No. 733150-I
(Skagit County Superior Court No. 14-2-00947-2)

SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD and MARNIE FOX, husband and wife,
Appellants,

v.

SKAGIT COUNTY, a municipal corporation, SKAGIT COUNTY BOARD OF HEALTH, an RCW 70.05 local board of health, DALE PERNULA, DIRECTOR of the SKAGIT COUNTY PLANNING AND DEVELOPMENT SERVICES and JENNIFER KINGSLEY, DIRECTOR of the SKAGIT COUNTY BOARD OF HEALTH AKA SKAGIT COUNTY PUBLIC HEALTH DEPARTMENT,

Respondents,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Richard and Marnie Fox ("Fox") petition this Court to accept review of the Court of Appeals decision identified in Part B of this petition.

B. THE COURT OF APPEALS DECISION

Fox requests this court to review the Court of Appeals, Division 1 opinion in *Fox v. Skagit County,* Docket No. 73315-0-I, filed April 11, 2016. A copy of this decision, terminating review, is attached as Appendix A. The Court of Appeals decision reviewed de novo and affirmed the trial court decision dismissing the Fox's writ of mandamus action without a factual hearing. This decision terminated review.

C. ISSUES PRESENTED FOR REVIEW

1. Is a rulemaking determination of hydraulic continuity enough, by itself, to conclude as a matter of law that a permit-exempt groundwater use is subject to the minimum instream flows and interruptible under WAC 173-503-040 and therefore an inadequate water supply under RCW 19.27.097?

2. Did the Court of Appeals err in ruling that Skagit County can impose a new requirement on building permit applicants, who otherwise qualify for the groundwater permit exemption, to either obtain a water right permit or prove legal water availability and non-impairment of instream flows?

3. Did the Court of Appeals err by determining, as a matter of law, that Fox's permit-exempt groundwater use would be junior in priority date to an instream flow water right, without a trial on factual issues concerning whether the priority date precedes the instream flow rule pursuant to the common law relation back doctrine?

D. STATEMENT OF THE CASE

1. Introduction.

The Supreme Court invalidated the 2006 Amended Skagit River Instream Flow Rule in *Swinomish Indian Tribal Cmty. v. Dep't of Ecology,* 178 Wn.2d 571, 311 P.3d 6 (2013). That ruling had the effect of re-codifying the 2001 Skagit River Instream Flow Rule, Ch. 173-503 WAC (the "2001 Skagit Rule") and causing a domino effect that led to this case. The Appellants, Richard and Marnie Fox, are the owners of a rural property in Skagit County who have been unable to get a building permit from Skagit County for a single family home because the 2001 Skagit Rule has been improperly interpreted and applied to permit-exempt wells since the *Swinomish* decision. Skagit County would not issue a building permit to Fox, ostensibly because their exempt well water right would be junior to the instream flow water rights at WAC 173-503-040, even though neither Ecology nor the County adopted rules or made findings that a permit-exempt use of Fox well would "impair" the Skagit River minimum instream flows. The courts below determined that Fox's well would be inadequate as a water supply for their home because it would be interruptible when

minimum flows were not met, and dismissed Fox's writ of mandamus action to compel the County to issue the building permit.

2. Storied History of the Skagit Instream Flow Rule.

Chapter 173-503 WAC has a storied history, beginning with a Memorandum of Agreement (MOA) in which the County, the Swinomish Tribe and Ecology negotiated and agreed that some exempt wells would not be subject to the Instream Flow Rule. (CP 125-126). The 2001 Skagit Rule was silent on express applicability to exempt wells, which prompted an APA challenge by the County to the 2001 Skagit Rule. A settlement of that APA lawsuit resulted in the 2006 Amendments to the Skagit Rule, including multiple reservations for future uninterruptible groundwater uses, including exempt wells, which was challenged by the Swinomish Tribe. The Supreme Court invalidated the 2006 Amendments to the Skagit Rule in *Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), on the basis that those reservations exceeded Ecology's authority to use the "overriding considerations of public interest" exception and were inconsistent with the prior appropriation doctrine. That invalidation resulted in the reinstatement of the 2001 Skagit Rule in its original form. Significantly, the County issued hundreds of building permits to rural residents of the county based on exempt well water supplies under both the

2001 Rule and the 2006 Amendments before the 2013 *Swinomish* decision. Following that decision, but with no other rule-making actions by Ecology or the County, the County added new requirements for approval of water supply adequacy for building permits, the legality of which are the subject of this case. (CP 273).

