

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

SKAGIT COUNTY,  
Petitioner,  
  
v.  
  
WASHINGTON STATE DEPARTMENT OF  
ECOLOGY,  
Respondent.

No. 03 2 00668 5  
PETITION FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

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I. INTRODUCTION

TRIBAL ATTORNEYS

1. This is a petition by Skagit County brought pursuant to the Washington Administrative Procedure Act (APA), RCW 34.05.570(2). The purpose of the petition is to challenge WAC Chapter 173-503, a final rule adopted by the Washington Department of Ecology (Ecology) effective April 14, 2001, establishing minimum instream flows for the Skagit River. (Attachment A) Claims against agency rules based on failure to comply with the rulemaking requirements in RCW 34.05.310 through RCW 34.05.395 must be raised within two years of the effective date of the rule. RCW 34.05.375. Skagit County raises only those claims in this petition. In addition, this petition is brought against WAC 173-503 to address only the issue of Skagit County's ability to authorize subdivision and development using exempt wells in areas of Skagit County not served by public water systems as reserved by Skagit County in a 1996 Memorandum of Agreement relating to water resource issues in Skagit County. Skagit County and other parties are currently working to resolve Skagit County's concerns with WAC 173-503, but have been unable to do so prior to the statutory deadline for filing certain claims

PETITION FOR DECLARATORY AND  
INJUNCTIVE RELIEF

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1 under RCW 34.05.375. Consequently, Skagit County is filing this appeal to preserve  
2 certain claims against WAC 173-503 in the event that the parties cannot resolve the  
3 issues.

4 2. In this petition for judicial review, Skagit County asks the Court to invalidate  
5 only those portions of WAC 173-503 necessary to ensure Skagit County's ability to  
6 authorize subdivision and development using exempt wells in areas of Skagit County  
7 not served by public water systems as reserved by Skagit County in the 1996 MOA.

## 8 II. PARTIES

9 3. Petitioner Skagit County is a general purpose local government organized  
10 under the laws of the State of Washington. Skagit County has responsibilities under  
11 RCW 19.27.097 and RCW Chapter 58.17 to ensure that adequate, reliable water supplies  
12 are available prior to issuing building permits or authorizing the subdivision of land  
13 within Skagit County. Skagit County's ability to comply with its statutory obligations,  
14 and the interests of the citizens of Skagit County have been harmed by Ecology's  
15 adoption of WAC 173-503. Skagit County's mailing address is: County Administration  
16 Building 700 S. 2nd Street, Room 202, Mount Vernon, WA 98273.

17 4. Respondent State of Washington Department of Ecology is an agency of the  
18 State of Washington responsible for managing and regulating the water resources of the  
19 state. RCW Chapters 90.22, 90.54, and 90.03 provide the authority and limitations for  
20 Ecology to adopt instream flow regulation.

## 21 III. JURISDICTION AND VENUE

22 5. This Court has jurisdiction under RCW 34.05.570(2), which authorizes judicial  
23 review of an agency rulemaking action. Venue is proper in Thurston County, as this  
24 action involves a rule challenge under RCW 34.05.570(2).

## 25 IV. BACKGROUND

26 6. In 1996, Skagit County, Ecology, and other water resource interests entered  
into a Memorandum of Agreement Regarding Utilization of Skagit River Basin Water

1 Resources for Instream and Out of Stream Purposes (1996 MOA) through RCW Chapter  
2 39.34, the Interlocal Cooperation Act. (Attachment B) Skagit County and the City of  
3 Anacortes approved the 1996 MOA through adoption of local resolutions. Skagit  
4 County entered into the 1996 MOA to establish a coordinated water management  
5 process and ensure that Skagit County could implement RCW Chapter 58.17, the state  
6 subdivision act, and RCW Chapter 19.27, the state building code. To achieve this, the  
7 1996 MOA included provisions relating to water rights held by the City of Anacortes  
8 and Skagit County PUD, to improve the ability of those purveyors to provide water  
9 service within their designated service areas in Skagit County. In addition, to ensure  
10 water availability in areas of Skagit County in which existing water purveyors could  
11 not provide service, Skagit County "reserve[d] the right to allow exempt wells for  
12 single family systems in the Skagit Basin above the PUD Pipeline Crossing." 1996  
13 MOA, IV.3.D.2.

13 7. The 1996 MOA also addressed instream water resource issues. Specifically,  
14 Ecology agreed to adopt "Lower Skagit River Instream Flows." The Lower Skagit River  
15 generally extends up until the area of PUD Pipeline Crossing, below which Ecology  
16 agreed to establish minimum instream flows, and above which Skagit County reserved  
17 its right to authorize subdivision and development using exempt wells.

18 8. Ecology is authorized to adopt minimum instream flows for rivers in  
19 Washington State. RCW 90.22.010; RCW 90.54.040. Minimum instream flows must be  
20 adopted by rule. RCW 90.22.020. When Ecology adopts a minimum instream flow rule,  
21 that minimum instream flow constitutes an appropriation of water within Washington's  
22 water code, and has a priority date of the date of rule adoption. RCW 90.03.345. Water  
23 rights issued after the priority date of an instream flow rule are junior to the instream  
24 flow rule, and may be interrupted when the actual instream flows is insufficient to  
25 satisfy the minimum instream flow adopted through regulation. If an instream flow  
26 level is not being met, Ecology can order water rights or uses with a priority dates later

1 in time than the instream flow rule to cease using water until the instream flow level is  
2 satisfied.

