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, AND WASHINGTON STATE ASSOCIATION OF COUNTIES,

Amici Curiae.

AMICUS CURIAE BRIEF OF
THE SQUAXIN ISLAND TRIBE

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I. INTRODUCTION

The Squaxin Island Tribe ("Tribe") respectfully asks that this Court accept review of the Court of Appeals' decision in *Whatcom County v. Hirst*, No. 70796-5-I ("*Hirst*") under RAP 13.4(b)(1) and (b)(4). To assist, the Tribe offers the following arguments.

II. IDENTITY AND INTERESTS OF AMICUS CURIAE

The Tribe's identity and interests is described in the Motion for Leave to File Amicus Brief attached hereto. The Tribe bases its participation on the impacts to its federally-protected rights. The Tribe's culture and economic well-being depends upon sustainable fisheries.

III. STATEMENT OF THE CASE

The Tribe concurs with and adopts the statement of the case set forth in the Hirst Petition for Review at pp. 3-8 (March 24, 2015).

IV. SUMMARY OF ARGUMENT

This Court should accept review of the Court of Appeals' decision under RAP 13.4(b)(1) and (4) because it conflicts with prior decisions of this Court, and this matter involves issues of substantial public interest. As to the former, the Tribe concurs with arguments presented by amicus Center for Environmental Law and Policy ("CELP"). As to the public interest, the *Hirst* decision ignored the statutory framework for counties that governs land and water use in rural areas, opting instead for an

inadequate substitute consisting of the Department of Ecology's ("Ecology") watershed regulations. Second, the Court of Appeals erroneously deferred to an Ecology amicus position that contravenes the water code, and which is particularly concerning as Ecology took exactly the opposite position in other litigation involving a similarly worded WRIA rule. Finally, the public interest is implicated by county planning and regulation that is ill-informed and thus accommodates rural growth at the expense of fisheries.

V. ARGUMENT

A. The Court of Appeals Decision Conflicts with Prior Decisions of this Court.

The Tribe adopts the arguments presented by Petitioners Hirst and amicus CELP as to conflicts with this Court's decisions.[1]

B. The Decision Involves Issues of Substantial Public Interest.

1. The Court of Appeals Decision Ensures that Counties Will Continue Facilitating the Dewatering of Streams with Senior Instream Flow Rights, in Violation of the GMA and Other Statutes.

The Court of Appeals held that Whatcom County fulfilled its duties under the Growth Management Act ("GMA") merely by adopting

[1] These decisions are: *Postema v. Pollution Control Hr'gs Board*, 142 Wn.2d 68, 11 P.3d 726 (2000); *Swinomish Indian Tribal Comm. v. Dep't of Ecology,* 178 Wn.2d 571, 311 P.3d 6 (2013); and *Kittitas County v. Eastern Washington Growth Management Hr'gs. Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011).

Ecology's rule for Water Resource Inventory Area ("WRIA") 1 into its comprehensive plan. *Hirst v. Western Washington Growth Management Hearings Board,* _ Wash.App. _, 344 P.3d 1256, 1262-71 (2015). The immediate effect of this decision is to provide counties with a shortcut around comprehensively planning and regulating, as the GMA requires, to ensure water availability while preventing permit-exempt wells from dewatering fish-bearing streams in rural areas. Counties should not be encouraged to keep sanctioning the proliferation of new unregulated permit-exempt wells at the expense of nearby fish-bearing streams with senior instream flow rights. The appeals court's decision ignored the governing statutory framework and instead erroneously relied on Ecology's often-defective WRIA regulations as a means of meeting counties' GMA obligations.

The problem of proliferating and unregulated permit-exempt wells in rural areas is a real one. In many cases, these new wells are hydraulically connected to fish-bearing streams. *Postema*, 142 Wash.2d at 76. When they pump and intercept groundwater that is hydraulically connected to and should[2] feed a stream with senior instream flows,

[2] If the stream has pre-existing instream flow rights, then those are senior to the well and trump the junior water rights. RCW 90.03.010; RCW 90.03.345; RCW 90.44.030. Instream flows established by rule are water rights with priority dates of the rule's adoption. *Id.*

dewatering occurs that is particularly harmful during the drier months when salmon spawn. *See id.* at 112. While the impact of one or several permit-exempt wells on a stream is usually small, scores or hundreds of them over time can have a cumulative impact. *See Chandler v. Ecology*, PCHB No. 96-35, 1997 WL 241278 (1997). The Tribe has the utmost concern that streams throughout its usual and accustomed fishing area not be dewatered and support healthy fisheries for future generations. Streams in South Puget Sound, the Tribe's usual and accustomed fishing area ("U&A"), are particularly dependent upon being fed by cold groundwater, as opposed to snowpack. *See Squaxin Island Tribe v. Washington State Dept. of Ecology*, 177 Wash.App. 734, 736, 312 P.3d 766 (2013). Accordingly, the Court of Appeals' decision imperils the interests of Indian tribes and the public.

