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**SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

**SWINOMISH INDIAN TRIBAL
COMMUNITY**, a Federally Recognized Indian
Tribe,

Petitioner,

vs.

**WASHINGTON STATE DEPARTMENT
OF ECOLOGY**,

Respondent.

No.

08-2 01403-4

**PETITION FOR
JUDICIAL REVIEW**

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I. INTRODUCTION

1. This is a petition for a declaratory judgment brought by the Swinomish Indian Tribal Community ("Tribe") under the Washington Administrative Procedure Act ("APA"), RCW Chapter

PETITION FOR JUDICIAL REIEW

Swinomish Indian Tribal Community
Office of the Tribal Attorney
PO Box 817
11404 Moorage Way
La Conner, WA 98257
(360) 466-7248

1 34.05, and the State Environmental Policy Act ("SEPA"), RCW Chapter 43.21C, seeking judicial
2 review of the validity of certain amendments to the Skagit River Basin Instream Flow Rule, WAC
3 173-503. The amendments were effective June 15, 2006. A copy of WAC 173-503, as amended
4 (hereinafter "2006 Instream Flow Rule Amendments"), is attached as Exhibit 1. The Tribe does not
5 seek judicial review of the validity of the original Skagit River Basin Instream Flow Rule, which
6 was effective April 14, 2001 (hereinafter "2001 Instream Flow Rule").
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8 II. PARTIES

9 2. Petitioner Swinomish Indian Tribal Community is a federally recognized Indian tribe
10 organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and
11 located on the Swinomish Reservation on Fidalgo Island in Skagit County of the State of
12 Washington. The Tribe's mailing address is Post Office Box 817, La Conner, Washington 98257.

13 3. Since time immemorial the Tribe has lived, hunted, fished and gathered in and around
14 the Skagit River Basin, among other places. Anadromous fish, and particularly salmon, have played
15 a central role in the Tribe's subsistence, economy, culture, spiritual life, and day-to-day existence.
16 The Tribe has been adjudicated to be a successor-in-interest to signators of the Treaty with the
17 Duwamish, Suquamish, Etc., 12 Stat. 927 (hereinafter "Treaty of Point Elliott" or "Treaty"), by
18 which the Tribe reserved various rights, including the right to use and occupy exclusively
19 Reservation lands pursuant to Article 2 and to exercise off-Reservation fishing rights at usual and
20 accustomed fishing areas of the Tribe pursuant to Article 5 of such Treaty. *United States v.*
21 *Washington*, 459 F.Supp. 1020, 1039 (W.D. Wash. 1978). The Skagit River Basin has been
22 determined to be within the usual and accustomed fishing areas of the Tribe. *Id.* at 1049.
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1 4. The 2006 Instream Flow Rule Amendments, or the threatened application of those
2 Amendments, interfere with or impair or immediately threaten to interfere with or impair the legal
3 rights or privileges of the Tribe, and substantially prejudice the Tribe by threatening the Tribe's
4 fishing opportunities and the recreational, commercial, spiritual, aesthetic, scientific, environmental,
5 and cultural benefits derived by the Tribe and its members from the presence of anadromous fish,
6 and particularly salmon, in and around its Reservation and usual and accustomed fishing areas. *See*
7 *Postema v. P.C.H.B.*, 142 Wn.2d 68, 74, 11 P.3d 726 (2000) ("The tribes' treaty rights are not
8 directly at issue in these cases, but their treaty rights form the basis for their interest in these case.")

9
10 5. The interests Petitioner seeks to protect are within the zone of interests protected or
11 regulated by SEPA.

12 6. While Petitioner's interest arises from the Treaty of Point Elliott, Petitioner does not
13 assert, but rather explicitly reserves, any and all claims to or arising from Petitioner's Federal rights,
14 including but not limited to claims relating to rights under the Treaty of Point Elliott and Federal
15 reserved rights. *See Postema v. P.C.H.B.*, 142 Wn.2d at 74. Adjudication of the existence or extent
16 of Petitioner's Federal rights is not at issue in this judicial review proceeding, and adjudication of
17 such rights would exceed the permissible scope of this judicial review proceeding under RCW
18 34.05.570.

