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6 SUPERIOR COURT OF WASHINGTON  
7 IN AND FOR THE COUNTY OF SNOHOMISH

8 **SWINOMISH INDIAN TRIBAL  
9 COMMUNITY, and the SAUK-  
10 SUIATTLE INDIAN TRIBE, Federally  
11 recognized Tribes,**

11 Plaintiffs,

12 vs.

13 **SKAGIT COUNTY, a Municipal  
14 Corporation,**

14 Defendant

NO. 04 2 05812 1

**COMPLAINT OF SWINOMISH INDIAN  
TRIBAL COMMUNITY AND SAUK-  
SUIATTLE INDIAN TRIBE AGAINST  
SKAGIT COUNTY FOR INJUNCTIVE  
AND DECLARATORY RELIEF**

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16 The Swinomish Indian Tribal Community and the Sauk-Suiattle Indian Tribe ("Tribes")  
17 each bring this action on their own behalf and on behalf of their members under the doctrine of  
18 *parens patriae*. The Tribes, by and through their attorneys of record, Ann E. Tweedy and  
19 Rebecca Leonard respectively, aver as follows:

20 **I. JURISDICTION**

21 1.1 This Court has subject matter jurisdiction pursuant to RCW 2.08.010, 7.24.010,  
22 7.24.020, 7.24.030, 7.24.080, and 7.40.010.

23 **II. PARTIES AND VENUE**

24 2.1 Plaintiff Swinomish Indian Tribal Community is a federally recognized Indian Tribe  
25 reorganized pursuant to Section 16 of the Indian Reorganization Act of 1934, and located in the State

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27 **COMPLAINT OF SWINOMISH INDIAN TRIBAL  
28 COMMUNITY AND SAUK-SUIATTLE INDIAN  
TRIBE AGAINST SKAGIT COUNTY FOR  
INJUNCTIVE AND DECLARATORY RELIEF - 1**

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**COPY**

1 of Washington. The Tribe has been adjudicated to be a successor-in-interest to signators of the  
2 Treaty of Point Elliott, 12 Stat. 927, and exercises off-reservation fishing rights pursuant to Article  
3 5 of such Treaty. *United States v. Washington*, 459 F.Supp. 1020, 1039 (W.D. Wash. 1978). Among  
4 other purposes, the Tribe reserved water rights sufficient to preserve, protect and make meaningful  
5 its off-reservation fishing rights. The Skagit River Basin has been adjudicated to be within the usual  
6 and accustomed fishing areas of the Tribe.<sup>1</sup> *Id.* at 1049. Since time immemorial the Swinomish  
7 Community has depended upon the land and water resources of the Skagit River Basin.

8 2.2 Plaintiff Sauk-Suiattle Indian Tribe is a federally recognized Indian Tribe located in  
9 the state of Washington. The Tribe has been adjudicated to be a successor-in-interest to signators of  
10 the Treaty of Point Elliott, 12 Stat. 927, and exercises off-reservation fishing rights pursuant to  
11 Article 5 of such Treaty. *United States v. Washington*, 384 F.Supp. 312, 401 (W.D. Wash. 1974).  
12 Among other purposes, the Tribe reserved water rights sufficient to preserve, protect and make  
13 meaningful its off-reservation fishing rights. Portions of the Skagit River Basin have been  
14 determined to be within the usual and accustomed fishing areas of the Tribe.<sup>2</sup> *Id.* at 375. Since time  
15 immemorial the Sauk-Suiattle Indian Tribe has depended upon the land and water resources of the  
16 Skagit River Basin.

17 2.3 Defendant is Skagit County (“County”) incorporated under the laws and constitution  
18 of the State of Washington. RCW ch. 36 *et seq.*

19 2.4 Venue lies in Snohomish County pursuant to RCW 36.01.050(1).  
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21 1

22 Although the Swinomish Tribe describes its proprietary and governmental interests in this case as  
23 including federally secured and federally protected treaty rights, the Tribe does not assert any claim based  
24 on a violation of its federal treaty rights.

25 2 Although the Sauk-Suiattle Tribe describes its proprietary and governmental interests in  
26 this case as including federally secured and federally protected treaty rights, the Tribe does not assert any  
27 claim based on a violation of its federal treaty rights.

28 **COMPLAINT OF SWINOMISH INDIAN TRIBAL  
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TRIBE AGAINST SKAGIT COUNTY FOR  
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1 **III. BACKGROUND FACTS**

2 3.1 The Memorandum of Agreement Regarding Utilization of Skagit River Basin Water  
3 Resources for Instream and Out of Stream Purposes (“1996 MOA”) was signed by representatives  
4 of the Skagit County P.U.D. #1, the City of Anacortes, Washington Department of Fish & Wildlife,  
5 Washington Department of Ecology, the Sauk-Suiattle Indian Tribe, the Swinomish Indian Tribal  
6 Community, Skagit County, and the Upper Skagit Tribe in October through December 1996. Its  
7 purposes included, among others, (1) ensuring “establishment of instream flows to protect fisheries  
8 resources . . . ,” (2) providing a “mechanism for coordinated management of water resources . . . ”  
9 to meet out-of-stream needs, and (3) “avoid[ing] litigation or adjudication of water resources within  
10 the Skagit River Basin between the Parties . . . ” to the 1996 MOA. 1996 MOA, Part I, attached as  
11 Exhibit A.