The GMA recognizes the fish-surface flow connection.[3] It establishes planning and regulatory mandates, which the Tribe suspects most of Ecology's WRIA rules fail to meet.[4] It requires that comprehensive plans and development regulations protect rural character,

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[3] Low flows due to surface water diversions and groundwater withdrawals diminish fish runs by decreasing wetted habitat, increasing temperatures, impairing channel configuration, and exacerbating other water quality impediments – ultimately decreasing the quantity of fish that can be harvested from saltwater.

[4] Ecology's amicus brief lists only three WRIA rules that expressly regulate permit exempt wells. Amicus Brief at pp. 18-19 n. 16.

by mandating that rural land use and development be (1) consistent with protecting natural surface water flows, groundwater and surface water recharge; and (2) compatible with fish habitat. RCW 36.70A.011, .030(15)(g). And, the GMA requires that plans and regulations ensure the protection and enhancement of "the availability of water." RCW 36.70A.020(10). Accordingly, counties, in their long-term planning efforts and before approving new buildings and subdivisions, must ensure that water is both physically and legally available for the proposed use. *See* RCW 19.27.097; RCW 58.17.110; *Kittitas*, 174 Wash.2d at 179; WAC 365-196-825 (citing AGO 1992 No. 17). Legal availability means that the groundwater withdrawn will not interfere with a senior water right, whether an instream flow or consumptive use. AGO 1992 No. 17.

The Court of Appeals decision also subverts counties' related planning and regulatory duties under the 1971 Water Resources Act. These duties cannot be met simply by adopting an Ecology WRIA rule. Counties "shall, whenever possible" carry out their vested powers consistent with the Act. RCW 90.54.090 (emphasis added). The Act mandates comprehensive planning as a "high priority" "to ensure that available water supplies are managed to best meet both instream and offstream needs." RCW 90.54.010(1)(b). While recognizing a need to accommodate the water needs of a growing population, the Act also

requires protecting instream resources values for future generations. RCW 90.54.010(1)(a). It prohibits water withdrawals that conflict with base flows, except in narrow circumstances that do not include private domestic wells. RCW 90.54.020(9); *Swinomish*, 178 Wash.2d at 13. Finally, counties must administer programs involving water use with an eye towards the natural interrelationships of surface and groundwaters and the public interest. RCW 90.54.020(9), (10).

The Tribe has first-hand experience with WRIA rules that do not regulate permit-exempt wells, and the regulatory free-for-all. The Tribe in 2009, frustrated with the proliferation of unregulated permit-exempt wells in the Johns Creek basin near Shelton, petitioned Ecology under the APA to amend the WRIA 14 rule to expressly regulate permit-exempt wells, among other things. *Squaxin Island Tribe v. Washington State Dept. of Ecology*, 312 P.3d 766, 177 Wash.App. 734 (2013). The WRIA 14 rule establishes instream flows and closures[5] for 24 fish-bearing streams in Mason County. WAC 173-514-030, -040. It greatly resembles the WRIA 1 rule (as does the WRIA 13 rule, WAC 173-513-030, -040, which establishes the same for seven Thurston County streams) in that it does not

[5] A closure recognizes that water in the stream is insufficient to meet existing rights and provide adequate base flows. *See Postema*, 142 Wash.2d at 94.

expressly apply to permit-exempt wells.[6] The WRIA 13 and 14 rules encompass streams in a substantial portion of the Tribe's U&A.