19 7. Respondent Washington Department of Ecology (hereinafter "Ecology") is an agency
20 of the State of Washington responsible for managing and regulating the water resources of the state.
21 Ecology's authority includes the authority to adopt regulations concerning instream flows pursuant
22 to RCW Chapters 90.03, 90.22 and 90.54. The mailing address of the Department of Ecology is
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1 Post Office Box 47600, Olympia, Washington 98504-7600, and the physical address is 300
2 Desmond Drive SE, Lacey, Washington 98503.

3 **III. JURISDICTION AND VENUE**

4 8. This Court has jurisdiction over this action, and venue is proper, under RCW
5 34.05.570(2) and RCW 43.21C.075.

6 **IV. FACTS**

7
8 9. The Skagit River is the third largest river system in the Western United States. More
9 than 3,000 rivers and streams flow into the Skagit River system, accounting for one-quarter of the
10 fresh water flowing into Puget Sound. It is the only river in the lower 48 states that is home to all
11 five species of Pacific salmon. Over the years, development and other human activity in the Skagit
12 Basin has led to declines in its salmon runs. One of the causes of the declining fish population is the
13 reduction of stream flows necessary for spawning and migration. *See Swinomish Indian Tribal*
14 *Community v. Skagit County*, 138 Wn.App. 771, 773, 158 P.3d 1179 (2007).

15 10. The Skagit River Basin includes the Skagit River and streams that are tributary to the
16 River.

17 11. The Skagit River Basin is classified by the State of Washington as consisting of two
18 different Water Resource Inventory Areas (WRIAs): WRIA 3 is the Lower Skagit River Basin and
19 WRIA 4 is the Upper Skagit River Basin.

20 12. Groundwater in the Skagit River Basin is in hydraulic continuity with surface water
21 in the Skagit River and its tributaries, such that a withdrawal of groundwater affects the flow in a
22 tributary or in the River with which the groundwater is in hydraulic continuity.
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1 13. Withdrawal of groundwater within the Skagit River Basin may affect surface waters
2 containing threatened or endangered salmonids, including Chinook salmon, bull trout and steelhead.

3 14. Ecology has recognized that fish populations need adequate water to survive and, in
4 particular, has recognized that fish need instream flows that provide habitat for rearing and spawning
5 and provide other essential ecological functions including migration, stream sediment removal and
6 stream channel formation and maintenance. There is a high correlation between stream flows,
7 habitat and fish populations, and Ecology has acknowledged this correlation.

8 15. A reduction of the flow in a stream usually has greater impacts on fish populations as
9 flow levels decrease, such that a reduction of stream flow in smaller streams or during low-flow
10 periods will generally have a greater impact on fish populations than will the same reduction in
11 larger streams or during periods of higher flows.

12 16. Increased out-of-stream uses of water resulting from adoption of the 2006 Instream
13 Flow Rule Amendments will cause direct and indirect environmental effects that adversely impact
14 fish, such as reduced stream flows, increased stream temperature, and increased impervious surfaces
15 and runoff.

16 17. It is the strong public policy of the State of Washington to preserve the quality of the
17 natural environment and to maintain sufficient water in streams and other public waters to protect
18 and enhance instream resources and productive fish populations. *See, e.g.*, RCW 43.21C.020; RCW
19 90.54.020. Ecology is authorized or directed to establish by administrative rule minimum instream
20 flow levels for the purpose of protecting and enhancing instream values and resources, including
21 fish, game, bird, and other wildlife populations; recreational, aesthetic, navigational, and other
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1 environmental values; and water quality. See RCW 90.03.005, 90.22.010, 90.54.005, 90.54.010,
2 90.54.020.

3 18. In 1996 a Memorandum of Agreement Regarding Utilization of Skagit River Basin
4 Water Resources for Instream and Out of Stream Purposes with a 50-year term ("1996 MOA" or
5 "MOA") was signed by Ecology, Washington Department of Fish & Wildlife, public water
6 purveyors Skagit County P.U.D. # 1 and the City of Anacortes, Skagit County, the Sauk-Suiattle
7 Indian Tribe, the Upper Skagit Tribe and the Swinomish Indian Tribal Community. The MOA was
8 intended in part to ensure the establishment of instream water flows to protect fisheries resources, to
9 develop a coordinated water delivery system, and to reduce the use of exempt water wells in areas of
10 the county experiencing inadequate instream flows as a result of groundwater withdrawal.
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12 *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn.App. at 774.

