

No. 90386-7

SUPREME COURT OF THE STATE OF WASHINGTON

SARA FOSTER,

Appellant,

v.

WASHINGTON DEPARTMENT OF ECOLOGY, THE CITY OF
YELM, and WASHINGTON POLLUTION CONTROL HEARINGS
BOARD,

Respondent.

MOTION FOR RECONSIDERATION

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1. IDENTITY OF MOVING PARTY

Water is a resource for fish, irrigation, municipal and other purposes. The majority disregards that the resource is improved by the City's plan, in derogation of the Legislature's carefully crafted resource management laws. The City of Yelm ("Yelm") moves for relief identified in this motion pursuant to RAP 12.4.

2. RELIEF SOUGHT

Yelm seeks reconsideration and correction of the Court's majority opinion filed on October 8, 2015 ("Opinion").¹ The Opinion contravenes goals and policies in the Water Resources Act (Chapter 90.54 RCW) and Growth Management Act (Chapter 36.70A RCW) that govern protection of water resources and discourage uncoordinated and unplanned growth. The Opinion also fundamentally alters the regulatory effect of the Water Code, and lacks a sufficient legal basis for overturning Yelm's Permit.²

2.1 RECONSIDERATION

2.1.1 The Court's Opinion creates significant public policy conflicts among the Legislature's stated policy goals governing coordinated land use planning and water resources protection, as set forth more particularly in the Water Resources Act ("WRA") and Growth

¹ *Sara Foster v. Washington Department of Ecology, The City of Yelm, and Washington Pollution Control Hearings Board*, Slip Op. No. 90386-7, October 8, 2015.

² Permit No. G2-29085-P.

Management Act (“GMA”). The Opinion will set this state on a course that results in the proliferation of unpermitted, exempt groundwater wells as a means for addressing future public water supply demand, with greater resulting harm to the very resources the State’s instream flow rules seek to protect, and will encourage, rather than discourage, urban sprawl.

2.1.2 This Court held that the terms “withdrawal” and “appropriation” should be defined by “[r]eading the language of the OCPI exception together with the emergency drought provision in RCW 43.83B.410....” Opinion at 7-8. Yelm seeks reconsideration of the Court’s holding that the term “withdrawal” in the Overriding Consideration of Public Interest statute (“OCPI statute”) (RCW 90.54.020(3)(a)) should be construed such that it applies only to temporary withdrawals of water. Opinion at 9. This Court’s well established rules of statutory construction dictate that the Court should look, instead, to the Groundwater Code (Chapter 90.44 RCW) to inform and construe terms used in the OCPI statute. Yelm asks the Court to reconsider its sweeping holding and find that there is, in fact, no legal foundation to interpret the OCPI statute to apply only to “temporary” uses of groundwater.

Furthermore, the Court should refrain from clarifying the Opinion such that Court’s reasoning applies only when construing the OCPI

statute. For the reasons stated herein, any such clarification would be erroneous and contrary to the Court's rules of statutory construction, as over a dozen statutes in the Groundwater Code apply those terms interchangeably, and not in the manner determined by the Court.

2.1.3 This Court holds that "*Swinomish* and the plain language of the OCPI exception –specifically, “withdrawals of water”-largely resolves this case.” Opinion at 7. *Swinomish* supports Yelm's permit. Yelm seeks reconsideration of the Court's reliance upon the facts and holding in *Swinomish* as that case does not provide a legally sufficient basis for reversing the Pollution Control Hearings Board's (PCHB's) Order.³

3. FACTS IN THE RECORD RELEVANT TO THIS MOTION

For nearly two decades the City of Yelm (“City” or “Yelm”) has planned and worked towards meeting its obligations to plan for and meet its public water supply needs.⁴ The uncontested record shows that Yelm's population is projected to grow by over 11,000 residents between 2015 and 2029,⁵ yet the Yelm's water supply system can accommodate only 147 new connections.⁶ Yelm's State-approved Water System Plan

³ Clerk's Papers (“CP”) 00249.

⁴ CP 00142.

⁵ City of Yelm Water System Plan (2010), pp. 2-9, Table 2-10 Projected Residential Water Demand, PCHB Exh. Y-13.

