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**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, and
DAVID STALHEIM, AND FUTUREWISE,

Petitioners,

v.

WHATCOM COUNTY AND WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Respondents,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
WASHINGTON REALTORS, BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON, WASHINGTON STATE FARM BUREAU,
SQUAXIN ISLAND TRIBE, CENTER FOR ENVIRONMENTAL LAW
& POLICY, AND WASHINGTON STATE ASSOCIATION OF
COUNTIES,

Amici Curiae.

**RESPONDENT WHATCOM COUNTY'S ANSWER
TO AMICUS CURIAE SQUAXIN ISLAND TRIBE AND CENTER
FOR ENVIRONMENTAL LAW & POLICY**

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I. INTRODUCTION

Whatcom County (“County”) submits this answer to the amicus memoranda filed by the Squaxin Island Tribe (“Tribe”) and the Center for Environmental Law & Policy (“CELP”) which focus on one, central issue in this case.¹ Contrary to the Tribe’s and CELP’s arguments, the County’s “rural measures” addressing availability of water supply comply with Growth Management Act (“GMA”) requirements to protect surface water and groundwater resources pursuant to RCW 36.70A.070(5)(c). The Court of Appeals correctly reversed the Growth Management Hearings Board’s (“Board”) holdings to the contrary.² The County has adopted a cooperative regulatory approach to water availability by incorporating Ecology’s instream flow rule for the Nooksack basin³ (the “Nooksack Rule”) into the County’s land use decision making. This approach requires consistency with water resources management and complies with the GMA.

CELP’s and the Tribe’s memoranda, like Hirst’s,⁴ fail to justify a different conclusion. They mischaracterize the County’s arguments and

¹ The County does not file an answer to the remaining amicus memoranda filed by the Washington State Association of Counties (“WSAC”), the Department of Ecology (“Ecology”), and the Washington Realtors, Building Industry Association of Washington, and Washington State Farm Bureau (the “Associations”) because those *amici* support the County’s position in this appeal.

² There are two decisions that are the subject of this consolidated appeal: the Board’s Final Decision and Order (“FDO”); and its Second Order on Compliance (“CO”). Each of the Orders includes a separate administrative record. We cite to the record from the FDO as “FDO CP” and the record from the CO as “CO CP.”

³ Ch. 173-501 WAC.

⁴ We refer to Petitioners Eric Hirst, Laura Lee Brakke, Wendy Harris, David Stalheim, and Futurewise collectively as “Hirst.”

use conclusory reasoning to advocate for a different policy outcome. Despite their disingenuous protests to the contrary, their arguments confirm that their real grievance is with the Department of Ecology (“Ecology”). Specifically, CELP and the Tribe disagree with how Ecology interprets and implements the Nooksack Rule and therefore seek to force the County to enforce their preferred interpretation of the Nooksack Rule. The GMA does not require this result. Instead, the County’s compliance with the GMA should be measured by whether its approach is consistent with Ecology’s regulatory program. Hirst, CELP and the Tribe should be required to pursue recourse for their grievance with Ecology in any number of avenues available to them under the Water Code⁵ and the APA. They should not be allowed to leverage the County’s GMA planning to seek changes in Ecology’s water resources management and policy, or to seek to graft onto GMA planning an impairment analysis for permit-exempt withdrawals that is contrary to the statutory exemption for those water rights.

II. STATEMENT OF THE CASE

The County incorporates the statement of the case included in the County’s Supplemental Brief.

⁵ We use the term “Water Code” to refer to the various statutes in Title 90 RCW that govern water resources, including: ch. 90.03 RCW; ch. 90.44 RCW; ch. 90.14 RCW; ch. 90.54 RCW; and ch. 90.22 RCW.

III. ARGUMENT

CELP and the Tribe's memoranda restate many of Hirst's arguments, which the County has already addressed in its supplemental brief and its briefs filed with the Court of Appeals. For the same reasons identified in the County's prior briefing and as explained in further detail below, the Court should agree with the Court of Appeals' well-reasoned and thorough decision and reverse the Board.

