent.

PCHB No. 11-155

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

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

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

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

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

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

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

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

2 [1]

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

10 [2]

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

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

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[3]

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

[4]

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

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[5]

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

[6]

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

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

7 [7]

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

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

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

4 [8]

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

14 [9]

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

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

7 *Gallagher Testimony.*

8 [10]

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

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

3 [11]

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

12 [12]

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

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1 [13]

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

12 [14]

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

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

5 [15]

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

14 [16]

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

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

2 *Boessow Testimony.*

3 [17]

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

10 [18]

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

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[19]

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

[20]

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

[21]

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

[22]

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

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

3 [23]

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

12 [24]

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

17 [25]

18 Any conclusion of law deemed to be a finding of fact is adopted as such.  
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**CONCLUSIONS OF LAW**

[1]

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

[2]

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

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'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?

[3]

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

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

13 [4]

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

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

6 [5]

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

15 [6]

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

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[7]

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

[8]

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

[9]

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

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

4 [10]

5 A stream closure is not an appropriation, but a determination by Ecology that the water  
6 instream is insufficient to meet existing rights and provide adequate base flows. A stream  
7 closure by rule indicates that Ecology has determined water is not available for further  
8 appropriation. Because water availability is a requirement for the granting of a new water right,  
9 a proposed withdrawal of groundwater in a hydraulic continuity with a closed water body must  
10 be denied if the withdrawal will have any effect on the flow or level of the surface water.  
11 *Postema* at 95. See also *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (2006).

12 [11]

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

19 [12]

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

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

6 [13]

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

15 [14]

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

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[15]

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

[16]

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

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).

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[17]

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

[18]

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

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.

RCW 90.54.010(1)(a).

1 [19]

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

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

- 1 8. The amount of water depletion was small so that there is no or only minimal impact  
2 to water resources.
- 3 9. Water can be added if feasible during critical times for fish, and should not be  
4 diminished during such critical times.
- 5 10. Stakeholders were bought into and supported the proposed project and mitigation.
- 6 11. Mitigation was consistent with adopted watershed plans.
- 7 12. Water conservation efforts will be utilized, which in this case includes the use of  
8 reclaimed water.

9 [20]

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

18 [21]

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

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

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

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

3 [22]

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

7 [23]

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

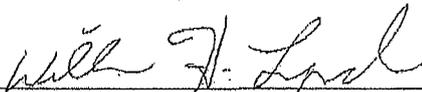
9 **ORDER**

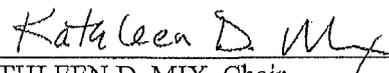
10 Water Right Permit No. G2-29085 issued for the City of Yelm is AFFIRMED with the  
11 following modification:

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

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

17 **POLLUTION CONTROL HEARINGS BOARD**

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WILLIAM H. LYNCH, Presiding

20   
21 \_\_\_\_\_  
KATHLEEN D. MIX, Chair

**OFFICE RECEPTIONIST, CLERK**

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Thank you.

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