3. The Fox Writ of Mandamus Action.

Fox acquired the subject property in 2000 with the intention of building their home for retirement, and lawfully divided the property into two building lots in 2000 with a recorded short plat (CP 660), showing the location of groundwater wells. (CP 661). They submitted a building permit application to Skagit County in 2014 but the County refused to approve it, stating that it was "incomplete" and needed to document water availability pursuant to new requirements -- a letter from Ecology acknowledging that Fox's parcel has an approved water right or an approved mitigation plan. (CP 666). Fox submitted a legal opinion indicating they qualified for the statutory exemption and possessed a groundwater right senior in priority to the 2001 Skagit Rule, but the County refused to act on the application or consider it complete. (CP 668-731). On June 11, 2014, Fox obtained an alternative writ of mandamus to comply or show cause why the building permit should not issue. (CP 643). After service of the writ on Skagit

County, Ecology and the Swinomish Tribe intervened and contested issuance of the writ.

4. Decisions below.

The trial court (Snohomish County Superior Court Judge George F. B. Appel presiding after recusal by the Skagit County judges), directed submittal of briefs on mandamus legal issues, and denied Fox's motion to affirm the writ of mandamus. At the same hearing, the trial court essentially ruled on summary judgment that Fox failed to demonstrate that their exempt groundwater use would not reduce the flows of the Skagit River, dismissed the writ of mandamus action, and denied a reconsideration request. Fox appealed both decisions, raising seven assignments of error and six distinct issues.

The Court of Appeals, Division I, affirmed the trial court by a published decision dated April 11, 2016. The Court of Appeals decision concluded that "a permit-exempt well under RCW 90.44.050 is subject to the prior appropriation doctrine and therefore may be limited by senior water rights, including the instream flow rule." Accordingly, the Court of Appeals held that Fox's well may be interrupted, and concluded that water is not legally available for purposes of their building permit application as a matter of law.

There are three fundamental issues in this case that were ignored by the trial court and the Court of Appeals contrary to Supreme Court precedent and statutory mandates, and which have statewide implications for exempt well users in all twenty-nine basins with instream flow rules. First, the Court of Appeals decision is inconsistent with *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d 726 (2000) by allowing a blanket assumption of "hydraulic continuity" in the Skagit Rule (i.e., without any impairment findings) to justify denial of a building permit for a home relying on a permit-exempt use of groundwater. There is no evidence in the Skagit Rule or otherwise that Ecology ever closed the ground waters of the Skagit Basin by rule, and there is no finding in the Skagit Rule that new permit-exempt groundwater uses would impair the minimum instream flows. Richard and Marnie Fox were denied a building permit based only on assumptions that groundwater was hydraulically connected to the Skagit River, without any impairment findings in the rule.

Second, the new county requirements upheld by the Court of Appeals decision violate rulemaking requirements of the Administrative Procedure Act and are contrary to RCW 90.44.050 and *Hillis v. Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). They impose a new requirement not found in RCW 90.44.050, RCW 19.27.097, or the 2001 Skagit Rule that

exempt well users either obtain a water right permit or mitigation plan approval from Ecology, which is a new requirement of general applicability to those seeking to exercise their statutory rights under the groundwater exemption.

Third, even if the 2001 Skagit Rule applies to Fox's exempt well use under prior appropriation principles, the trial court and the Court of Appeals improperly dismissed the Fox's writ of mandamus action after ruling on Fox's motion on the mandamus legal issues. (CP 588-89); (CP 228). The dismissal was based on the courts' conclusion that Fox's permit-exempt groundwater right would necessarily be junior to the Skagit River minimum instream flows as a matter of law. The trial court and Court of Appeals agreed that common law applied to determine the priority date, but they misapplied the relation back doctrine articulated in *Hunter Land Co. v. Laugenour,* 140 Wash. 558 (1926) to Fox's well. Fox was denied a trial regarding the priority date of his permit-exempt water right, despite issues of fact whether that right "related back" to a date prior to the 2001 Skagit Rule.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Appellants seeks review pursuant to RAP 13.4(b)(1) and (4) where the Supreme Court will accept a petition for review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or …
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals decision is in conflict with decisions of the Supreme Court and Court of Appeals.

a. The Court of Appeals decision that permit exempt water uses are "subject to" the 2001 Skagit Rule and interruptible as a matter of law is contrary to the Supreme Court's decision in *Postema v. PCHB* that hydraulic continuity is not enough. Impairment findings are required to deny a groundwater permit or to limit exempt well water rights in favor of prior instream flow water rights.