13 19. Skagit County adopted the 1996 MOA by resolution under RCW Chapter 39.34, the
14 Interlocal Cooperation Act, pursuant to which the 1996 MOA took effect once it was recorded by
15 Skagit County with the county auditor.

16 20. The 1996 MOA is incorporated as a part of the Skagit County Coordinated Water
17 System Plan, and both the 1996 MOA and the Skagit County Coordinated Water System Plan are
18 incorporated as parts of the Skagit County Comprehensive Plan.

19 21. The short-term objectives of the 1996 MOA included funding and conducting an
20 Instream Flow Incremental Methodology ("IFIM") study of the Lower Skagit River, and then
21 establishing scientifically based instream flows by rule for the Lower Skagit River Basin (WRIA 3,
22 excluding various islands). An IFIM study uses a series of computer-based models and data
23 collected in the field to accurately predict the amount of fish habitat that occurs with different flow
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1 levels in a river or stream. An IFIM study is the most widely-used and accepted method for
2 evaluating instream flow needs for fish habitat.

3 22. The IFIM study required by the 1996 MOA was conducted and Ecology subsequently
4 engaged in rulemaking and adopted the Skagit River Basin Instream Flow Rule, WAC 173-503,
5 effective on April 14, 2001. The purpose of the Instream Flow Rule was to retain instream flows in
6 rivers, streams, and lakes in the Skagit River Basin to provide for the protection and preservation of
7 wildlife, fish, scenic, aesthetic, and other environmental and navigational values, as well as
8 recreation and water quality. *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn.App. at
9 775.

11 23. As contemplated by the parties to the 1996 MOA, the instream flow levels set in the
12 2001 Instream Flow Rule for the Skagit River and for four tributaries to the Skagit River which
13 originate from Cultus Mountain ("Cultus Mountain tributaries") were consistent with the instream
14 flow levels that were found by the IFIM study to be necessary to protect fish populations dependent
15 upon the Skagit River and its tributaries.

16 24. Once Ecology adopted the 2001 Instream Flow Rule, the flow levels established in
17 that Rule constituted appropriations of Skagit River and Cultus Mountain tributary water under
18 Washington water law with a priority date of appropriation as of the Rule's April 14, 2001 effective
19 date. RCW 90.03.345.

21 25. Skagit County filed a Petition for Declaratory and Injunctive Relief in this Court in an
22 action entitled *Skagit County v. Washington State Department of Ecology*, No. 03-02-00668-5,
23 seeking judicial review of the 2001 Instream Flow Rule on procedural grounds. Skagit County
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1 subsequently amended its petition to also seek judicial review of the 2001 Instream Flow Rule on
2 substantive grounds (hereinafter “the judicial review litigation”).

3 26. Each of the parties to the 1996 MOA (with the exception of the Department of Fish
4 and Wildlife) subsequently intervened as parties in the judicial review litigation.

5 27. In February 2005, while the judicial review litigation was pending in this Court,
6 Ecology issued a CR 102 proposing to adopt amendments to the 2001 Instream Flow Rule. The
7 proposed amendments were not adopted by Ecology as a final rule and expired by passage of time.

8 28. On October 31, 2005, while the judicial review litigation remained pending in this
9 Court, Ecology issued a second CR 102 proposing to adopt amendments to the 2001 Instream Flow
10 Rule.

11 29. On May 17, 2006, the Tribe learned that a settlement involving Ecology had been
12 reached in the still-pending judicial review litigation. The Tribe immediately requested a copy of
13 settlement documentation from counsel for Ecology, but the Tribe was not provided with a copy of
14 the settlement documentation until May 22.

15 30. On May 19, 2006 – two days after the Tribe had requested a copy of settlement
16 documentation but several days before the Tribe received that documentation – Ecology and Skagit
17 County filed in this Court a “Stipulation and Settlement Agreement and Agreed Order of Dismissal”
18 of the judicial review litigation, and procured a hearing later on May 19 for consideration of the
19 settlement and their proposed Agreed Order of Dismissal.
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21 31. None of the other parties to the 1996 MOA or to the pending judicial review litigation
22 were parties to the settlement reached by Ecology and Skagit County.
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1 32. None of the other parties to the pending judicial review litigation were given notice
2 that Ecology and Skagit County had filed their Stipulation or their proposed Agreed Order of
3 Dismissal in this Court, or were given notice that Ecology and Skagit County had procured the May
4 19 hearing for consideration of the settlement and proposed Agreed Order of Dismissal.

