

## Landmark Water Right Decisions by Washington High Courts 2011-2016

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### Kittitas County v Eastern Washington Growth Management Hearings Board

- ❑ Challenge of county regulations regarding housing developments
- ❑ GMHB determined county regulations violate GMA because they allow filing multiple applications for "separate projects" that have common ownership/scheme
- ❑ Supreme Court ruled local governments have responsibility to protect water resources under Growth Management Act and other laws
- ❑ Supreme Court ruled county must determine that water is both physically and legally available before they can approve applications for subdivisions and/or building permits

### Swinomish Indian Tribal Community v Ecology

- ❑ Skagit River Basin Instream Flow Rule adopted in 2001 closed the basin to further appropriations of water
- ❑ ISF rule amendment in 2006 established 27 reservations of water for domestic uses
- ❑ Ecology used the Overriding Consideration of Public Interest (OCPI) exemption in Washington's water code to establish the reservations
- ❑ Supreme Court ruled Ecology lacks authority to establish reservations of water that allow non-interruptible water uses in basins closed to further appropriation
- ❑ Supreme Court ruled Ecology cannot use the OCPI exemption to establish reservations of water that is needed to maintain minimum ISFs

### Foster v Ecology & City of Yelm

- ❑ Ecology issued a new water right to the City of Yelm that relied upon an extensive mitigation plan and the OCPI exemption in Washington's water code
- ❑ Supreme Court ruled Ecology exceeded its authority by issuing a water right where all seasonal flow impacts are not offset with "water-for-water" or "in-kind" mitigation
- ❑ Supreme Court ruled Ecology is not authorized to accept/require out-of-kind mitigation as a means to meet the 4-part test in Washington's water code
- ❑ Supreme Court ruled Ecology unlawfully issued Yelm's new water right based on OCPI because that statutory exemption can only be used to approve "temporary" uses of water



### Whatcom County v Western Washington Growth Management Hearings Board

- ❑ Challenge of County's Comprehensive Plan & Zoning Code – challengers claim the Plan violates GMA because it does not limit rural development so it does not protect water resources
- ❑ GMHB determined the Plan does not protect water resources because under the Nooksack River Basin ISF rule water is no longer available for new uses in rural areas
- ❑ GMHB determined the Plan violates GMA because it allows development that relies upon permit-exempt wells for water supply without mitigation to protect stream flows
- ❑ Court of Appeals reversed the GMHB decision and ruled the county's Plan complies with GMA because it does not allow daisy-chaining of permit-exempt uses
- ❑ Court of Appeals ruled that to comply with GMA requirements to protect water resources, the County must act consistently with the Nooksack Basin ISF rule
- ❑ Supreme Court hearing held; decision pending

### Fox v Skagit County

- ❑ Fox had application on file with Skagit County to obtain a building permit
- ❑ Fox filed Writ of Mandamus in Skagit County Superior Court to compel the county to issue a building permit
- ❑ Superior Court determined Fox does not have a legal water supply because domestic uses of water would be subject to interruption under the Skagit River Basin ISF rule when ISFs are not being met
- ❑ Court of Appeals upheld Superior Court decision and agrees that Fox does not have a legal water supply
- ❑ Fox can petition the Supreme Court to hear the case; petition has not yet been filed but is anticipated

### New Ground Rules for Managing Water

- ❑ County must make determinations that water is both physically and legally available
- ❑ County building permit decisions must be consistent with Ecology's ISF rules
- ❑ Permit-exempt uses are subject to minimum ISFs and closures established by ISF rule
- ❑ Permit-exempt uses are not legal if the use is subject to interruption under an ISF rule
- ❑ OCPI exemption cannot be used to establish reservations of water in closed basins
- ❑ Out-of-kind mitigation cannot be used to meet the 4-part test in WA water code

### Big Picture Message from Courts

#### **Closed means Closed**

Ecology cannot circumvent ISF rules and/or basin closures by establishing or invoking reservations, OCPI, out-of-kind mitigation, even for permit exempt water uses