⁶ CP 00138.

identifies a need for 1,836 acre-feet of water to serve forecasted needs through 2028.⁷ However, Yelm’s current water rights portfolio is only 894 acre feet, leaving a significant deficit of 942 acre-feet of demand.⁸

Yelm’s new water right permit would bridge this significant public water supply mitigating any impacts to instream resources, as confirmed by the Washington State Department of Fish and Wildlife (“WDFW”).⁹ The instream resources are enhanced, not diminished by the Permit.

Yelm’s Permit is conditioned upon implementation of a unique set of in-kind and out-of-kind mitigation actions contained in the City’s Mitigation Plan. This mitigation was developed based on a conservative hydrologic groundwater model; and was developed in cooperation with the Washington State Department of Ecology (“Ecology”), WDFW, the Squaxin and Nisqually Indian Tribes, and the cities of Lacey and Olympia, who obtain their public water supply from the same watersheds.¹⁰ These entities collaborated under the terms of the Watershed Planning Act, Chapter 90.82 RCW, to develop a comprehensive strategy for balancing competing demands for water, while at the same time, preserving and enhancing the future integrity of the watershed.

⁷ CP 00138.

⁸ CP 00138.

⁹ CP 00138.

¹⁰ CP00142.

The Court knows the record in this matter. Yelm’s Mitigation Plan¹¹ is considered by WDFW the “**gold standard**” of mitigation plans for water rights.¹² The PCHB and the Thurston County Superior Court determined that the “overriding considerations of the public interest” (“OCPI”) statutory exception was clearly satisfied.¹³

Appellant Sara Foster failed to support her Permit challenge in *Foster v. Department of Ecology and City of Yelm*, PCHB No. 11-155.¹⁴

In its Order upholding Ecology’s Permit approval, the PCHB went beyond the methodology used by Ecology to apply the OCPI statute, applying, instead, 12 “more stringent” factors that it held supported issuance of the Permit and supported Ecology’s use of the OCPI exception.¹⁵

Soon after the PCHB ruled, this Court issued its decision in *Swinomish v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013). In *Swinomish*, this Court recognized, as it did in *Postema v. Pollution Control Hearings Board*,¹⁶ that OCPI **was an exception to the rule that**

¹¹ City of Yelm Water Right Mitigation Plan, February 2011 (“Mitigation Plan”) CP 00183.

¹² PCHB Transcript (“Tr.”) 256:10-12.

¹³ CP 00272; Order Denying Petition for Review, Thurston County Cause No. 13-2-01080-9, May 16, 2014.

¹⁴ Findings of Fact, Conclusions of Law and Order, PCHB No. 11-155, 2013 WL 1294428 (March 18, 2013) (“Order”) CP 00249-274.

¹⁵ CP 00271-00272.

¹⁶ *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000).

water right permits could not impair senior instream flows or closures set by rule. The Court recognized that the OCPI statute was a “narrow exception.”¹⁷

The Appellant appealed the Board’s Order to the Superior Court. The Superior Court determined that the record and the unrefuted expert testimony supported the use of OCPI, that *Swinomish* did not, in fact, dictate reversal of the PCHB’s Order, and that the Appellant failed to meet her burden of proof under any standard of review set forth in RCW 34.05.570. Superior Court Tr. at 45:7 – 46:16.

4. GROUNDS FOR REQUESTED RELIEF AND ARGUMENT

4.1.1 The Court’s Holding Undermines the Legislature’s Stated Priorities Regarding Growth Management

While the Court’s Opinion is well intended, it would be a major setback for growth management in Washington. The most central mission of the Growth Management Act is to concentrate and direct population growth away from areas that have high resource and environmental values into urban areas that provide infrastructure to accommodate projected population growth. Accommodating population growth in cities protects farms and forests, advances salmon recovery efforts, and reduces

¹⁷ *Swinomish*, 178 Wn.2d at 584.

greenhouse gas emissions. Encouraging and concentrating urban development is an essential part of the State's environmental policy. Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 872–73 (1993).¹⁸