A. This Case Properly Focuses on the County's Incorporation of the Nooksack Rule.

As a preliminary matter, the Court should reject CELP's suggestion that the County "mischaracterizes" the central role of the Nooksack Rule to the disposition of this case.⁶ Contrary to CELP's suggestion, this issue and the associated briefing have focused on the meaning of Ecology's Nooksack Rule precisely because the purported deficiency the Board identified (based upon Hirst's specific challenge) was premised on the Board's erroneous understanding of Nooksack Rule and its erroneous legal conclusions about the ramifications of that incorrect interpretation on the County's GMA planning.⁷ The Board incorrectly concluded that the County's measures did not comply with the GMA because permit-exempt withdrawals occurred in areas governed by

⁶ CELP Memorandum at 3.

⁷ FDO CP 55 (Board concludes that County's measure "falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals); FDO CP 56-57 (Board concludes that "[i]f Ecology has closed a stream to additional withdrawals, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream"; therefore Board finds noncompliance because "ultimately, a building permit for a single residential well does not require the applicant to demonstrate that the groundwater withdrawal will not impair surface flows.")

the Nooksack Rule. *Id.* In other words, the Board's very measurement of GMA compliance on this issue was solely based on the Nooksack Rule and consistency with the past decisions of this Court related to permit-exempt withdrawals. Thus, the Board's decisions in this appeal framed the issues in this case, not the County's briefing.

In any event, CELP and the Tribe should not now be allowed to broaden the scope of the issues beyond what is properly before this Court or to assert a different or broader GMA deficiency than what Hirst argued below that formed the basis of the Board's decision. *See* RCW 36.70A.290; RCW 36.70A.320. And yet, that is exactly what CELP seeks to do when it suggests that the County's measures are insufficient outside of the areas governed by the Nooksack Rule or when it incorrectly suggests that the sum total of all of the County's measures is limited to the provisions that the Board found to be deficient.⁸ The County's measure incorporating the Nooksack Rule is the focus of the Board's erroneous conclusion. Because the purported flaw argued by Hirst and identified by

⁸ CELP Memorandum at 8 (implying that the County measures are deficient because they purportedly do not require a "determination of water availability for development, anywhere outside 'the boundaries of an area where DOE has determined by rule that water for development does not exist.'"); *id.* at 13 (suggesting the extension of the County's argument is "that any planning jurisdiction located in a watershed for which Ecology has not yet enacted an instream flow rule would have no responsibilities to evaluate water availability, or to even consider protection of water resources, in its planning for rural development"); *id.* at 5 n.5 (asserting that the totality of the County's measures require "only that a proposed private well 'not fall within the boundaries of an area where DOE has determined by rule that water for development not exist.'") (emphasis added). In prior briefing, the County has demonstrated its broader regulatory approach to water availability in the context of building permit and subdivision applications. *See* Opening Brief of Whatcom County, Court of Appeals Division I, 70796-5-I, at 16-17; Appendix at 16-23.

the Board in this case is the County's allowance of development in a manner that they allege is inconsistent with the Nooksack Rule, CELP cannot now turn that into broader exploration of what the GMA requirement means in other circumstances.

B. The GMA Requires a Cooperative Regulatory System in Which Counties Exercise Land Use Authority in a Manner Consistent with Ecology's Regulation of Water Resources.

Both CELP and the Tribe take up Hirst's false mantra that the County purportedly fails to assess the legal availability of water.⁹ Contrary to their suggestions, the County does regulate development relying on permit exempt withdrawals. The question is not whether the County assesses legal availability, but how. In the specific circumstances at issue in this case, the County prohibits new development premised on a permit exempt withdrawal in areas where Ecology has determined by rule that water is not available.¹⁰ Thus, the County follows Ecology's lead on the question of whether Ecology's Nooksack Rule limits new appropriations. The County evaluates development proposals relying on permit-exempt withdrawals, but because the instream flow rule does not legally preclude establishment of a permit-exempt withdrawal, according to Ecology, development that relies on that water source may proceed.

This is precisely the kind of cooperative regulatory approach the GMA envisions. This Court's decision in *Kittitas County v. Eastern*

⁹ See, e.g., CELP Memorandum at 8.