3 9. Many rural areas of Skagit County are not served by existing public water  
4 systems. Thus, unless a new water right is issued by Ecology or an existing water right  
5 is transferred, rural water supply depends solely on small withdrawals exempt from the  
6 permit requirement of RCW 90.44.050. These so-called "exempt wells" are allowed for  
7 (1) any amount of water for livestock; (2) any amount of water for a lawn or for a  
8 noncommercial garden of a half acre or less; (3) not more than five thousand gallons per  
9 day for domestic use; and (4) not more than five thousand gallons per day for an  
10 industrial purpose. Though exempt from the water right permit requirement of RCW  
11 90.44.050, exempt wells, like any other water use, exist within Washington's prior  
12 appropriation scheme. This means that exempt wells that are junior to the instream  
13 flow rule in WAC 173-503 can be interrupted if the instream flow level adopted in WAC  
14 173-503 is not being met. Interruptible water sources do not meet the requirements for  
15 an adequate reliable supply of water needed to authorize issuance of a building permit  
under RCW 19.27.097, or subdivision of land under RCW Chapter 58.17.

16 10. Ecology is authorized to adopt by rule "minimum water flows . . . for the  
17 purposes of protecting fish, game, birds or other wildlife resources, or recreational or  
18 aesthetic values of said public waters whenever it appears to be in the public interest to  
19 establish the same." RCW 90.22.010. RCW 90.54.020(3)(a) states that "perennial rivers  
20 and streams of the state shall be retained with base flows necessary to provide for  
21 preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and  
22 navigational values." The Office of the Attorney General has construed the purpose  
and meaning of these statutes as follows:

23 The intent was, simply stated, that streams with certain values were not to  
24 be dried up or reduced to trickles. Rather, flows, usually in an amount  
25 extending to a limited portion of a stream's natural flow, were to be  
26 retained in order to protect instream values of a stream from total  
extinguishments. Of import here, the thrust of the [legislation] was not

1 designed to maintain a flow in excess of the smallest amount necessary to  
2 satisfy the protection and preservation values and objectives just noted.

3 Letter from Charles B. Roe, Senior Assistant Attorney General to Eugene F. Wallace,  
4 Program Manager for Water Resources, Department of Ecology, February 20, 1986, p. 8.

5 11. Ecology's Skagit River Instream Flow Rule, WAC 173-503 became effective  
6 April 14, 2001. The flow levels adopted in WAC 173-503 have been met by actual flows  
7 in only 6 of the previous 60 years. WAC 173-503 directly conflicts with the 1996 MOA  
8 by adopting flows for both the Lower and Upper Skagit River (rather than only the  
9 Lower Skagit River), and by adopting flow levels that will rarely be met by actual flows,  
10 resulting in all junior water uses being interruptible, and preventing Skagit County  
11 from authorizing development in Upper Skagit County that relies on exempt wells for  
12 water supply.

13 12. Together, Ecology's adoption of instream flow levels that will rarely be met  
14 by actual flows, and its decision to adopt an instream flow applicable to the Upper  
15 Skagit Basin, rather than the Lower Skagit River as agreed in the 1996 MOA, directly  
16 violates provisions of the 1996 MOA. Because all junior water rights or uses starting  
17 after the effective date of WAC 173-503 are subject to the instream flow rule, and  
18 because the instream flow level will rarely be met, any junior water use is subject to the  
19 instream flow and thus interruptible. Because of WAC 173-503, all new exempt uses  
20 would be interruptible, and thus would not satisfy the water availability requirements  
21 of RCW Chapter 58.17 and RCW 19.27. Thus, WAC 173-503 is in direct conflict with the  
22 County's reservation of its authority in the 1996 MOA to allow exempt wells in the  
23 Upper Skagit River Basin.

24 13. In adopting WAC 173-503, Ecology failed to substantially comply with  
25 rulemaking requirements in RCW Chapter 34.05.

#### 26 V. PETITIONER'S CAUSE OF ACTION

14. Paragraphs 1 through 10 are incorporated herein by reference.

1 15. WAC 173-503 is a significant legislative rule under RCW 34.05.328. As such,  
2 Ecology was required to prepare a Small Business Economic Impact Statement (SBEIS)  
3 in accordance with RCW 19.85.040. The SBEIS must be prepared and submitted with  
4 the initial notice of the proposed rule. RCW 34.05.320. However, Ecology's notice of  
5 proposed rule states "no small business economic impact statement has been prepared  
6 under chapter 19.85 RCW." Ecology Notice of Proposed Rulemaking for WAC 173-503  
7 includes an assertion that "nothing in this rule has an inherent disproportionate impact  
8 on small versus large businesses." This assertion is not accurate given the impact of  
9 rule on small businesses, such as those in the land development industry in rural parts  
10 of Skagit County. RCW 34.05.375 requires that rules be invalidated for failure to  
11 comply with the RCW 34.05.328. This claim is brought against WAC 173-503 to address  
12 only the issue of Skagit County's ability to authorize subdivision and development  
13 using exempt wells in areas of Skagit County not served by public water systems as  
reserved by Skagit County in the 1996 MOA.