The Court acknowledges, municipal water needs “are common and likely to occur frequently as strains on limited water resource increase throughout our state.” Opinion at 11. The uncontested evidence in the record indicates that Yelm’s population is projected to grow by over 11,000 residents between 2015 and 2029,¹⁹ yet the Yelm’s water supply system can accommodate only 147 new connections. The uncontested evidence in the record also shows that Yelm has spent the last twenty years attempting to secure municipal water supply, and that no alternative source of water supply is available. However, the Court’s Opinion means that Yelm cannot accommodate the growth mandated by GMA. *See* RCW 36.70A.110(2). The decision also means that similarly situated cities and counties will not be able accommodate growth under the GMA. Without

¹⁸ “The central and most controversial policy of the GMA is to concentrate new development in compact urban growth areas contiguous with presently urbanized areas....[B]y minimizing the area devoted to development, land with environmentally critical qualities and commercially valuable natural resources can be protected and preserved....[B]y concentrating development in contiguous areas, public facilities may be provided more efficiently and with less environmental harm.”

¹⁹ City of Yelm Water System Plan, p. 2-9, Table 2-10 Projected Residential Water Demand; PCHB Exh. Y-13.

adequate municipal water supply, future growth will not occur within Yelm's Urban Growth Area ("UGA"), but elsewhere, in the unincorporated county on parcels that rely on permit exempt wells for water supply. This contravenes core concepts of GMA.

GMA simply does not mandate that local governments require an impairment analysis prior to approving development that relies upon an exempt well. Justice Madsen raised this issue during the *Hirst* oral argument, but requiring local governments to demand an impairment analysis is inconsistent with this Court's holdings in *Lewis County v. Western Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 504 fn. 12, 139 P.3d 1096, 1104 (2006); *Quadrant Corp. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005); *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002); and *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998).

The GMA cannot be liberally construed because the GMA was born out of controversy, not consensus. *Irondale Community Action Neighborhoods v. Western Washington Growth Mgmt. Hearings Bd.*, 163 Wn. App. 513, 262 P.3d 81, review denied 173 Wn.2d 1014, 272 P.3d

246.²⁰ The GMA does not have a liberal interpretation clause, and local governments are afforded deference in its application and weighing of the thirteen non-exclusive goals under the GMA.²¹ For these reasons, this Court has repeatedly stated that the goals of the GMA do not provide any affirmative obligation on local governments unless there are specific obligations within the substantive provisions of the GMA. *See Quadrant*, 154 W.2d at 246-247; *Stevens County*, 163 Wn. App. at 692 (“Quadrant reversed the superior court, holding the GMA goals do not themselves impose substantive requirements.”). To read an impairment analysis into the GMA is contrary to the plain language of the GMA, and is contrary to the decisions of this Court.

State law establishes a division of labor for accommodating population growth. Land use planning falls under the local government’s jurisdiction, while water resources falls under Ecology’s jurisdiction. This Court acknowledges that it is the duty of local governments to accommodate growth. *Spokane County v. City of Spokane*, 148 Wn. App.

²⁰ The Appellate Court in *Irondale* was correct. The GMA does not include a liberal construction clause unlike other statutes, such as the Shoreline Management Act.

²¹ RCW 36.70A.020 (establishing the GMA’s planning goals); RCW 36.70A.3201 (establishing deference to local governments). This Court may take judicial notice of GMA statutes and all regulations. *Gross v. City of Lynwood*, 90 Wn.2d 395, 397, 583 P.2d 1197 (1978) (“It is the general rule that public statutes of Washington State will be judicially noticed by all courts of this state.”); *See also* RCW 34.05.210(9) (“Judicial notice shall be taken of rules filed and published as provided in RCW 34.05.380 and this section.”).

120, 130, 197 P.3d 1228, 1233 (2009); RCW 36.70A.110(1), (2). This Court also acknowledges that Ecology is the appropriate agency to determine the existence of water rights and the availability of water, which includes completing an impairment analysis. *Rettkowski v. Dept. of Ecology*, 133 Wn.2d 219, 228, 858 P.2d 232 (1993). This is precisely what happened here. Yelm appropriately planned to accommodate population growth in conformance with the GMA, and Ecology appropriately applied OCPI. The Court should reconsider its decision eliminating OCPI as a limited, but available tool to assist Washington State in accommodating population growth in accordance with the GMA and the established application of Washington State water law.

