

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.

SQUAXIN ISLAND TRIBE'S MOTION TO FILE
AMICUS CURIAE BRIEF

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I. INTRODUCTION

Pursuant to RAPs 10.6 and 13.4(h), the Squaxin Island Tribe (“Tribe”), through its counsel Kevin Lyon and Sharon Haensly, respectfully moves this Court for leave to file an amicus curiae brief. The proposed amicus brief will assist the Court in deciding the issues presented in this matter. The amicus brief is submitted with this motion.

II. THE TRIBE’S INTEREST IN THIS MATTER

The Squaxin Island Tribe is a federally recognized Indian tribe located in this state. It bases its participation on the impact to its federally protected rights of the matters being considered in this case. Under the Treaty of Medicine Creek, the Tribe holds the right to fish on all runs that pass through its “usual and accustomed” fishing areas (“U&A”), regardless of where those fish runs originate. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The Tribe’s U&A includes all of Southern Puget Sound south of Tacoma Narrows. *United States v. Washington*, 384 F.Supp. at 378.

The importance of fish to the Tribe cannot be overstated. The Tribe’s culture and economic well-being depends upon sustainable fisheries. The Supreme Court characterized the treaty fishing right as being “not much less necessary to the existence of the Indians than the

atmosphere they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905). For the fish themselves, adequate stream flows literally are the “atmosphere they breathe,” for without sufficient water for spawning, rearing and migration, there will be no salmon. *See id.*

The Court of Appeals decision in this case will adversely affect streams throughout the Tribe’s U&A, since the Ecology water resource rule at issue in this case bears strong resemblance to two water resource rules that cover a significant portion of the Tribe’s U&A. WAC Ch. 173-501 (WRIA 1); WAC Ch. 173-513 (WRIA 13); WAC Ch. 173-514 (WRIA 14). The decision undermines state and local protections for instream flows needed to protect fish and fish habitat. The Tribe has a vital interest in ensuring state law provisions that require maintenance of adequate instream flows are honored and enforced. It also has an interest in ensuring that local planning for and regulation of water availability in rural areas is well-informed and protective of rural characteristics that include instream flows and fisheries, as the Growth Management Act requires.

The Court of Appeals decision directly implicates the Tribe’s interests.¹ Impairment of fish habitat and reductions in fish production

¹ The Tribe’s arguments raised in the proposed amicus brief rest solely on state law. The Tribe reserves all arguments based on its federally reserved rights and any other rights arising under federal law.

resulting from decreased flow will adversely affect the Tribe's economy, the livelihood of Tribal members, and the Tribe's culture.

III. THE TRIBE'S FAMILIARITY WITH THIS CASE

The undersigned counsel for the Tribe have read the Growth Management Hearings Board decisions, parties' briefs, Commissioner's rulings, and the Court of Appeals decision in this consolidated matter and are familiar with the record, issues and arguments set forth therein. In addition, the Tribe has consistently participated in other cases that have statewide impacts on the interpretation and application of state laws that address water resources, management and regulation. *See, e.g., Squaxin Island Tribe v. Washington State Dept. of Ecology*, 177 Wash.App. 734, 312 P.3d 766 (2013); *Squaxin Island Tribe v. Ecology and Miller Land & Timber LLC*, PCHB No. 05-137, 2006 WL 3389970 (2006); *Squaxin Island Tribe v. Pollution Control Hearings Bd.*, 148 Wash. App. 1040 (2009).

IV. SPECIFIC ISSUES TO BE ADDRESSED

The Tribe proposes to address the grounds under which this Court should grant discretionary review of the Court of Appeals' decision in this case, and specifically issue 1 as set forth in the Hirst Petition for Review.

**V. ADDITIONAL BRIEFING IS NECESSARY AND
WILL BE HELPFUL TO THE COURT**

The Tribe proposes to argue that this Court should accept review of the Court of Appeals' decision in these consolidated cases, as it (1) conflicts with statutes and prior Supreme Court decisions and (2) raises issues of statewide concern that have not been adequately addressed by the parties. RAP 13.4. As to former, the Tribe concurs with and adopts arguments presented by amicus Center for Environmental Law and Policy. As to the public interest, the Tribe believes that the following additional argument provided in its amicus brief will be both necessary and helpful to this Court as it addresses this important matter.

The Tribe can explain how the significance of this case extends far beyond the Nooksack River and basin, including into South Puget Sound. It will affect streams and rivers that flow throughout the State of Washington, since the appeals court has allowed counties to meet certain GMA planning and regulatory obligations simply by adopting Ecology's water resource rule (known as Water Resource Inventory Area, or "WRIA"). However, most of these WRIA rules – including those that cover areas within the Tribe's U&A – do not expressly regulate private wells that are exempt from the water code's permitting requirements (known as "permit-exempt" wells). *See* RCW 90.44.050. These permit-

exempt wells, if hydraulically connected to a stream, can dewater streams and their fisheries.

The Tribe can also offer additional perspective on the Court of Appeals having deferred to arguments presented in the Washington Department of Ecology's ("Ecology") amicus brief. Ecology took the position that permit-exempt wells, if not expressly regulated in the WRIA rule, are not subject to senior instream flow rights. This has statewide ramifications. Moreover, the Tribe will explain that Ecology took exactly the opposite position in earlier litigation against the Tribe.

The Tribe also has a unique interest in ensuring that the GMA, which governs local land use and regulation, and that the state's water laws, which govern water allocation and protect instream flows, are interpreted and implemented in accordance with the Legislature's intent. The Tribe has a federally protected right to take fish. Effective state and local governance in these matters is an important component in maintaining a meaningful federal right to take fish.

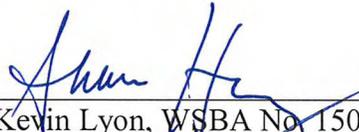
Finally, the Tribe seeks to share with the Court risks and missed opportunities associated with counties' failure to wisely plan for and regulate water availability in rural areas. The Tribe respectfully submits that additional argument will be useful to the Court in resolving this matter.

VI. Conclusion

For the foregoing reasons, the Tribe respectfully requests the Court's permission to file an amicus brief.

Respectfully submitted this 22nd day of May, 2015.

Squaxin Island Tribe



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