¹⁰ WCC 24.11.090(B)(3); WCC 24.11.160(D)(3); WCC 24.11.170(E)(3). The County attached these and other County regulations as Appendix C to its Supplemental Brief.

Washington Growth Management Hearings Board interpreted the relevant GMA provision as requiring consistency, and determined that Kittitas County's development regulations did not comply with the GMA because the County turned a blind eye in its regulation of land use and allowed land use applicants to "contravene" Ecology's management of water resources and "condone[d] the evasion of our state's water permitting law."¹¹ Implementing GMA regulations adopted by the Department of Commerce similarly require local regulations that are "consistent" with instream flow rules adopted by Ecology. *See* WAC 365-196-825(3).

This cooperative approach is analogous to what this Court has concluded the GMA requires in other contexts in which local jurisdictions are required to "protect" resources over which state agencies have particularized expertise. In the critical areas context, this Court has concluded that counties must follow recommendations of those state agencies unless they can build a robust scientific record that justifies their deviation from the agency's approach.¹² If the County can achieve compliance when adopting critical areas regulations by following recommendations of state agencies with expertise, this Court should not

¹¹ 172 Wn.2d 144, 177, 180, 256 P.3d 1193 (2011). While CELP and the Tribe, like Hirst, argue that Whatcom County's measures allow parties to contravene instream flow regulations, what they really mean is that the County's measures allow parties to contravene *their preferred legal interpretation* of the Nooksack Rule, which stands in contrast to Ecology's interpretation. However, Ecology contests their legal theory of instream flows. Again, this emphasizes that their main contention is with Ecology, not the County.

¹² *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 836, 123 P.3d 102, 108 (2005). *See also Ferry County v. Growth Mgmt. Hearings Bd.*, 184 Wn.App. 685, 740, 339 P.3d 478, 502 (2014).

require counties to ignore and even contradict the position of the state agency that has expertise over the subject matter when interpreting the obligation to “protect” water resources. Ultimately, and as described in *Ferry County*, the “central purpose of the GMA is to coordinate land use, zoning, subdivision, planning, development, natural resources, public facilities, and environmental laws into one scheme...” 184 Wn.App. at 727. Whatcom County has unambiguously incorporated Ecology’s expertise as the primary administrator of the water code into the land use planning process.

Even the provisions of the Water Code to which CELP and the Tribe cite reflect this need for a cooperative approach. Specifically, local governments should, “whenever possible” exercise their authority “in manners which are consistent with” state-directed water resources policy, underscoring the need for cooperative and consistent land use planning expressed in *Kittitas*, 172 Wn.2d 144. RCW 90.54.090 (emphasis added). The Tribe’s references to the state-led “comprehensive water resource planning” process under the 1971 Water Resources Act, chapter 90.54 RCW, more generally, also support the County’s approach. The regional-scale “comprehensive water resources planning” referenced in the statute is distinct from County comprehensive land use planning under the GMA and the Water Resources Act emphasizes Ecology’s central role in leading that planning process.¹³ Thus, the sections in chapter 90.54 RCW to

¹³ See RCW 90.54.030 (explaining Ecology’s role in the performance of the water resources program and development of the comprehensive water resource data program);

which the Tribe cites are directed at Ecology, and the provision directed specifically at local governments recommend that they act consistently.

Interpreting the GMA to require “consistency” between state and local regulation is not, as CELP contends, “deflecting” GMA responsibility or reading “the requirement to protect water resources out of the GMA,” nor does it render GMA provisions superfluous.¹⁴ The GMA requirement and the measures the County has adopted are important regulatory mechanisms. Indeed, without the regulations that require consistency, it is conceivable that land use applicants could proceed with land use development applications that contravene Ecology’s management of water resources, as occurred in *Kittitas* where there were no land use regulations requiring consistency with Ecology’s management of water resources. 172 Wn.2d at 179-80. The statutory scheme ensures that GMA planning and development regulations within the County’s land use authority work in concert with Ecology’s management of water resources.