Ecology, however, adamantly refused to amend the WRIA 14 rule to expressly regulate permit-exempt wells.[7] *Squaxin*, 177 Wash.App. at 738-739. Ecology ignored that many streams within WRIA 13 and 14 already had compromised flows when Ecology adopted the rules, including Johns Creek, the primary focus of the Tribe's lawsuit. *See* WAC 173-513-040(2), WAC 173-514-040(2). The Tribe explained that over 280 permit-exempt wells had been drilled in the small basin after 1984, the priority date for Johns Creek's instream flows, without Ecology or Mason County taking any regulatory or enforcement efforts. 177 Wash.App. at 737. Ecology's rationale for not amending the WRIA 14 rule was its stated priority of developing instream flow rules for new watersheds, rather than fixing existing rules. *Id.* at 747. Division 2 of the Court of Appeals upheld Ecology's rulemaking discretion. *Id.*

Accordingly, the Tribe fears that the Court of Appeals decision in *Hirst* perpetuates the regulatory free-for-all and planning vacuum that exists for land uses reliant on private wells in rural areas.

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[6] This is unsurprising because Ecology adopted the WRIA 1, 13 and 14 rules in the 1980's, when it was more preoccupied with surface diversions and permitted wells. *See Postema*, 142 Wash.2d at 88.

[7] In the instant case, Ecology's amicus brief seemed open to an APA petition to amend the rule, when in reality Ecology is not. Ecology Amicus Br. at p. 11 n. 12.

2. Ecology has Lost Sight of its Statutory Framework, to the Detriment of the Public Interest.

In the instant case, Ecology irresponsibly informed the Court of Appeals that since the WRIA 1 rule did not govern permit-exempt groundwater use, the rule's instream flows and closures "are not applicable to permit-exempt wells in Whatcom County." Ecology Amicus Br. at p. 11 (emphasis added). Although this statement directly conflicts with the statutory scheme, the Court of Appeals implicitly agreed and deferred to Ecology's view. *See Hirst*, 344 P.3d at 1268, 1269. The court thus sanctioned impairment of senior instream flow rights by junior permit-exempt wells, unless a WRIA rule says otherwise (most do not).[8]

Ecology took exactly the opposite stance when defending its WRIA 14 rule against the Tribe's challenge. Ecology acknowledged that while permit-exempt uses "were not part of the [WRIA 14] Rule," the WRIA rule still complied with the statutory priority system because "[e]ven permit-exempt groundwater uses [...] are still 'appropriations' within the meaning of the water code" and "[a] water management rule cannot abrogate water law or the doctrine that regulatory instream flows constitute appropriations (water rights) that cannot be impaired by junior

[8] If Ecology follows the Court of Appeals' decision in its upcoming guidance for county water availability determinations, it will indicate that water is legally available throughout nearly the entire state. *See* http://www.ecy.wa.gov/programs/wr/wrac/rwss-wag.html

users." Exhibit 1: portions of Ecology Response Brief at pp. 40, 41. Ecology further stated, "[T]hose exempt uses, even though not part of the Rule, are still part of the priority system and a senior user is not without remedies should that senior user maintain that junior permit exempt uses are causing impairment." *Id.* at p. 44. Ecology denied that the WIRA 14 Rule implicitly allowed for impairment of instream flows by future permit-exempt rights. *Id.* at p. 45.

3. Counties Should Not be Excused From Ensuring that Water is Available for Development in Rural Areas Without Compromising Senior Instream Flows.

The *Hirst* decision contravenes the public interest by subverting the GMA's paramount purpose of fostering informed, long-term planning for rural land use and development that is compatible with sustainable fisheries. The decision only encourages "uncoordinated and unplanned growth" – exactly what the GMA disfavors. *See* RCW 36.70A.010.

Moreover, the lower court's decision exposes counties to legal risks when they approve building permits and subdivisions for which water use may later be curtailed to serve senior instream rights (see Skagit County). These risks only rise with the predicted water scarcity that accompanies climate change. *Cornelius v. Washington Dep't of Ecology*, 182 Wash. 2d 574, 344 P.3d 199, 216 (2015). County inaction further increases the stakes when Indian tribes seek to declare and enforce their

federal reserved water rights to instream flows, which are both senior to state instream flows and often reserve more water. *See United States v. Adair*, 723 F.2d 1394, 1410, 1414 (9th Cir. 1983).

Finally, comprehensive plans and development regulations offer counties unique opportunities to coordinate with Ecology and creatively plan for long-term water availability in rural areas. These efforts can require and/or incentivize a local portfolio of alternative water systems (e.g., rainwater collection and sanitization systems) that result in no net loss to area surface waters. There is no reason that such plans and regulations cannot or should not require and/or entice mitigation, water conservation practices, metering, water use efficiency and using reclaimed water. *See* RCW 90.54.020(7).

