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## Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology, 311 P.3d 6 (Wash. 2013)

Holly Taylor

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diversion of twenty-two c.f.s. would result in a diversion greater than 9,000 acre-feet of water, far surpassing any quantity Vincent and its predecessor had ever used. In addition, the Court pointed out that the Cox Decree did not dispute the proposed determination drawn up in preparation for the 1936 general adjudication of the Sevier River system, which indicated that Vincent's predecessor used 5,000 acre-feet of water annually. Thus, it was reasonable to infer that the volume component of Vincent's water right was 5,000 acre-feet.

Last, the Court considered various issues that could potentially arise on remand. The Court first outlined a proper forfeiture analysis. It declared that because flow awards are not continuous, a failure to divert the maximum amount allowed did not result in automatic forfeiture. It recognized that a forfeiture analysis should focus on whether the appropriator has failed to use material amounts of its volume allowance. Also, the Court maintained that the number of acres irrigated was not determinative of forfeiture. Rather, the deciding factor was whether the appropriator used all of its water allowance in a reasonable manner and for a beneficial purpose. Thereafter, the Court addressed whether the water available to Vincent and its predecessor between March 1 and April 15 should count as available water for purposes of forfeiture. It reasoned that distinguishing the pre-irrigation season would be significant only in a drought year under the physical-causes exception. Additionally, it determined that because the Cox Decree did not provide otherwise, it did not have to exclude early water from the physical exception analysis. Last, the Court noted that contrary to Vincent's claim, the watering of indigenous vegetation was generally not beneficial use and that a trier of fact should be wary of such use to prevent forfeiture.

*Edgar Barraza*

## WASHINGTON

**Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology**, 311 P.3d 6 (Wash. 2013) (holding a Department of Ecology rule invalid because the Department of Ecology may not rely upon the water code's statutory exception for overriding considerations of public interest as broad authority to reallocate water from established minimum flow rights to reserve water for future beneficial uses).

The Skagit River system supplies water to numerous water rights holders and is the only river system in the contiguous United States that accommodates all six species of Pacific salmon. In 2001, the Washington State Department of Ecology ("Ecology") enacted the Skagit River Basin Instream Flow Rule ("Instream Flow Rule"), which established minimum instream flow requirements to protect wildlife, recreation, and aesthetic values.

In 2003, Skagit County and others filed suit against Ecology challenging the Instream Flow Rule. Skagit County argued the Rule was invalid because it did not allocate noninterruptible water for new uses and thus effectively prevented any new development that required water throughout the year. After several years, Skagit County and Ecology agreed to a settlement that resulted in Ecology promulgating an amended instream flow rule ("Amended Rule"). The

Amended Rule created twenty-seven reservations of water for particular uses that would not be subject to interruption, even when minimum instream flow requirements were unmet. Under the Amended Rule, a user could acquire a permit from Ecology to use these water reservations.

In exempting these water reservations from curtailment, Ecology relied upon the state water code's overriding-considerations exception ("OCPI Exception"), which allows for junior water withdrawals that impair minimum flows "where it is clear that overriding considerations of the public interest will be served." Ecology thus determined these reservations, which allowed for new uninterrupted withdrawals for domestic, municipal, industrial, agricultural, and stock watering purposes, would promote important public interests and the benefits would outweigh the impacts of such uses on water resources, fish populations, and recreational uses.

In 2008, the Swinomish Indian Tribal Community ("Tribe") filed a petition for review with the Superior Court of Thurston County ("trial court") challenging the validity of the Amended Rule under the Administrative Procedure Act ("APA"). The trial court upheld the Amended Rule and dismissed the Tribe's petition. The Tribe appealed to the Washington State Supreme Court ("Court").

The Court reviewed the validity of the Amended Rule in accordance with the APA. First, the Court considered Ecology's interpretation of the OCPI Exception. Creating its own balancing test, Ecology had evaluated the public interests served by the water reservations, the harm the reservations would pose to the public interest, and whether the benefits clearly outweighed the harms. Based upon projected increases in economic productivity over a twenty-year period and the need for uninterrupted water to supply new beneficial uses, Ecology concluded the benefits of the reservations clearly outweighed the "very small" potential ecological and recreational harms and, thus, constituted a valid exception.

However, the Court pointed out that the OCPI Exception is a narrow one that is not intended to be a mechanism to reallocate water. Referencing its holding in *Postema v. Pollution Control Hearings Board*, the Court reiterated that minimum flows established by rule constitute an appropriation with a priority date as of the rule's effective date. Such a minimum flow right is subject to the same protections as any other water right, meaning a subsequent water withdrawal cannot impair it unless it fits under the OCPI Exception. However, considering that the OCPI Exception itself did not receive a thorough analysis in *Postema*, the Court chose to continue that analysis here.

The Court next explored the OCPI Exception's statutory context. The Court observed that the OCPI Exception seeks to maintain base flows and permit withdrawals that conflict with such flows only when the withdrawals would clearly serve an overriding consideration of the public interest. Under Ecology's balancing test, a beneficial use of water qualified as an exception if the collective benefit of all such beneficial uses outweighed the collective harm resulting from impaired instream flows. The Court pointed out that the OCPI Exception does not contemplate beneficial uses and, therefore, does not regard every conceivable beneficial use as serving the public interest. The Court deter-

mined that the term “beneficial uses” was not equivalent to the OCPI Exception’s “public interests” language. The Court accordingly held that Ecology’s test, which balanced beneficial uses against the potential of harm to instream uses, was not consistent with the statutory requirement of the OCPI Exception. Thus, the Court rejected Ecology’s interpretation of the OCPI Exception.