14 16. Because WAC 173-503 is a significant legislative rule, Ecology was required  
15 to "coordinate the rule, to the maximum extent practicable, with other federal, state,  
16 and local laws applicable to the same activity or subject matter." RCW 34.05.328(1)(h).  
17 The 1996 Memorandum of Agreement signed by Ecology and adopted through  
18 resolution by local government parties, includes a number of key provisions that are  
19 violated by WAC 173-503. The MOA was adopted under RCW Chapter 39.34, the  
20 Interlocal Cooperation Act. An MOA adopted pursuant to RCW Chapter 39.34 takes  
21 effect once recorded with the county auditor. RCW 39.34.040.

22 In the 1996 MOA, Skagit County "reserve[d] to right to allow exempt wells for  
23 single family systems in the Skagit River Basin above the PUD Pipeline Crossing." 1996  
24 MOA, IV.3.D.2. In contrast, WAC 173-503 results in a prohibition on exempt wells.

25 In addition, the 1996 MOA states that "established Lower Skagit River Instream  
26 Flows will constitute the full instream flow agreed to by the Parties for 50 years from

1 the effective date of this Agreement." IV.A.2. In contrast, WAC 173-503 applies not  
2 only to the Lower Skagit River, but to the Upper Skagit River as well.

3 WAC 173-503 clearly conflicts with the 1996 MOA, even though the  
4 Responsiveness Summary and Concise Explanatory Statement prepared during the  
5 rulemaking states that "The rule is based on recommendations that were submitted to  
6 Ecology pursuant to a Memorandum of Agreement signed in 1996 by local  
7 governments in Skagit County, tribes and the departments of Fish and Wildlife and  
8 Ecology." Responsiveness Summary and Concise Explanatory Statement, Ecology  
9 Publication No. 01-11-004, 1. RCW 34.05.375 requires that rules be invalidated for  
10 failure to comply with RCW 34.05.328(1)(h). This claim is brought against WAC 173-503  
11 to address only the issue of Skagit County's ability to authorize subdivision and  
12 development using exempt wells in areas of Skagit County not served by public water  
13 systems as reserved by Skagit County in the 1996 MOA.

14 17. In adopting WAC 173-503, Ecology was required to "determine, after  
15 considering alternative versions of the rule . . . that the rule being adopted is the least  
16 burdensome alternative for those required to comply with it that will achieve the  
17 general goals and specific objectives" of the rule "and the statute that the rule  
18 implements." RCW 34.05.328(1)(d); (a). Considering that one of the primary "goals  
19 and objectives" of the rule was to carry out the commitments in the 1996 MOA - a rule  
20 that violates those commitments cannot be the least burdensome. In fact, proposed  
21 language for WAC 173-503 that would have resulted in a rule that was consistent with  
22 provisions in the 1996 MOA authorizing Skagit County to allow exempt well use in  
23 certain parts of the county was reviewed but not included in the rule. RCW 34.05.375  
24 requires that rules be invalidated for failure to comply with RCW 34.05.328(1)(d) and  
25 (a). This claim is brought against WAC 173-503 to address only the issue of Skagit  
26 County's ability to authorize subdivision and development using exempt wells in areas  
of Skagit County not served by public water systems as reserved by Skagit County in  
the 1996 MOA.

1 18. In adopting WAC 173-503, Ecology was required to "determine that the  
2 probable benefits of the rule are greater than its probable costs, taking into account both  
3 the qualitative and quantitative benefits and costs and the specific directives of the  
4 statute being implemented." RCW 34.05.328(1)(c). While Ecology did produce a  
5 limited cost-benefit analysis, this analysis did not include any actual analysis of the  
6 economic costs associated with the impact on land subdivision and residential  
7 development caused by the adoption of WAC 173-503. RCW 34.05.375 requires that  
8 rules be invalidated for failure to comply with the requirements of RCW 34.05.328(1)(c).  
9 This claim is brought against WAC 173-503 to address only the issue of Skagit County's  
10 ability to authorize subdivision and development using exempt wells in areas of Skagit  
11 County not served by public water systems as reserved by Skagit County in the 1996  
12 MOA.

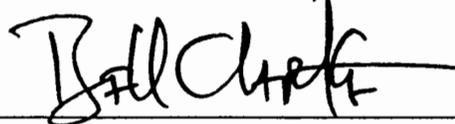
#### VI. REQUEST FOR RELIEF

13 Skagit County requests invalidation of only those portions of WAC 173-503  
14 necessary to ensure Skagit County's ability to authorize subdivision and development  
15 using exempt wells in areas of Skagit County not served by public water systems as  
16 reserved by Skagit County in the 1996 MOA.

17 DATED this 11<sup>th</sup> day of April, 2003.

18 Respectfully Submitted,

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