VI. CONCLUSION

For the reasons set forth above, amicus curiae Tribe respectfully requests that this Court accept review of the Court of Appeals' decision.

Respectfully submitted this 22nd day of May, 2015.

Squaxin Island Tribe

Kevin Lyon, WSBA No. 15076
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EXHIBIT 1

NO. 42710-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SQUAXIN ISLAND TRIBE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, a State agency; TED STURDEVANT, Director of the Washington Department of Ecology, in his official capacity; CHRISTINE GREGOIRE, Governor of the State of Washington, in her official capacity; and MASON COUNTY, a municipal corporation and political subdivision of the State of Washington,

Appellants.

STATE'S OPENING BRIEF

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VIII. CONCLUSION 47

Court may review the Tribe's challenges to the 1984 rule. Should the Court reach the rule challenge claims, they should be rejected.

Counts 4 and 5 of the Tribe's lawsuit seek a declaration that WAC 173-514-030(4), WAC 173-514-030(6), WAC 173-514-060(2), WAC 173-514-070,[30] and WAC 173-514-010 are invalid.[31] Under both the APA and the Uniform Declaratory Judgment Act, the Tribe cannot meet its burden of demonstrating based upon the agency record that the challenged provisions of the Rule are invalid.

As explained at pages 19–20, above, the standard of review in effect in 1984 when Ecology adopted the Rule was former RCW 34.04.070(2). Under this rigorous standard, rules are presumptively valid and the Court may set aside a rule only if the Court concludes that it was adopted in excess of the agency's authority. This is not the case with any of the challenged provisions of the Rule.

1. WAC 173-514-030(4) and WAC 173-514-030(6) are valid.

The Tribe first challenges two subsections of WAC 173-514-030, which establishes instream flows for WRIA 14. The challenged subsections are (4) and (6).

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[30] The Tribe's Petition for Judicial Review challenges the section of the rule titled "Future Rights," which is WAC 173-514-070. The Tribe mistakenly refers to this section of the Rule in its Petition for Judicial Review as WAC 173-514-060.

[31] Ecology addresses the sections of the rule challenged by the Tribe in the order presented by the Tribe in its complaint. CP 19–22

WAC 173-514-030(4) states:

> Future consumptive water right permits issued hereafter for diversion of surface water in the Kennedy-Goldsborough WRIA and perennial tributaries shall be expressly subject to instream flows established in [the rule]... except from those exempted uses described in WAC 173-514-060 (1) through (3).

WAC 173-514-030(6) provides for the future use of groundwater in the basin:

> If department investigations determine that withdrawal of groundwater from the source aquifers would not interfere significantly with stream flow during the period of stream closure or with maintenance of minimum flows, then applications to appropriate public groundwaters may be approved and permits or certificates issued.

WAC 173-514-030(4) provides that future surface water uses will be subject to the established minimum instream flows, while WAC 173-514-030(6) ensures that future permitted groundwater uses also protect the integrity of the established flows. The Tribe states that both sections implicitly allow for the construction and operation of new permit-exempt wells that impair surface water rights established by the rule. CP 19–20. With respect to the second section, the Tribe takes issue with the standard set forth for future appropriations of groundwater (the "interfere significantly" standard). *Id.*

The question before the Court in assessing the Tribe's challenge to these two sections of the Rule is whether the challenged sections of the

Rule—enacted by Ecology in 1984—exceeded Ecology's statutory authority.[32] They did not. Ecology adopted WAC 173-514 under the authorities of chapter 90.54 RCW (Water Resources Act of 1971), chapter 90.22 RCW (minimum water flows and levels), and chapter 75.20 RCW (State Fisheries Code). *See* WAC 173-514-010. In adopting WAC 173-514-030(4), Ecology took an approach consistent with its authorities to adopt a rule that sets instream flows and regulates future surface water diversions that might interfere with those flows. Similarly, in adopting WAC 173-514-030(6), the agency outlined a standard for future permitted groundwater use in the basin that preserves the integrity of the adopted flows by ensuring that future groundwater uses *not be permitted* if they will interfere significantly with adopted flows.