5 33. Only Ecology and Skagit County attended the May 19 hearing in this Court.

6 34. Following the May 19, 2006 hearing with Ecology and Skagit County, this Court
7 approved the settlement between Ecology and Skagit County and entered the Agreed Order of
8 Dismissal.

9 35. On May 22, 2006, the Tribe obtained a copy of the Stipulation and Settlement
10 Agreement and first learned that Ecology and Skagit County had filed the Stipulation, had procured
11 the May 19 hearing, and that the Agreed Order of Dismissal had been entered by the Court.

12 36. On May 30, 2006, the Tribe requested either reconsideration and vacation of the May
13 19 Agreed Order of Dismissal under CR 59(a), or in the alternative amendment of the May 19 Order
14 pursuant to CR 59(h).

15 37. On July 14, 2006, this Court vacated the May 19 Agreed Order of Dismissal,
16 dismissed Skagit County's procedural claims with prejudice and substantive claims without
17 prejudice, and dismissed the County's petition for judicial review.

18 38. In Ecology's Settlement Agreement with Skagit County, Ecology agreed to adopt
19 specific amendments to the 2001 Instream Flow Rule that were attached to the Settlement
20 Agreement.
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1 39. As agreed, on May 15, 2006, Ecology adopted the amendments to the 2001 Instream
2 Flow Rule that were attached to the Settlement Agreement. The amendments were effective June
3 15, 2006.

4 40. In the 2006 Instream Flow Rule Amendments, Ecology reserved water for additional
5 future withdrawals for out-of-stream uses for domestic, commercial/industrial and municipal supply,
6 stock watering and agricultural irrigation, despite the fact that the Skagit River instream flow levels
7 that were recommended by the Skagit River IFIM study as necessary to protect fisheries resources
8 and that were adopted by Ecology in the 2001 Instream Flow Rule had frequently not been met since
9 adoption of the 2001 Rule. See WAC 173-503-052, 173-503-060, 173-503-073.
10

11 41. Ecology's reservation of water for additional future withdrawals for out-of-stream
12 uses was based upon a finding by Ecology "that the public interest advanced by these limited
13 reservations clearly overrides the potential for negative impacts on instream resources," citing RCW
14 90.54.020(3)(a).

15 42. RCW 90.54.020(3)(a) states:

16 (3) The quality of the natural environment shall be protected and, where possible,
17 enhanced as follows:

18 (a) Perennial rivers and streams of the state shall be retained with base flows
19 necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other
20 environmental values, and navigational values. Lakes and ponds shall be retained
21 substantially in their natural condition. Withdrawals of water which would conflict
22 therewith shall be authorized only in those situations where it is clear that
23 overriding considerations of the public interest will be served.
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- 1 d. Ecology did not coordinate the 2006 Instream Flow Rule Amendments with
2 other applicable law, including but not limited to the 1996 MOA, to the
3 maximum extent practicable, in violation of RCW 34.05.328(1)(i); and
4 e. Ecology's application of a return flow recharge credit or septic system credit
5 to water imported into the basin or subbasin at issue, when accounting for
6 water reserved by the 2006 Instream Flow Rule Amendments, constitutes a
7 substantive rule that was adopted without compliance with rulemaking
8 procedures required by RCW Chapter 34.05.

9
10 45. The allegations of paragraphs 1-44 are incorporated by reference as if fully set forth
11 in this paragraph.