4.1.2 The Court's Holding Undermines the Legislature's Stated Priorities Regarding Protection of the State's Water Resources.

The record includes unrefuted expert testimony on the significant adverse impacts to water resources in the Nisqually and Deschutes watersheds if Yelm is compelled to accommodate anticipated growth through reliance upon unpermitted, exempt wells. The expert testimony of Ecology's Senior Hydrogeologist demonstrates that far greater harm will result to affected water resources in the watersheds if Yelm's Permit is denied. Development for population growth will rely on exempt wells.

No evidence whatsoever exists in the record that the City retains other feasible options for securing 942 acre-feet of additional public water supply.

Ecology's Senior Hydrogeologist Mike Gallagher testified that 2,800 homes could be served under Yelm's permit with a total *mitigated* withdrawal of 942 acre-feet, as compared to the unpermitted and *unmitigated* withdrawal of 25,000 acre-feet by the equivalent number of homes relying on exempt wells. *See* RCW 90.44.050. Yet that is what the majority Opinion will cause.

The cumulative impact of an increased reliance upon permit exempt wells includes the following: (1) the slow and cumulative dewatering of fish-bearing streams, (2) the steady diminishment of fish resources, including the recovery and protection of federally listed species, and (3) the uncontrolled, steady decrease in ground and surface water resources available to serve both existing and future agricultural needs and commercial and industrial development. These impacts will occur across the entire state as public water systems, particularly those located within one of the 26 watersheds statewide where instream flow rules are in effect,²² cannot secure adequate water rights to meet forecasted needs.

²² As of February 2013, instream flow rules were in effect in 26 of the State's watersheds. The Court may take judicial notice of these rules. *Gross v. City of Lynwood*, 90 Wn.2d 395, 397, 583 P.2d 1197 (1978) ("It is the general rule that public statutes of Washington

The very same resources that Appellant and amicus CELP seek to protect will, in fact, suffer greater harm as a result of legal and practical implications of the Court's holding. The Legislature provided OCPI as one, albeit narrow, tool for addressing water needs. The Court's Opinion removes this tool from the alternatives provided by the Legislature.

4.2 The Court's Holding Rests on an Erroneous Application of the Rules of Statutory Construction.

4.2.1 The OCPI Statute is Unambiguous on Its Face.

The plain language of the OCPI statute does not differentiate between temporary and permanent uses of water. Yet, the Court ignored the plain language of the statute and the well-established principles of statutory construction to reach an untenable conclusion that the phrase "withdrawals of water," relates only to temporary uses of water. Opinion at 9.

Many of the Court's opinions have held that if language in a statute is unambiguous, "we give effect to that language and that language alone because we presume the legislature says what it means and means what it says." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004); *See also, TracFone Wireless, Inc., v. Wash. Dep't of Revenue*, 170 Wn.2d 273,

State will be judicially noticed by all courts of this state."); See also, RCW 34.05.210(9) ("Judicial notice shall be taken of rules filed and published as provided in RCW 34.05.380 and this section.").

281, 242 P.3d 810 (2010); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002). As the Court readily acknowledges “[g]enerally “withdrawal” refers to the physical act of removing water. Opinion at 8. No further inquiry was necessary.

Even if the Court considered the phrase “withdrawals of water” ambiguous in the context of the OCPI statute, it should have followed this Court’s well-settled rules of statutory construction and examined the most closely interrelated statutes, namely the Groundwater Code (Chapter 90.44 RCW). *See Swinomish* at 581 (“We determine plain meaning from all that the Legislature has said in the statute and related statutes *which disclose legislative intent about the provision in question*”); *See also, Tracfone*, 170 Wn.2d at 281. Instead, the Court completely overlooked the Groundwater Code, the most closely related statutory scheme. Chapter 90.44 RCW.

RCW 90.44.060 largely resolves this issue. The statute provides:

RCW 90.44.060 Laws governing **withdrawal**.