A water management rule cannot abrogate water law or the doctrine that regulatory instream flows constitute appropriations (water rights) that cannot be impaired by junior users. *See*, e.g., RCW 90.03.010; RCW 90.03.345.[33] WAC 173-514-030(4) is expressly consistent with this doctrine, as future diversions are expressly made subject to the flows, while WAC 173-514-030(6) ensures that future permitted groundwater

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[32] The Tribe has not maintained that the provisions are unconstitutional or that they were adopted without compliance with statutory rulemaking procedures. *See* former RCW 34.04.070(4).

[33] Under RCW 90.03.345, regulatory instream flows are considered appropriations, or "water rights" with a priority date as of the date of the adoption of the flows.

uses are also protective of flows. Even permit-exempt groundwater uses under RCW 90.44.050 are still "appropriations" within the meaning of the water code, and exempt only from permitting.[34] To the extent the Tribe maintains that the Rule allows for junior groundwater rights, permit-exempt or not, to abrogate adopted flows in WRIA 14, the Rule does nothing that would limit any remedies available to a senior right holder with standing who claims impairment.

In challenging the validity of these sections of WAC 173-514-030, the Tribe seems to be suggesting that whenever a minimum instream flow in a basin is not met and area groundwater uses are in hydraulic continuity with the stream, then it can be presumed that groundwater uses are impairing the water right that is associated with the minimum flow. The Supreme Court rejected this argument in a 2000 case involving Ecology's denial of several groundwater applications due to hydraulic continuity with regulated surface water bodies. *Postema v. Pollution Control Hearings Bd.*, 142 Wn. 2d. 68, 11 P. 3d 726 (2000). In *Postema*, the Supreme Court held that "hydraulic continuity between groundwater and a surface water source with unmet minimum flows or which is closed to further appropriation is not, in and of itself, a basis on which to deny an

[34] A permit exempt use established under RCW 90.44.050 is considered a "right equal to that established by a permit issued under the provisions of th[e] chapter" to the extent it is used beneficially.

permit exemption. However, the Tribe can point to no provision in the law in 1984 (or now) that required exemptions unique to an instream flow (here those small surface water uses that were found not to have a measurable impact on instream flows) to be the same as the exemptions from groundwater permitting established in RCW 90.44.050.

As discussed above, those exempt uses, even though not part of the Rule, are still part of the priority system and a senior user is not without remedies should that senior user maintain that junior permit exempt uses are causing impairment. The Tribe cannot satisfy its burden of demonstrating that this section of the rule was adopted in excess of Ecology's authority.

3. WAC 173-514-070 and WAC 173-514-010 are valid.

The Tribe's final rule challenges are to two standard provisions of the rule. WAC 173-514-070 is entitled "Future Rights":

> No rights to divert or store public surface waters of the Kennedy-Goldsborough WRIA 14, shall hereafter be granted which shall conflict with the purpose of this chapter.

WAC 173-514-010 simply outlines the scope and authorities under which Ecology adopted WAC 173-514 in 1984:

> These rules apply to waters within the Kennedy-Goldsborough water resource inventory area (WRIA 14), as defined in WAC 173-500-040. This chapter is promulgated pursuant to chapter 90.54 RCW (Water Resources Act of 1971),

> chapter 90.22 RCW (minimum water flows and levels), chapter 75.20 RCW (State Fisheries Code) and in accordance with chapter 173-500 WAC (water resources management program).

As with other challenged provisions, the Court must determine whether Ecology adopted these provisions in 1984 in excess of the agency's authority. The answer, once again, is no.

WAC 173-514-070 simply provides that rights cannot issue that conflict with the purpose of the chapter, which is "to retain perennial rivers, streams, and lakes in the [watershed] with instream flows and levels necessary to provide protection for wildlife, fish, scenic, aesthetic, and environmental values, recreation, navigation, and water quality." WAC 173-514-020. The Tribe argues that the section "implicitly allows the construction and operation of both permit and permit exempt wells that affect or impair senior surface water rights." CP 21. This argument is without merit, as the section of the rule is simply a reaffirmation of the doctrine that instream flow rights are water rights that cannot be impaired. RCW 90.03.345. It in no way "implicitly" allows for impairment of those flows by future rights, as the Tribe speculates. Once again, the Tribe continues to pursue the false notion that whenever a minimum instream flow in a basin is not met and area groundwater uses are in hydraulic continuity with the stream, then it can be presumed that groundwater uses are impairing the water right that is associated with the minimum flow.