Thus, the Court of Appeals in this case was correct when it concluded that the GMA requires “*consistent* local regulation by counties in land use planning to protect water resources” and that the County’s

RCW 90.54.040(1) (directing Ecology to develop and implement “a comprehensive state water resources program”); RCW 90.54.040(2) (directing Ecology “to modify existing regulations and adopt new regulations, when needed and possible,” to regulations align with water resource policy of the act and the water resources program). The statute envisions that local governments as well as Tribes can participate in that planning process. RCW 90.54.010(1)(b); RCW 90.54.010(1)(d).

¹⁴ CELP at 6, 17, 18.

measures satisfy that standard.¹⁵ The Supreme Court should affirm the Court of Appeals and reverse the Board on the same grounds.

C. The GMA Does Not Amend the Water Code or Authorize Counties to Usurp Ecology's Exclusive Authority Over Appropriations and Setting Instream Flows.

This Court in *Kittitas* acknowledged that both counties and Ecology must consider protection of water resources when exercising their respective authority, holding, with respect to counties, that the GMA requires counties to consider legal availability of water in their land use planning and permitting decisions.¹⁶ However, the GMA does not, as CELP and the Tribe suggest, authorize or require counties to go even further and usurp Ecology's authority over water appropriations. Yet that is precisely the result CELP and the Tribe pursue when they argue that counties should complete an impairment analysis of proposed permit-exempt withdrawals when assessing legal availability of water.¹⁷ Similarly, CELP suggests that the GMA sets up an independent obligation on counties to set restrictions that "protect base flows."¹⁸ The result advocated by the Tribe and CELP is inconsistent with the law.

¹⁵ 186 Wn.App at 51, 344 P.3d at 1265 (emphasis in original).

¹⁶ *Kittitas*, 172 Wn.2d at 178, 180.

¹⁷ Tribe Memorandum at 4 (Tribe argues that County's deficiency is that "the County will not ask whether the new junior groundwater use might impair senior instream flows and closed basins."); *id.* at 9 (Purported deficiency is that County does not ask "whether the groundwater pumped from a proposed building or subdivision could impact the flows of a fish-bearing surface stream with senior, unmet instream flows.").

¹⁸ Tellingly, while CELP suggests that the GMA requires protection of base flows, CELP cites only to the water code and not the GMA for that bold assertion. CELP at 14 (chapter 90.54 RCW); *see also* CELP at 15.

First, the approach urged by CELP and the Tribe would expand the County's regulatory role in a manner that would infringe on the exclusive authority established in the Water Code for these decisions. The mechanism for resolving whether one water right impairs another falls expressly within the auspices of title 90 RCW and is within the jurisdiction of a superior court (when addressing claims between existing water rights) or Ecology (when in the context of evaluating an application for a new appropriation).¹⁹ Similarly, CELP's suggestion that the GMA forces on the County the obligation to protect base flows beyond the mechanism adopted by Ecology infringes on Ecology's "exclusive" authority to "establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state."²⁰ To the contrary, this Court in *Kittitas* confirmed that Ecology "maintains its role, as provided by statute" as the "primary administrator" of the Water Code.²¹

Second, if the legislature intended the GMA to have that sweeping effect of expanding County authority into Ecology's exclusive authority established under the Water Code, it would have done so expressly. In fact, the Legislature considered but ultimately declined to include

¹⁹ *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 227-28, 858 P.2d 232, 237 (1993) (while Ecology has authority to investigate impairment in the permitting context, once a right has been issued, a "later decision that an existing permit conflicts with another claimed use and must be regulated necessarily involves a determination of the *priorities* of the conflicting uses" and "it is because of the complicated nature of such inquiries, and their far-reaching effect, that the Legislature has entrusted the superior courts with responsibility therefor") (citing RCW 90.03.110).

²⁰ RCW 90.03.247.

²¹ 172 Wn.2d at 178, 180.

language in the original GMA legislation that would have required Ecology to subject all new groundwater uses, including permit-exempt withdrawals, to a permit review process similar to the four-part test in RCW 90.03.290. See E.S.H.B. 2929, 51st Leg., Reg. Sess. (Wash. 1990). This result, which the Legislature rejected, is precisely what the Tribe and CELP seek here, except that their end goal is even more drastic, by seeking to hold local governments, rather than Ecology, responsible for such a review process. Nothing in the GMA or its legislative history supports that result.