12 46. The 2006 Instream Flow Rule Amendments are also invalid because substantive
13 provisions of the Amendments are contrary to law and/or are arbitrary and capricious, specifically
14 including but not limited to the following:

- 15 a. Ecology did not determine that water was available for withdrawal in the
16 Skagit River Basin or tributary subbasins (specifically including the four
17 Cultus Mountain tributary subbasins) as required by RCW 90.03.290, and any
18 determination of availability that may have been implicit in the 2006 Instream
19 Flow Rule Amendments is not supported by substantial evidence and is
20 arbitrary and capricious;
21 b. Ecology's determination that the reservations of water as established are
22 necessary as required under RCW 90.54.050 is unsupported by substantial
23 evidence, is arbitrary and capricious, and is contrary to law;
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- 1 c. The sizes of the reservations of water created by the 2006 Instream Flow Rule
2 Amendments are arbitrary and capricious, are unsupported by substantial
3 evidence, are contrary to the recommendations and opinions of the State's
4 own fisheries biologists, and are contrary to Ecology's own 2004 *Guidance:*
5 *Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses;*
6
7 d. Ecology acted arbitrarily and capriciously and unlawfully in relying upon a
8 wholesale application of the doctrine of Overriding Considerations of the
9 Public Interest under RCW 90.54.020(3)(a) to globally justify all of the
10 reservations of water for a multitude of out-of-stream uses throughout the
11 entire Skagit River Basin, rather than weighing the public benefit derived
12 from instream values in the Skagit River mainstem subbasins or in particular
13 tributary subbasins against (i) the interests to be served by specific out-of-
14 stream uses proposed for each such basin and (ii) the purported benefits
15 derived from the extent of the reservation made for each such proposed out-
16 of-stream use;
17
18 e. Even if Ecology's global application of Overriding Considerations of the
19 Public Interest under RCW 90.54.020(3)(a) was lawful, Ecology's reliance
20 upon the doctrine to justify the creation of the reservations of water for
21 agricultural and stockwatering uses, for domestic use in the Upper Skagit
22 Subbasin and in specified tributary subbasins, and for commercial and
23 industrial uses and municipal supply is unsupported by substantial credible
24 evidence, is arbitrary and capricious and is contrary to law and to Ecology's
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1 own 2004 *Guidance: Setting Instream Flows and Allocating Water for Future*
2 *Out-of-Stream Uses*;

- 3 f. Ecology's failure to require mitigation by users of reserved water, and failure
4 to restrict the use of reserved water to indoor domestic uses and limited
5 outdoor uses, are contrary to Ecology's own policy as set forth in its 2004
6 *Guidance: Setting Instream Flows and Allocating Water for Future Out-of-*
7 *Stream Uses*, and are arbitrary and capricious;
- 8 g. Ecology's refusal to require measurement of groundwater withdrawals serving
9 a single residence is arbitrary and capricious and contrary to law, including
10 WAC 173-173-040;
- 11 h. Because water consumption is typically highest during the period when stream
12 flows are the lowest and therefore when additional withdrawals for out-of-
13 stream uses are more likely to result in adverse impacts to fish populations,
14 Ecology's assumption, for purposes of calculating the extent to which
15 reserved water is utilized, that a single residence uses an annual average of
16 350 gallons of water per day is arbitrary and capricious and is inconsistent
17 with Ecology's own recognition elsewhere in the 2006 Instream Flow
18 Amendments that (for users other than a single residence) the proper measure
19 of daily water use is the average use only during the period of maximum use;
- 20 i. Ecology's adoption of a return flow recharge credit or septic system credit for
21 all locations served by a septic system is contrary to law;
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- 1 j. Ecology's adoption of a 50% return flow recharge credit or septic system
2 credit that does not reflect differences in groundwater recharge based on
3 place, type and period of use and that is available for further appropriation is
4 unsupported by substantial evidence, arbitrary and capricious, and is contrary
5 to law; and
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7 k. Ecology's application of a return flow recharge credit or septic system credit
8 to water imported into the basin or subbasin at issue, when accounting for
9 water reserved by the 2006 Instream Flow Rule Amendments, is inconsistent
10 with Ecology's stated position during notice and comment rulemaking and is
11 unsupported by substantial evidence, arbitrary and capricious and contrary to
12 law.

13 VI. REQUEST FOR RELIEF

14 WHEREFORE, Petitioner respectfully requests that this Court:

- 15 1. Issue a declaratory judgment that the 2006 amendments to the Skagit River Basin
16 Instream Flow Rule, WAC 173-503, are invalid to the extent that the Court
17 determines that the amendments were adopted without compliance with statutory
18 procedural requirements, and to the extent that the provisions of the amendments
19 are contrary to law or arbitrary and capricious (Petitioner does not request a
20 determination that any provision of the original 2001 Skagit River Basin Instream
21 Flow Rule is invalid);
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