WAC 173-503-060 must be read in light of *Postema v. PCHB*, 142 Wn.2d 68; 11 P.3d 726 (2001), where this Court rejected Ecology's argument that a finding of hydraulic continuity is enough to deny a groundwater permit. Hydraulic continuity is not enough by itself to deny a building permit based on an exempt well in this case. A finding of "impairment" of a minimum flow water right or of an effect on the flow of a closed stream is necessary to make junior exempt groundwater withdrawals subject to the Skagit Rule and interruptible to protect the minimum instream flows. *See Postema*, 142 Wn.2d at 93-95. The courts below erred by assuming that Fox's exempt well usage was subject to the Skagit Rule without a finding of impairment. There are no findings by Ecology in the 2001 Skagit Rule or otherwise that exempt ground water

uses would "impair" the instream flows, and no groundwater closure regulation in the 2001 Skagit Rule or under RCW 90.54.050.

WAC 173-503-040(5) provides:

> (5) Future consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, **and withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be expressly subject to instream flows established in WAC 173-503-040 (1) through (3) as measured at the appropriate gage, and also subject to WAC 173-503-060.** (Emphasis added).

The 2001 Skagit Rule was improperly interpreted by the County, Ecology and the courts below, to regulate future exempt groundwater uses solely on the basis of hydraulic continuity, not on any finding of impairment. WAC 173-503-060 provides that when "Ecology determines there is hydraulic continuity," withdrawals may be approved "subject to the [instream] flows," but does not address whether future permit-exempt wells would be regulated without findings of hydraulic continuity or impairment.

> **WAC 173-503-060. Ground Water.** If the department determines that there is **hydraulic continuity** between surface water and the proposed ground water source, a water right permit or certificate shall not be issued unless **the department determines** that withdrawal of ground water from the source aquifer would not interfere with stream flows during the period of stream closure or with maintenance of minimum instream flows. **If such findings are made**, then applications to appropriate public ground waters may be approved subject to the flows established in WAC 173-503-040(2). (Emphasis added).

In *Postema*, however, this Court held:

> "**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." 142 Wn.2d at 93. (Emphasis added).

The *Postema* holding is significant because it establishes a standard for determining when new groundwater appropriations are subject to, and interruptible for the protection of instream flow water rights. Hydraulic continuity was rejected as that standard because it is not enough by itself to prove impairment of existing rights as a matter of law under the code. Other facts relating to the source of the aquifer and its location relative to a surface water flow are relevant to findings of impairment. 142 Wn.2d at 40.

There is a significant difference between the Court of Appeals' holding that exempt well water rights are subject to prior appropriation, and whether senior instream flow water rights would be impaired as a matter of law. The Court of Appeals decision was erroneous and inconsistent with *Postema* because it found impairment from the Instream Flow Rule per se, not based upon any impairment findings. As such it attempts to rewrite the *Postema* decision and prior appropriation law by eliminating a central

requirement – that junior water rights can be regulated or application for permits denied if they impair senior water rights.

b. The additional requirement that Fox obtain a water right permit or Ecology-approved mitigation plan is inconsistent with RCW 90.44.050, *Hillis v. Ecology,* and the APA rulemaking requirements.

The County stated Fox's application was incomplete without "[a] letter or email from Ecology … [1] acknowledging [Fox's parcel] has an approved water right or transfer… [or] [2] an approved mitigation proposal," or "a submittal of an Engineered Plan for a Rainwater Catchment System." (CP 666). There was no county ordinance or Ecology rulemaking adopting this requirement. In effect, this new requirement was tantamount to requiring Fox to obtain a water right permit or its equivalent in a mitigation plan, i.e., to demonstrate to Ecology that their groundwater usage would not impair the instream flows.[1]

Unlike applications for water right permits under RCW 90.03.290, permit-exempt groundwater rights by definition do not require individual "impairment" or "availability" findings. They are presumed to be available as a water supply for new homes under the plain meaning of RCW

[1] Ecology, without rulemaking and only through its legal counsel, sent an email to Skagit County after *Swinomish v. Ecology* was decided in October 2103 that directed the County to stop issuing building permits that rely on the exemption. CP 273. Skagit County did not update its development regulations before enforcing this requirement.