Additionally, interpreting the GMA to yield a result contrary to that set forth in the Water Code would violate basic rules of statutory construction. When reconciling multiple statutes that address the same subject matter, this Court has held that “statutes which stand *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.”²² A statute’s plain meaning is “discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.”²³ Interpreting the vaguely worded GMA provision as requiring the County to perform an impairment analysis for permit-exempt withdrawals would contravene the policy choice the legislature made in the Water Code to

²² *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453, 457 (1974) (citing *Champion v. Shoreline School Dist.* 412, 81 Wn.2d 672 (1972)).

²³ *Dep’t of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

expressly exempt those same withdrawals from that very analysis. Indeed, CELP's and the Tribe's briefs all but admit that they are advocating for a different policy outcome, but they should not be allowed to pursue their policy preference (one that is inconsistent with the Water Code) under the guise of the GMA. It would also require reading the GMA to have implemented sweeping reform in the regulation of water resources, despite the fact that the GMA "is not to be liberally construed."²⁴

The question of what water limitations are needed to protect instream resources as well as the question of whether one water appropriation impairs another are precisely within Ecology's purview, not the County's. The Court must reject Amici's request, like those of Hirst, to expand County authority into those areas of Ecology's exclusive authority. While *Kittitas* requires consistent county planning, it does not require or allow the County to usurp Ecology's authority.

D. Amici's Interpretation of Ecology's Instream Flow Rule is Incorrect.

Despite their protests to the contrary, CELP's and the Tribe's real grievance, like that of Hirst, lies with Ecology and they should be required to pursue their grievance directly against the state agency. This is perhaps best reflected in the fact that the County would not need to change anything in its rural measures to accommodate the result the Tribe, CELP

²⁴ *Kittitas*, 172 Wn.2d at 155 (citing *Thurston County v. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 342, 190 P.3d 38, 44 (2008)). The Supreme Court explained that this rule is appropriate because the GMA "was spawned by controversy, not consensus." *Thurston County*, 164 Wn.2d at 342.

and Hirst seek, should those parties prevail in a direct challenge to Ecology's interpretation and implementation of the governing Instream Flow Rule. The question behind CELP's and the Tribe's claims is whether the Nooksack Rule prohibits new permit-exempt withdrawals. Ecology has concluded it does not, and the operative County rural measure therefore does not preclude development premised on those withdrawals. But if CELP and the Tribe (or Hirst) were to prevail or Ecology were to change its rule consistent with their preferred policy outcome, the very same rural measure would preclude development premised on permit-exempt withdrawals *without any amendment*. Because their claims seek to indirectly challenge Ecology's implementation of the Nooksack Rule, this Court should not allow the parties to litigate their grievance with Ecology in this GMA case about the County's rural measures.

The Court of Appeals properly decided that indirect challenge to Ecology's interpretation in Ecology's favor; however, this Court need not affirm the Court of Appeals' conclusion on the proper interpretation of the Nooksack Rule. It is sufficient to conclude that the County's measures, on their face, require consistency with Ecology's rules and to force CELP, the Tribe and Hirst to pursue any challenges to the meaning and extent of those rules in the proper forum.

Even if that issue were properly before this Court, CELP and the Tribe are wrong on the merits. Ecology's amicus memorandum explains the agency's proper interpretation of its Nooksack Rule, and those arguments are not repeated here. In their briefs, CELP and the Tribe

misstate governing principles of Washington water law to support their challenge to Ecology's interpretation. For example, CELP takes a position inconsistent with *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), when CELP argues that "water law treats permit-exempt wells consistently," regardless of the specific language of the governing instream flow rule. CELP at 14-15. In *Postema* this court concluded that there is no uniform interpretation of Instream Flow Rules, and that language that is different in each rule must be given operating effect.²⁵