Application for permits for **appropriation** of underground water shall be made in the same form and manner provided in RCW 90.03.250 through 90.03.340 as amended the provisions of which section are hereby extended to govern and apply to groundwater or **groundwater right certificates** and to **all permits** that shall be issued pursuant to such applications, and the

rights to the withdrawal of groundwater acquired thereby shall be governed by RCW 90.03.250 through RCW 90.03.340, inclusive, PROVIDED...

RCW 90.44.060 (emphasis added).

Thus, by the very title of the statute, each and every **“withdrawal,”** whether an **“appropriation of underground water,”** and **“all permits”** (whether temporary or permanent) **are all considered withdrawals** subject to **“Laws governing withdrawal.”**

To the extent the Court needed to look to other statutes at all, it should have examined the most closely related statutory scheme, the Groundwater Code, Chapter 90.44 RCW. Instead the Court erroneously looked to the chapter governing “Water Supply Facilities,” Chapter 43.83B RCW and Chapter 90.03 RCW. But Chapter 90.03 RCW, the Surface Water Code, fails to address or even reference groundwater withdrawals.

The language of the statute is clear on its face. The term “withdrawal” applies to all withdrawals, whether temporary or permanent.

4.2.2 The Court’s Holding Rests on the Erroneous Interpretation and Application of the Term “Withdrawal.”

The Court wrongly states that “...the plain language of the OCPI exception- specifically, “withdrawals of water” –largely resolves this

case.” Opinion at 7. However, the Groundwater Code, is replete with provisions that expressly undermine the Court’s holding.

As noted above, RCW 90.44.060, by its very title, sets forth “Laws governing withdrawals,” and, by its terms, regulates all withdrawals of groundwater, including “appropriations” and “all permits.” *See* RCW 90.44.060. And, of course, Yelm’s Permit is a groundwater permit. The following examples illustrate that the terms “withdrawal” and “appropriation” are, in fact, used interchangeably in the Groundwater Code, and not as the Court holds: RCW 90.44.070 (permits for “development **or withdrawal** of groundwater subject to limitations of pumping capacity”); RCW 90.44.080 (certification upon **perfected appropriation** of groundwater requires information **on means of withdrawal**); RCW 90.44.100 (holder of a **valid right to withdraw public groundwaters** may apply to amend permit or **certificate**); RCW 90.44.105 (“holder of a **valid right to withdraw** public groundwaters may consolidate that right” with an exempt right); RCW 90.44.110 (“permit or certificate of **vested right to withdraw and appropriate** public groundwaters” may be specified to avoid waste); RCW 90.44.130 (“prior appropriators are entitled to the preferred use of such groundwater and... enjoy the right to have **any withdrawals by a subsequent appropriator**”

of groundwater limited” to avoid impairment.”); RCW 90.44.220 (adjudication to determine rights of appropriators of groundwater or of surface water); RCW 90.44.230 (“In any determination of the right to **withdrawal of groundwater... judgment shall determine the priority of right and the quantity of water to which each appropriator** who is party to the proceedings shall be entitled...”); RCW 90.44.250 (“reports from each **groundwater appropriator as to the amount of public groundwater being withdrawn** and as to the manner and extent of the beneficial use.”); and RCW 90.44.520 (Any period of nonuse of a right to **withdraw groundwater** is deemed to be involuntary due to a drought or low flow period and such unused water is deemed standby or **reserved** water supply.) (Emphasis added).

The Court’s unprecedented interpretation is wrong; the legislature repeatedly uses the terms “withdrawal” and “appropriation” interchangeably. This erroneous legal interpretation undermines the first of the Court’s two stated bases for its Opinion.

4.2.3 The Emergency Drought Statute Is Neither Instructive Nor Controlling.

The need to construe statutes together to achieve a unified whole arises only when statutes are in pari material, that is, on the same subject. *See e.g., Hallauer v. Spectrum Propos, Inc.*, 143 Wn.2d 126, 146, 18 P.3d

540 (2001). However where statutes are unrelated, there is no basis for importing meaning from language in one statute into another. *See, e.g., Auto Value Lease Plan, Inc., v. Am. Auto Lease Brokerage, Ltd.*, 57 Wn. App. 420, 423, 788 P.2d 601 (1990).

