



Washington State Legislature

December 2, 2013

The Honorable Jay Inslee

Dear Governor Inslee:

As you are undoubtedly aware, the Washington State Supreme Court recently issued a decision in the case of *Swinomish Indian Tribal Community v. Ecology*, Case No. 87672 (2013). This water law decision not only has significant impacts on the Skagit Basin but the entire state. We are committed to working with you, Ecology, and stakeholders to find a workable solution moving forward. However, we recognize that the issues involved are very complicated and controversial and may take some time to resolve.

In recent years, Ecology's instream flow rulemaking has created significant problems at the local level, including creating direct conflicts with local land use plans and establishing mitigation standards that cannot be met, even when mitigation funding is provided by the Legislature. While the ramifications of the decision can be determined and a solution can be crafted, we urge you to suspend all pending and new instream flow rulemaking so that Ecology and the Legislature can assess how the agency's rulemaking authority should be used.

In 2001, Ecology adopted an administrative rule establishing minimum flow rights for the Skagit River system. While drafts of the 2001 rule included water for rural development, the final rule did not. The 2001 rule was challenged by Skagit County in *Skagit County v. Washington State Department of Ecology*. Skagit County's legal challenge was based in part on the fact that the rule disregarded specific statutes that required continued access to water for certain uses. In 2006, to settle the case with Skagit County, Ecology amended the rule to establish 27 reservations of water, including reservations for domestic, municipal, commercial/industrial, agricultural irrigation and stockwatering, that were not subject to the senior minimum instream flow rights. The recent *Swinomish* decision invalidated the 2006 rule and amendments creating the reservations and reinstated the 2001 Skagit Instream Flow Rule. Under the 2001 rule, water rights established on or after April 14, 2001, are subject to curtailment when minimum instream flow rights are not being met.

As far as the implications for the Skagit Basin, we know that the effects of the decision are still being evaluated by Ecology as well as Skagit and Snohomish counties. There are obvious concerns, however, that are immediately evident. For the Skagit Basin, the decision could have severe impacts in at least two different areas. First, for homes and businesses that established groundwater rights in the Skagit Basin between April 14, 2001, and the October 2, 2013 relying on water from the 2006 rule, there is risk

of enforcement action against the water use at times when instream flows are not being met. Ecology estimates that there are approximately 475 homes and 8 businesses that could be subject to enforcement action. While we are pleased to hear that Ecology and the Swinomish Tribe have agreed at this time not to curtail water use for these users while solutions are developed and as long as these uses are fully mitigated, we are concerned that this agreement could dissolve at any time, especially depending on the length of time it takes to develop water supply solutions or if there is disagreement over mitigation.

Second, for new building permit and subdivision applications, counties are required to find that adequate water supply is available prior to issuing an approval. While the 2006 Rule explicitly provided legal water supply meeting these requirements, it appears that the 2001 Rule now in effect, does not. Now that the 2006 Rule is invalidated, it is unclear how county governments and Ecology will evaluate whether legal water supply exists under the 2001 rule. It is also unclear how Ecology will interpret the mitigation standards of the 2001 rule.

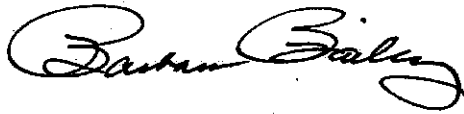
It is important to note that, prior to 2001, Ecology's instream flow rules simply retained existing exemptions for certain small water uses (instead of appropriating water for reservations). For instance, Ecology's *Instream Resources and Water Allocation Review - Draft EIS (1987)* summarizes this longstanding state position with regard to small domestic water supplies: "The Water Resources Act declares a broad range of out-of-stream and instream water uses to be beneficial, **requires** that the allocation of water among potential uses and users be based generally on the securing of maximum net benefits to the people of the state, and **requires** that adequate and safe supplies of water be preserved and protected in potable condition to satisfy human domestic needs (RCW 90.54.020). Given this context, the Act was intended to require a balanced assessment of water for the benefit of the public."ⁱⁱ

Ecology's 2005 proposals for amendment to the 2001 Skagit rule reflected a similar position: "A rule amendment is necessary to create a new administrative framework to allow new domestic water uses and limited stock watering, including those uses exempt from water right permitting, be used without interruption from the senior instream flow right. This is done in support of the goal of RCW 90.54.020(5) which requires that adequate and safe supplies of water be preserved and protected in potable conditions to satisfy human needs."ⁱⁱⁱ Similarly, in Ecology's *Responsiveness Summary* for the 2007 Walla Walla Instream Flow Rule, Ecology characterized the Legislature's domestic water directive as follows: "While setting instream flows is a major purpose of this rule, other legal objectives exist. One basic objective is to *ensure that adequate and safe supplies shall be preserved and protected to satisfy future human domestic needs.*" RCW 90.54.020(5)."ⁱⁱⁱⁱ

Despite the Supreme Court's *Swinomish* decision, it is not at all clear how the 2001 Skagit rule squares with statutory requirements and legislative directives protecting permit-exempt access to these small water users. Thus, we cannot overstate our concern regarding the legal uncertainty this decision has created and the negative impact this decision may have on economic viability in the Skagit Basin and elsewhere. Ensuring a legal, available water supply is imperative to the economy of the Skagit Basin and to many other basins across the state.

On a statewide basis, we understand the ramifications of the decision are still being evaluated. However, we understand that there are other basins that rely on the type of reservations that were involved in the *Swinomish* decision. The status of those reservations is now in question and could lead to litigation to challenge them. Because of this uncertainty, we think it is wise to take a time out from pending and future instream flow rulemaking so that the issues can be fully understood. During this time period, we are committed to working with you, Ecology, and stakeholders to develop water supply solutions for the Skagit Basin and elsewhere in Washington State.

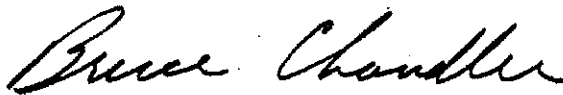
Sincerely,



Senator Barbara Bailey



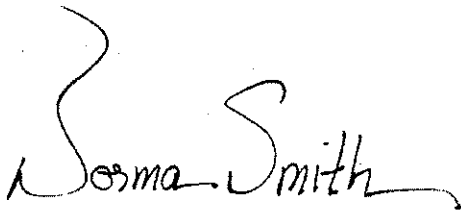
Senator Jim Honeyford



Representative Bruce Chandler



Representative Dave Hayes



Representative Norma Smith

cc: Maia Bellon, Director of Ecology

ⁱ <http://www.forestress.wa.gov/ecy/publications/publications/87900.pdf>

ⁱⁱ <http://apps.leg.wa.gov/documents/laws/wsr/2005/04/05-04-108.htm>;

ⁱⁱⁱ <http://fortress.wa.gov/ecy/publications/publications/0711023.pdf>