



CLEAN, FLOWING WATERS FOR THE WEST

The Center for
Environmental Law & Policy

November 21, 2010

Honorable Christine Gregoire
Office of the Governor
PO Box 98504-002
Olympia WA 98504-0002

Re: Recent Developments in Skagit County regarding the Closure of Fisher Carpenter Sub-basin.

Dear Governor Gregoire:

The Center for Environmental Law and Policy (CELP) is a statewide environmental advocacy organization that focuses on water quantity issues, including water supply, water rights, and instream flow protection. Because of its involvement in preserving instream flows in the Skagit and its sub-basins, CELP received a copy of the Skagit County Commissioners' letter to you of November 15, 2011. CELP would like to take this opportunity to provide additional background on the Fisher Carpenter closure and to correct certain misstatements in that letter.

The Department of Ecology closed the Fisher-Carpenter basin last summer not because of litigation with the Swinomish Tribe or any other party, but because the reservations set forth in the 2006 minimum flow rule for the Skagit River were simply used up. As you know, Ecology had amended the Skagit minimum flow rule in 2006 under an agreement with Skagit County that created certain amounts of water – called reservations – for general domestic use, farm irrigation and livestock watering. The domestic reservation in the Carpenter-Fisher sub-basin is the only reservation to have reached its full allocation. That 2006 bi-party agreement settled litigation brought by Skagit County challenging the 2001 instream flow rule. Neither the Swinomish tribe, nor any other tribe, nor environmentalists, nor the greater community were part of the agreement that led to 2006 amendment establishing the reservations by rule.

Moreover, nothing in the Minimum Flows Act supports the creation of reservations set forth in the 2006 amendment. The Minimum Flows Act authorizes establishing instream flow rules and giving priority to those flows based upon the adoption of the rule. To legally justify the Skagit River reservations that Ecology agreed to as the result of Skagit County's litigation, Ecology looked beyond the Minimum Flows Act, and "borrowed" from the Water Resources Act, the rarely used Overriding Consideration of the Public Interest ("OCPI") exception. The OCPI exception should only be used for emergencies, such as fire prevention, and, indeed prior to the

2006 Skagit amendments, had only been used for considerations of overriding public interest, such as public education. To apply the OCPI exception as Ecology did to allow more permit exempt wells is not an emergency but political expediency. The Swinomish Tribe was rightly concerned that if Ecology could rely on the OCPI to justify reservations in 2006 in the Skagit, it could do so again in the Skagit. Indeed, that is exactly what Skagit County now asks you to do—to direct Ecology to create new reservations because—not surprisingly, the 2006 reservation was insufficient to supply permit exempt wells on every undeveloped lot in the Fisher Carpenter Sub-basin. The 2006 reservation is tapped out so Skagit County wants an additional one.

The answer to the scarcity problem in Skagit County is not a stopgap measure such as reservations based upon OCPI. CELP shares the Swinomish Tribe's concern that Ecology's reliance on OCPI is a Rube Goldberg legal construct that not only is bad public policy, opening the floodgates to "reservations" from instream flow rules in every water-stressed sub-basin in the state, but an upending of prior appropriation doctrine that could jeopardize every instream flow rule in the state.

The answer to the scarcity problem in Skagit County is a complex mix of increased hook-ups to public water supply, water-for-water mitigation¹, increased use of reclaimed water, and notice to property owners that merely buying property does not guarantee you the right to a permit exempt well.

CELP, as a state-wide water advocacy organization, is fully cognizant that water resources are increasingly becoming the most important limitation on property development. Indeed, we have been working with other counties, including King County², to better define what responsibilities counties have under the Growth Management Act to ensure that water is legally available before issuing building permits. Every county, including Skagit County, must realize that just because land is zoned for development, it may not be developable in a closed basin or basin where instream flows are unmet unless public water or appropriate mitigation is available.

But as recent events in Skagit County have demonstrated, it is important that the State, through the Departments of Ecology, Health, and Fish and Wildlife, provide guidance to local

¹ The Department of Ecology commendably recently hired Washington Water Trust to inventory existing water rights in the Carpenter-Fisher sub-basin to explore creating a basin-wide mitigation project using existing water rights to offset the effects of pumping new wells. A comparable project is underway in Kittitas County.

² Contrary to the statement in the County's letter of November 15th, CELP did not threaten to sue King County but wrote a detailed letter regarding King County's responsibilities under the recent decision of *Kittitas County v. Eastern Wash GMHB*, 256 P.3d 1193, 1210 (Wash. 2011).

governments and citizens in identifying and resolving water scarcity issues before people invest in “dry” lots, and to preserve instream flows for the public trust.

Thank you for your attention to this contentious and difficult issue.

Very truly yours,



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