The majority assigns great weight to a single, unrelated statute governing emergency drought declarations to support its reasoning that the phrase “withdrawals of water” pertains only to temporary withdrawals. Opinion at 9-10. But nothing in Chapter 43.83B RCW provides or even suggests that use of the term “withdrawal” bears any relationship to how that term is used in Chapter 90.54 and how that term is used extensively throughout the Groundwater Code. Thus, the Court’s sweeping conclusion that “Washington’s statutory scheme, analyzed as a whole, also supports this conclusion,” is erroneous and without legal foundation.

The Court’s reasoning is also directly contradicted by the Legislature’s clarification that the temporal extent of an emergency “withdrawal” of public surface and groundwaters, is authorized only on a “temporary basis.” See RCW 43.83B.410(1)(a). If the meaning this Court seeks to import into the OCPI statute were clear based on the mere use of the term “withdrawal” no such qualification would have been necessary in RCW 43.83B.410(1)(a).

In *Swinomish*, this Court clearly states that “resolving the meaning of a statutory provision concerning water rights almost always requires consideration of numerous related statutes in the water code.” *Swinomish* at 582 (citing *Postema*, 142 Wn2d. at 77-83, 11 P.3d 726). In construing the intent and purpose of the minimum flows statute and the prior appropriation doctrine, the *Postema* court properly focused on the Groundwater Code at Chapter 90.44 RCW. There was no reference whatsoever to Chapter 43.83B RCW. *See Postema* at 735 (citing RCW 90.44.030 and RCW 90.44.040). The Court’s reliance upon the use of the term “withdrawal” in a single provision in the Water Supply Facilities chapter finds no support in this Court’s decisions and does not overcome the more frequent and interchangeable use of the terms “withdrawal” and “appropriation” in the most closely related statutory scheme, the Groundwater Code.

4.3 The Court’s opinion in *Swinomish* Does Not Resolve This Case.

4.3.1 This Case Does Not Involve The Re-Weighing or Reallocation of Water Through Reservations

The Court concludes that “*Swinomish* and the plain language of the OCPI statute... largely resolves this case.” Opinion at 7. However, the Court ignores the fundamental factual differences between this case and

Swinomish, and relies on a truncated quotation in *Swinomish* to misapply that holding to this case.

The Opinion states that in *Swinomish* “we emphasized that the OCPI exception is not a wide-ranging reweighing or reallocation of water.” Opinion at 7 (quoting *Swinomish*, 178 Wn.2d at 585.) The Court uses this truncated quotation to justify its holding. The actual holding in *Swinomish* is that the OCPI exception is “not a device for wide-ranging reweighing or reallocation of water *through reservations for numerous future beneficial uses.*” *Swinomish*, 178 Wn.2d at 585. Unlike the 27 new reservations of water in *Swinomish*, Yelm’s application for a single point of withdrawal was analyzed through the use of conservative groundwater model that was tested, peer reviewed and supported by a mitigation package that, in the uncontested expert opinion of WDFW, fully mitigated the impacts of Yelm’s Permit on regulated streams. There was no such record of foundation in *Swinomish*.

There is nothing “wide-ranging” about Yelm’s Permit. Unlike, Ecology’s Skagit Instream Flow Rule Amendment, the Permit does not create dozens of new, unmitigated reservations of water.

Further, under the Court’s reasoning, every application for a groundwater permit in a basin where an instream flow rule applies would,

by definition, involve an inappropriate “reallocation” of water due to the mere existence of a minimum instream flow rule. This strained interpretation is not supported by this Court’s own holdings. In both *Postema* and *Swinomish*, this Court has held that OCPI statute operates as a valid, albeit narrow, exception to protection against *legal injury* to senior water rights, i.e., instream flows rules.