Most notably, CELP and the Tribe obfuscate and conflate the distinction between the priority rule, by which existing senior water rights are protected from impairment by junior water rights, and the requirement to conduct an impairment analysis prior to approving a new appropriation of water. According to the Tribe and CELP, the failure to complete the latter necessarily violates the former.²⁶ The Tribe and CELP are wrong. Under the priority rule, a senior water right can seek recourse against junior water rights (including permit-exempt withdrawals) if the senior water right holder can demonstrate that the junior right is impairing the senior right. By contrast, the need to conduct a fact-specific, pre-approval

²⁵ *Postema*, 142 Wn.2d at 84, 87 ("Ultimately, we are unconvinced by the parties' arguments urging their respective versions of a consistent interpretation applying to all WRIAs); *id.* at 87 ("While there is some appeal to the idea that all of the rules should mean the same thing therefor, we too decline to search for a uniform meaning to rules that simply are not the same.").

²⁶ *See, e.g.*, CELP at 14-15 ("water law treats permit-exempt wells consistently, whether an instream flow rule includes language specific to permit exempt or relies on the prior appropriation doctrine alone to address such withdrawals ...").

analysis of whether a proposed new appropriation will impair senior rights is limited to new permits.²⁷ Permit-exempt withdrawals are expressly exempt from that permitting requirement. *Id.* Ecology's position on the distinction between the two has been consistent. The section of Ecology's brief from a different proceeding that the Tribe quotes addresses the priority rule and acknowledges that "a senior user is not without remedies should that senior user maintain that junior permit exempt uses are causing impairment."²⁸ However, Ecology is also correct in the confines of this case that a pre-approval impairment analysis is expressly not required prior to proceeding with a permit-exempt withdrawal. Thus, contrary to the Tribe's briefing, Ecology did not take "an entirely inconsistent position" in the earlier case. The Court should reject the Tribe's invitation to collapse the distinction made by controlling statutes and the decisions of this Court between the priority rule that allows a senior water right holder to seek recourse if the water right is impaired and the pre-approval impairment analysis from which permit-exempt withdrawals are expressly exempt.²⁹

Moreover, interpreting the GMA to include such a requirement would eviscerate the meaning of the exemption from the permitting

²⁷ RCW 90.03.290. *See also Campbell & Gwinn*, 146 Wn.2d at 16 ("[W]here the exemption in RCW 90.44.050 applies, Ecology does not engage in the usual review of a permit application under RCW 90.03.290, including review addressing impairment of existing rights and public interest review.").

²⁸ Tribe's Memorandum at 6 (quoting Ecology's brief in *Squaxin Island Tribe v. Wash. State. Dep't of Ecology*, 177 Wn.App. 734, 312 P.3d 766 (2013)).

²⁹ *See Rettkowski*, 122 Wn.2d at 227-28.

process. While the Tribe and CELP argue that an impairment analysis *should* be required as a matter of policy, those policy arguments do not change the law as adopted by the legislature.

CELP's error in its legal analysis influences CELP's characterization of purported "facts" that are not supported in the record. CELP asserts without any citation to the record that the challenged measures would allow the County "to issue enough building permits or subdivision approvals supported by permit-exempt wells to completely dewater hydraulically connected streams."³⁰ While there is evidence in the record of permit-exempt withdrawals in areas subject to the Nooksack Rule and evidence that instream flows are not met, CELP's underlying conclusion that those facts necessarily prove impairment is flawed. The evidence necessary to demonstrate impairment or dewatering is fact specific. The question is not whether an appropriation "might" impair instream flows, nor is demonstration of hydraulic continuity between groundwater and surface water adequate to demonstrate impairment.³¹ The Tribe and CELP cannot assume simply because permit-exempt withdrawals "might" be hydraulically connected to surface water that those withdrawals are impairing instream flows. Perhaps more

³⁰ CELP Memorandum at 8. Similarly, the Tribe describes the "steady, cumulative dewatering of fish-bearing streams by unregulated permit-exempt wells." Tribe at 1.

³¹ *Postema*, 142 Wn.2d at 93 ("We also reject the Board's holding that hydraulic continuity, where minimum flows are unmet a substantial part of the year, equates to impairment of existing rights as a matter of law... Additionally, we reject the premise that the fact that a stream as unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals").

importantly, evidence in the record is largely irrelevant to this question of law. This Court in *Kittitas* was presented with similar evidence but ultimately concluded that “this issue is fundamentally a question of law regarding how the GMA requires counties to protect water resources.” 172 Wn.2d at 181.