90.44.050. The groundwater exemption is not limitless, however. Ecology could: (1) adopt administrative rules temporarily withdrawing groundwater to new permit-exempt water uses under authority of RCW 90.54.040-.50(2); or (2) amend the provisions of the Skagit Rule to establish that new permit-exempt wells in certain areas would impair the adopted instream flows. Ecology could also pass rules to implement the building permit application requirements of RCW 19.27.097[2] in consultation with the County. Rules under these provisions could also provide for mitigation or other alternatives for rural domestic water supplies. Ecology did neither of these things in the 2001 Skagit Rule or as a follow-up to the *Swinomish* decision. Thus, the Court of Appeals order affirming the trial court's dismissal of Fox's writ of mandamus leaves in place a new requirement of general applicability to those seeking to exercise their statutory rights under the groundwater exemption. This new requirement meets the definition of a rule under the Administrative Procedure Act, chapter 34.05 RCW ("APA"), but it is invalid for failure to comply with the APA rulemaking requirements and inconsistent with a prior Supreme Court ruling.

In *Hillis v. Ecology*, the petitioner alleged that procedures and priorities used by Ecology to prioritize water right application processing in

[2] RCW 19.27.097(3)

response to budget cuts were new "qualifications or requirements" relating to the benefit conferred by law. The Supreme Court held that while the requirements to actually acquire a water permit remain the four-part test requirements set out in the statute (RCW 90.03.290):

> [W]ater applicants have the right under the statute to have their application investigated and decided upon. RCW 90.03.290 creates this right. Therefore, when Ecology sets out priorities and establishes prerequisites to those decisions, the agency should engage in rule making so the public has some input into those decisions. 131 Wn.2d at 398.

In the present case, Fox has a statutory right to use less than 5,000 gallons of groundwater per day for domestic purposes without applying for a water right permit, i.e., without proving legal water availability, lack of impairment, or consistency with the public interest. RCW 90.44.050. This is the legislative balance struck when adopting the Ground Water Code in 1945[3], to exempt future users of small quantities of groundwater from the burden of applying for water right permits and satisfying the four-part test. The lower courts' holdings upset that balance, which has been relied upon by rural landowners like Fox for decades. *See Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 26, 43 P.3d 4 (2002).[4] By imposing a new

[3] RCW 90.44.035(3) amended definition of groundwaters in 1973 to include percolating.
[4] Footnote 7 of the majority opinion in *Campbell & Gwinn* indicates a concern that broader misuse of the exemption will decimate the permitting requirement. The Court of Appeals opinion in this case creates the opposite problem – its interpretation of the prior appropriation doctrine as subjecting all exempt wells to prior instream flow rules as a

requirement to either obtain a water right permit or to obtain a mitigation plan approval from Ecology, the County and Ecology were adding conditions to the use of a benefit conferred by law, which meets the definition of a "rule" requiring compliance with the APA.

The Court of Appeals disregarded Fox's rulemaking arguments, holding that "the County had the discretion to consider whether the instream flow rule prevented legal access to water in this case." That decision, however, allows counties to demand proof from exempt well users that they are not impairing instream flows, and adds procedural requirements relating to potential conflicts between permit-exempt wells and instream flow water rights. Just as in *Hillis*, the priority of water rights may be unaffected by this new requirement, but the procedural hurdles to obtaining benefit of the water appropriation system have improperly changed. The County and Ecology cannot impose these new requirements on the use of an exempt well without complying with the rulemaking requirements of the APA. The purpose of those requirements is plain and compelling – so the public, with proper notice, has input into those decisions. 131 Wn.2d at 399. Neither Fox nor any other rural property owner affected by the Skagit Rule were

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matter of law will decimate the exemption itself, eliminating it as a source of drinking water for rural homeowners who comply with, and have relied upon, the limits of the exemption.

consulted to provide input into these new requirements for determining water availability relating to permit-exempt wells, but they should have been.

c. The Court of Appeals decision conflicts with Supreme Court precedent because it misapplied the common law doctrine of relation back and ruled against the Fox's relation back priority date as a matter of law.

The Court of Appeals cited to *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002) for the proposition that water obtained from a permit-exempt well is treated as any other water right, including the "first in time" principle of prior appropriation. Treating exempt well water rights like other water rights includes the relation back doctrine of prior appropriation. When water right permits are issued under the Water Code, it is with a priority date that relates back to the date of application. RCW 90.03.340. This is the statutory version of the relation back doctrine. The groundwater permit exemption at RCW 90.44.050 is silent as to the priority date of permit-exempt water rights. Because there is no application for a permit-exempt groundwater right, common law relation back doctrine must apply to determine the priority date of an exempt well water right and the reasonable diligence required to preserve such priority date. *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 250 P. 41 (1926). The Court of Appeals acknowledged the common law of relation back priority dates, but

misapplied the rule to Fox, making the assumption that any water right developed by Fox's permit-exempt well would necessarily be junior to the 2001 Skagit Rule instream flows as a matter of law.