The instream flow rules in effect in the Nisqually and Deschutes watersheds, and in many watersheds throughout this state, do not prohibit all applications for future groundwater withdrawals. Water is available for appropriation based on the application of Ecology’s 4-part test, which includes application of applicable minimum flow rules. **As stated in *Postema*, the OCPI statute operates as a narrow exception to the prior appropriation doctrine and rules governing impairment of senior water rights, i.e., instream flow rules.** None of the Court’s previous opinions prohibit Ecology from applying the OCPI statute in the manner expressly authorized by the Legislature, i.e., as a narrow exception authorizing withdrawals of groundwater that may impair base flows.

The Opinion mischaracterizes *Postema* when stating “[o]ur cases have consistently recognized that the prior appropriation doctrine does not permit even de minimus impairments of senior water rights.”(citing

Postema, 142, Wn.2d at 90). *Postema* **did not** address whether the OCPI statute could authorize de minimis impairment of minimum flows. The Court examined the application of the prior appropriation doctrine and discussed impairment of senior water rights, i.e., minimum flow rights. The Court reasoned as follows:

Once established, a minimum flow constitutes **an appropriation with a priority date** as of the effective date of the rule establishing the minimum flow [RCW 90.03.345]. Thus a minimum flow right by rule is an existing right which may not be **impaired** by subsequent groundwater withdrawals. RCW 90.03.345; RCW 90.44.030. **The narrow exception to this rule is found in RCW 90.54.020(3)(a), which provides that withdrawals of groundwater which would conflict with base flows “shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.”**

Postema, 142 Wn.2d at 81.

This Court has never held that the OCPI statute cannot be applied to authorize withdrawals that are associated with a de minimis impairment of instream flows. Any such holding would render the entire OCPI statute superfluous. See *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) ([s]tatutes must be interpreted and construed such that all the language used is given effect, with no portion rendered meaningless or superfluous) (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). OCPI as provided

by the Legislature and previously held by this Court does not apply to only temporary withdrawals.

Not only does *Postema* squarely stand for the proposition that withdrawals that impair base flows may be authorized, the application of OCPI in this case is case is nothing like the Court rejected in *Swinomish*. There is simply no “end run” around the prior appropriation doctrine. The OCPI is a narrow exception that the legislature intended occupy an important place in the statutory scheme. That exception was fully met by the Yelm Permit.

4.3.2 *Swinomish* Restates The Same Exception to the Prior Appropriation Doctrine.

The Opinion erroneously states that “[i]n *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), we comprehensively analyzed the statutory provision and held that... withdrawals of water authorized under the statute **cannot permanently impair** senior water rights with earlier priority.” Opinion at 1-2. (emphasis added). However, the Court makes no such pronouncement in *Swinomish* and cites to no part of its opinion in support of this statement.

On no less than six occasions in its opinion the *Swinomish* Court recognized that OCPI, while a limited exception, permits impairment of minimum flows. On the very first page of the opinion, the Court states

“[t]his statutory provision [OCPI] allows impairment of instream flows when overriding considerations of the public interest are served.” *Swinomish*, 178 Wn.2d at 576. The Court repeats this, recognizing “[t]he exception is very narrow, however, and requires extraordinary circumstances before the minimum flow water right can be impaired.” *Swinomish*, 178 Wn.2d at 576. The Court finds again that “[a]lthough the term “minimum flow” does not appear in RCW 90.54.020(3)(a), we have already determined that the overriding-considerations exception is applicable to minimum flows.” *Swinomish*, 178 Wn.2d at 580.²³ This Court’s misstatement of its *Swinomish* holdings is abhorrent to the Court’s reasoned considerations and must be reconsidered and reversed.

4.3.3 Yelm’s Permit is Consistent With This Court’s Holding in *Swinomish*.

What informs this case is the *Swinomish* court’s pronouncement that OCPI is a “narrow exception.” Here, the PCHB properly recognized that the City and state agencies did not turn to the use of OCPI until it was clear that exhaustive efforts had been made by the City to mitigate impacts through water-for-water or in-kind mitigation.