E. The Court of Appeals Gave Appropriate Deference to Ecology in Its Interpretation of the Nooksack Rule.

The Court should reject CELP’s assertion that the deference the Court gave to Ecology’s interpretation of its Nooksack Rule was inconsistent with the deference due the Board under the GMA. CELP obfuscates the distinction between the interpretation of the GMA provisions at issue and the contested meaning of Ecology’s Nooksack Rule.

First, CELP’s recitation of GMA deference largely ignores the deference owed to the County’s underlying action. The GMA requires the Court give deference to the County’s local planning choices, including “local government determinations regarding what measures will best protect rural character” such as the protective measures at issue in this appeal.³² In general, this deference to the County “supersedes deference granted by the APA and courts to administrative bodies in general.”³³ If the Board fails to give appropriate deference to the County’s planning choices, the Board’s decision is not entitled to any deference from this Court. *Id.*

³² *Kittitas*, 172 Wn.2d at 164.

³³ *Quadrant Corporation v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132, 1139 (2005).

More importantly, what deference is owed to the County or Board under the GMA is irrelevant here because the Court of Appeals only deferred to Ecology when interpreting Ecology's Nooksack Rule, rather than the controlling GMA provisions.³⁴ The Court of Appeals properly gave deference to Ecology's interpretation of its Nooksack Rule, rather than deferring to the Board's erroneous interpretation of the same regulation (over which the Board has no expertise).³⁵

CELP's argument about GMA deference again highlights that they are pursuing their grievances in the wrong venue. It would be absurd to resolve their challenge to Ecology's implementation and interpretation of its instream flow rule without giving deference to that very agency that wrote and administers the rule. As argued above, the Court need not decide CELP's, the Tribe's and Hirst's challenge to Ecology's interpretation of its instream flow rule because this is not the right forum for that appeal. Nevertheless, because those parties pursue their indirect challenge to Ecology's instream flow rule in this forum, the Court of Appeals below correctly deferred to Ecology in its interpretation of its own regulation, consistent with the provisions of the APA.

³⁴ *Whatcom County v. W. Wash. Growth Mgmt. Hearing Bd.*, 186 Wn.App. 32, 45, 344 P.3d 1256, 1262 (2015) (citing RCW 34.05.570(3)(d) and related case law).

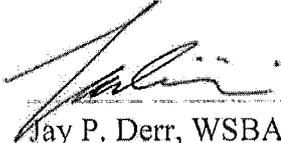
³⁵ *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659, 672 (2004) (in an appeal of a PCHB decision involving Ecology regulations, this Court gave deference to Ecology's interpretation of its rule over that of the quasi-judicial agency, "[b]ecause Ecology is the agency designated by the legislature to regulate the State's water resources... [and] it is Ecology's interpretation of relevant statutes and regulations that is entitled to great weight.").

IV. CONCLUSION

For the foregoing reasons, the County requests that this Court affirm the Court of Appeals below in reversing the Board's decisions that are the subject of this appeal.

Respectfully submitted this 6th day of October, 2015.

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No. 91475-3

**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, and
DAVID STALHEIM, AND FUTUREWISE,
Petitioners,

v.

WHATCOM COUNTY AND WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,
Respondents,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
WASHINGTON REALTORS, BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON, WASHINGTON STATE FARM BUREAU,
SQUAXIN ISLAND TRIBE, CENTER FOR ENVIRONMENTAL LAW
& POLICY, AND WASHINGTON STATE ASSOCIATION OF
COUNTIES,

Amici Curiae.

CERTIFICATE OF SERVICE

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I certify that I caused a copy of Respondent Whatcom County's Answer to Amicus Curiae Squaxin Island Tribe and Center for Environmental Law & Policy to be served on all parties or their counsel of record on the date below as indicated.

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



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Court and Counsel-

Please see attached for filing in Supreme Court No. 91475-3 Respondent Whatcom County's Answer to Amicus Curiae Squaxin Island Tribe and Center for Environmental Law & Policy and Certificate of Service.

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