The Court then considered the consistency of Ecology’s Amended Rule with respect to the overall statutory scheme, looking at the prior appropriation doctrine and minimum flow water rights in particular. Washington adopted the prior appropriation doctrine in 1917. Accordingly, in order to issue a water permit, “Ecology must affirmatively find (i) that water is available, (ii) for a beneficial use, and that (iii) an appropriation will not impair existing rights, or (iv) be detrimental to the public welfare.”

The Court observed that nothing in the OCPI Exception indicated that the state legislature intended to provide an alternate means of appropriating water if a user could not prove these four requirements. The Court noted that Ecology’s Amended Rule would allow new uses to impair existing water rights. Specifically, by combining the benefits of a new use with other uses for the purpose of making a water reservation under the OCPI, the Amended Rule would allow a junior appropriator to acquire rights superior to those of earlier appropriators. Therefore, the Court determined that the Amended Rule was not consistent with the prior appropriation doctrine.

The Court then considered minimum flow water rights. The Court noted that Washington had long expressed its intent to protect fish populations. In 1969, the Washington Legislature enacted the Minimum Water Flows and Levels Act, authorizing Ecology to set minimum flows to protect fish and wildlife, to preserve recreational and aesthetic values, and to preserve water quality. Under this act, minimum flow rights were subject to the “first in time, first in right” Principle of the prior appropriation doctrine. In 1971, the legislature passed the Water Resources Act to clarify the water resource policy and goals of the state and thereby assure that waters were fully protected and used for the greatest public benefit. The Water Resources Act identified safeguards for fish and wildlife and the preservation of environmental and aesthetic values in its designation of protected beneficial uses, but also included the public interest OCPI Exception. Over time, the legislature continued to confirm its belief that minimum flow rights demanded the same treatment as any other water right. Finally, in 2001 Ecology promulgated rules establishing minimum instream flow requirements for the Skagit River Basin.

The Court found Ecology’s interpretation and application of the OCPI Exception would diminish established minimum flow water rights. Additionally, the Court determined the overall statutory scheme did not support a view that potential economic profits justify impairment of established minimum flow rights. Thus, the Court concluded the Amended Rule failed to accord minimum flow rights the protection the state legislature deemed appropriate. The Court therefore held the Amended Rule was inconsistent with the overall statutory scheme.

Finally, reasoning that the OCPI Exception could not reasonably be interpreted to replace the state’s many water appropriation and minimum flows statutes, the Court determined that the legislature did not extend broad authority

to Ecology under the OCPI Exception to reallocate water. The Court held that the OCPI Exception was a narrow one requiring Ecology to identify extraordinary circumstances, not merely an alternative beneficial use, before impairing established minimum flow rights. The Court determined that Ecology's Amended Rule establishing reservations of water for certain future beneficial uses was not consistent with the plain language of the OCPI Exception, the statutory context, or with the overall statutory scheme. Therefore, the Court reversed the trial court's order and held the Amended Rule was in excess of Ecology's authority and was thus invalid.

Dissenting in part, Justice Wiggins argued that in the Water Resources Act of 1971 the legislature clarified its intent to give equal treatment to minimum flows and competing water interests. Further, referencing the Court's prior determination that Ecology had the authority to interfere with an existing water right to set minimum flows, Justice Wiggins contended that, considering equal treatment of water appropriations, Ecology could similarly interfere with an existing minimum flow right under certain circumstances. Thus, Justice Wiggins concluded that a vested minimum flow appropriation did not serve to make the water right irreversible.

Next, Justice Wiggins examined the language of the OCPI Exception. Justice Wiggins disagreed with the Court's determination that Ecology could not rely on a cost-benefit analysis to decide whether a certain reservation met the requirements of the OCPI Exception. Applying Ecology's cost-benefit analysis, Justice Wiggins conceded that the majority of the Amended Rule's reservations did not constitute overriding considerations of the public interest. However, with respect to the rural public water systems and permit-exempt wells exception, Justice Wiggins argued the record provided a clear indication this particular reservation would provide substantial value to underserved users at a negligible cost to the stream system. A reservation of 1.5 cubic feet per second in this case would provide water to individuals who otherwise might be without water for up to twenty days during some months. Accordingly, Justice Wiggins argued that if such overwhelming benefits failed to justify a valid exception, it would be difficult to determine whether there ever could be a legitimate application of the OCPI Exception. Further, Wiggins argued that, due to its hydrological expertise, Ecology was in a better position than the Court to determine the impact of the proposed reservation.

*Holly Taylor*

## WISCONSIN

**Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.**, 833 N.W.2d 800 (Wis. 2013) (holding the Wisconsin Department of Natural Resources ("DNR") (i) lacked constitutional authority under the public trust doctrine, but possessed statutory authority, to consider the impact of proposed water levels on adjacent wetlands above the ordinary high water mark, (ii) may consider wetland water quality standards, and (iii) must consider economic impacts when setting lake levels).