In stark contrast to the facts in *Swinomish*, Ecology (in consultation with WDFW), found the Yelm Permit to provide “net

²³ The applicability of the OCPI exception to minimum flows is stated several more times in the Court’s opinion at 584, 585, and in its Conclusion at 602.

ecological benefits” as result of implementation of a mitigation plan, one that WDFW considered the “gold standard” of mitigation plans. There is no evidence to the contrary. The PCHB characterized the Plan’s effect as “substantial” and “compelling” and “a significant benefit to the public and the environment.”²⁴ These public interest considerations were notably absent in *Swinomish*. The Court is without any factual foundation to determine otherwise.

The plain meaning of the OCPI statute underscores that the PCHB correctly applied the statute consistent with *Swinomish*. The ordinary dictionary meaning of “overriding” is to “to prevail over.”²⁵ Here, the PCHB applied no less than 12 factors, many of them express statements of the public interest, to evaluate and support the use of OCPI. Order at 23; CP00271. The Board held that the Mitigation Plan served as a “substantial and compelling basis” for the OCPI determination. Order at 14; CP00262. The PCHB recognized that the *net* ecological benefits of the Mitigation Plan to those streams and rivers having minimum flows “prevailed over” the potential for small modeled flow depletions to those same resources.

²⁴ CP00262.

²⁵ *Merriam-Webster.com* (transitive verb 3a: to prevail over; Dominate). <http://www.merriam-webster.com/wdictionary/overriding> (last visited Sept. 23, 2014).

The Court states “[w]e find however, that the mitigation plan is largely irrelevant to the analysis.” Opinion at 11. In rejecting consideration of Yelm’s Mitigation Plan, the Court plainly disregards the plain language of the OCPI statute and refuses to address one of the most important public interest considerations at issue under OCPI, protection of water resources. Such sweeping rationale de-couples what the Court refers to as “legal injury” to a senior water right from actual consideration of the what were “net ecological benefits” to the very resources the Deschutes and Nisqually minimum flow rules seek to protect. The Court’s complete disregard of the many of the environmental benefits associated with Yelm’s application is simply unprecedented in the context of water rights permitting. The water resource is more than paper “senior water rights.” The majority Opinion finds largely irrelevant that the resource is improved not diminished by the Permit. This is an absurd result that the Court cannot let stand.

The City never argued, as the Court suggests, that the mere existence of extraordinary circumstances is achieved because of a critical need for public water supply. Opinion at 11. The Water Resources Act sets forth two, often competing, public interests, i.e., to provide “[a]dequate water supplies... to meet the needs of the state’s growing

population” and the acknowledgment that “[a]t the same time instream values and resources must be preserved and protected” for future generations. *See* RCW 90.54.010(1)(a). The Court’s reasoning, rejecting all consideration of Yelm’s Mitigation Plan, fails to weigh the very interests the legislature identified as being of paramount importance.

The ordinary dictionary meaning of “extraordinary” is “going beyond what is usual, regular or customary, exceptional to a very marked extent.”²⁶ Those terms precisely describe the *net* ecological benefit to the resource – affected streams and rivers – that will result as part of the City’s Permit. Meeting the City’s critical public water supplies while actually going beyond what is called for by the Legislature; creating *net* ecological benefits to water resources; and furthering other stated public interests of the Legislature fully satisfies the overriding considerations requirement. The Legislature never intended that OCPI never apply to municipal water providers. No such meaning can be derived from the plain language of the statute or the statutory scheme.

Because the foundation of the Court’s rests on an unsupported interpretation of term “withdrawals” in the statute, and the plain language of the statute and uncontested expert testimony supports the finding of

²⁶ *Merriam-Webster.com*. <http://www.merriam-webster.com/dictionary/extraordinary> (last visited Sept. 23, 2014).

overriding considerations of the public interest, the Court should reconsider the Opinion and hold, instead, that the Board correctly interpreted and applied the law in this case.

5. CONCLUSION

The City requests reconsideration; and, upon reconsideration an order affirming the lower court and PCHB.

RESPECTFULLY SUBMITTED this 28th day of October, 2015.

s/ Joseph A. Brogan

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on October 28, 2015, I caused to be served a copy of the Response to Appellant's Brief in the above-captioned matter upon the parties herein as indicated below:

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

DATED Wednesday, October 28, 2015, in Seattle, Washington.

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