At common law, appropriative rights are established by "an intention to appropriate followed by reasonable diligence in applying the water to a beneficial use." *In re Rights to Waters of Alpowa Creek*, 129 Wash. 9, 13, 224 P. 29 (1924). If both elements are met, the date of priority of the right will "relate back" to the time work was first performed to appropriate the water. *Hunter Land*, 140 Wash. at 565. Skagit County and the courts below made broad assumptions without factual investigation that Fox's exempt well water right would necessarily be junior to the 2001 instream flows as a matter of law. In so doing, they failed to consider factual issues whether: (1) Fox's subdivision of their property in 2000 (including well site locations) was sufficient evidence of an intent to put groundwater to use on the property; and (2) whether Fox's actions to develop a well and apply for a building permit during the subsequent fourteen-year period was reasonable under the circumstances. Those circumstances included the legislatively-recognized "Great Recession" of 2008 and the County's unfettered practice of issuing building permits throughout the Skagit basin based on exempt wells until the *Swinomish* decision in October 2013. These

are questions of fact that should have been determined by the trial court instead of dismissing the writ action as a matter of law.

Issues of fact arising in a mandamus matter must be tried before the finder of fact.[5] Questions of fact remain concerning the Fox's relation back priority date and reasonable diligence, therefore dismissal of the writ action was improper and the case should be remanded to resolve those factual issues.[6]

2. The petition involves issues of substantial public interest that should be determined by the Supreme Court.

"The allocation of water rights in this state is of such great magnitude that we cannot tolerate a 'cheap and easy' solution." *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 225, 858 P.2d 232, 236 (1993). This case presents compelling questions regarding the interpretation and application of instream flow rules to permit-exempt water uses that should not be left to a court of appeals decision, or to cheap and easy solutions by the County or Ecology.

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[5] *See, Chief Seattle Properties v. Kitsap County*, 86 Wn.2d 7, 27 (1975) ("An application for writ of mandamus has in it all the elements of a civil action, and if issues of fact are raised, they may be tried before the court and an appropriate judgment entered upon findings").

[6] *Cf. Putnam v. Carroll,* 13 Wn. App. 201 (1979) (reversing trial court's dismissal on mandamus action for a building permit, remanding for a factual hearing on a shoreline exemption).

Who, for instance, is responsible for investigating and making findings regarding the effects of exempt well withdrawals on closed streams or impairment of instream flows when there is no requirement for a water right permit or the four-part test of RCW 90.03.290? In the absence of rule-making findings by Ecology regarding impairment or lack of availability of groundwater for permit-exempt uses, the Court of Appeals decision creates an enormous and unprecedented burden of proof for rural property owners to demonstrate that their permit-exempt groundwater use, even for a single home, does not impair instream flow water rights or have an effect on closed streams.

The Court of Appeals' broad conclusion that permit-exempt wells are subject to prior appropriation and thus subject to senior minimum flow water rights as a matter of law has the potential to be misread and misapplied to all twenty-nine basins with minimum instream flow rules, causing massive disruption to groundwater availability in rural areas throughout the state. The Supreme Court should accept review of this case to determine not only whether the Court of Appeals decision is a correct interpretation and application of the 2001 Skagit Rule and RCW 19.27.097, and whether different results may occur under other instream flow rules.

The Court of Appeals decision is unclear on this point and creates considerable uncertainty throughout the state.

The Supreme Court should also accept review of this case to determine whether additional rules need to be updated before exempt-well users can be required to prove legal water availability or non-impairment of instream flows. The public has a significant interest in being notified and consulted before such new requirements are imposed.

The Court of Appeals decision also makes broad assumptions that new exempt groundwater uses are necessarily junior to instream flow water rights and interruptible as a matter of law. The relation back of priority dates for permit-exempt wells is an issue of significant public interest, and is likely to be repeated in the Skagit Basin and other areas of the state where permit-exempt groundwater uses may conflict with senior rights, including minimum instream flows.

F. CONCLUSION

Fox respectfully petitions the Supreme Court to grant review of this case, for the reasons indicated in Part E., and to reverse the Court of Appeals decision and remand the case: (1) with instructions to issue the writ of mandamus; or (2) for a trial regarding the relation back priority date for the Fox's water right.

Dated: May 11, 2016

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Dated: May 11, 2016

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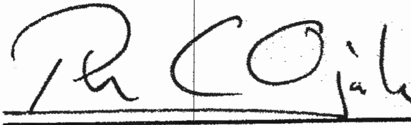

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