12 3.2 On December 23, 1996, and December 26, 1996, respectively, Robert Hart, County  
13 Commissioner for Skagit County, and O. Harvey Wolden, County Commissioner for Skagit County,  
14 signed the 1996 MOA, thereby binding Skagit County (“County”) to the 1996 MOA.

15 3.3 The 1996 MOA specifies that it will be in effect for at least fifty years and that it  
16 “may only be amended or modified during the 50-year term by mutual written agreement of all  
17 signatories.” Exhibit A, Part V.A.

18 3.4 The 1996 MOA defines “Out-of-Stream Use” to include “groundwater in continuity  
19 with the Skagit River or its tributaries . . . .” Exhibit A, Part III.C.

20 3.5 The short-term objectives of the 1996 MOA included funding and conducting an  
21 Instream Flow Incremental Methodology (“IFIM”) study of the Lower Skagit River within two years  
22 of the 1996 MOA and then establishing instream flows by rule for the Lower Skagit River,  
23 comprised of Water Resources Inventory Area (“WRIA”) 3 excluding various islands, within the  
24 following eighteen months. Exhibit A, Parts IV.C.2.c, IV.B.2.c, and IV.A.

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26 **COMPLAINT OF SWINOMISH INDIAN TRIBAL  
27 COMMUNITY AND SAUK-SUIATTLE INDIAN  
28 TRIBE AGAINST SKAGIT COUNTY FOR  
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1           3.6     The input criteria for the IFIM study was limited by agreement of the parties to the  
2 MOA to “fisheries and fisheries habitat management.” Exhibit A, Part IV.B.2.b.

3           3.7     “[T]he long term objective [of the 1996 MOA was] to develop a comprehensive  
4 watershed management plan for the Skagit River Basin designed to manage the use of the water  
5 resources to meet both instream and out of stream objectives . . . .” Exhibit A, Part IV.G.1.

6           3.8     Pursuant to this long term objective, all Parties to the 1996 MOA agreed “[t]o  
7 collaborate in investigating all alternatives so as to secure adequate stream flows to meet instream  
8 needs for portions of the Skagit River upstream of the PUD pipeline crossing at Sedro Woolley and  
9 out-of-stream needs within the [service] areas defined within the CWSP [Coordinated Water System  
10 Plan].” Exhibit A, Part IV.G.1.a.

11          3.9     Another “primary objective [of the 1996 MOA was] to reduce the use of exempt wells  
12 in those areas of the County experiencing inadequate instream flows that may be occurring as a result  
13 of groundwater withdrawal.” Exhibit A, Part IV.A.5.

14          3.10    Under, the 1996 MOA, the County specifically agreed “[t]o implement Section 63  
15 of the Growth Management Act [codified as RCW 19.27.097], such that building permits would only  
16 be issued if the parcel is served by a public water system or if there is an adequate supply of potable  
17 water that can be withdrawn from groundwater without adversely impacting Skagit River Basin  
18 Instream Flows, other than as agreed herein.” Exhibit A, Part IV.D.1.

19          3.11    The County also agreed, under the 1996 MOA, “[t]o seek amendment of the CWSP  
20 and related County implementing ordinances to require connection of new individual/single family  
21 homes to public water systems . . . .” Exhibit A, Part IV.D.3.

22          3.12    In the year 2000, Ecology issued for public comment several draft versions of the  
23 proposed Instream Flow Rule, which would set minimum levels for the amount of water needed to  
24 be left flowing in the river. In 1999 and 2000, it also held several public outreach events to explain  
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<p>26           <b>COMPLAINT OF SWINOMISH INDIAN TRIBAL 27           COMMUNITY AND SAUK-SUIATLE INDIAN 28           TRIBE AGAINST SKAGIT COUNTY FOR               INJUNCTIVE AND DECLARATORY RELIEF - 4</b></p>	<p>              <b>SWINOMISH INDIAN TRIBAL COMMUNITY                   OFFICE OF TRIBAL ATTORNEY                   11404 MOORAGE WAY / P.O. BOX 817                                   La CONNER, WA 98257                   PH: (360) 466-3163 FAX: (360) 466-5309</b></p>
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1 the proposed Rule. Additionally, on October 30, 2000, Ecology issued a Determination of  
2 Nonsignificance (“DNS”) following a State Environmental Policy Act (“SEPA”) analysis of the  
3 proposed rule. The August 9 and September 6, 2000 drafts of the rule and the DNS all stated that  
4 the proposed Rule would apply to both the Lower and Upper Skagit Basins, *i.e.* WRIAs 3 and 4,  
5 excluding various islands and the Samish River sub-basin. All three documents also indicated that  
6 groundwater withdrawals would be subject to the Rule whenever there was hydraulic continuity  
7 between the groundwater and the river mainstem. The period for interested parties to comment on  
8 the proposed rule ended December 8, 2000.

9 3.13 During the Rule development and comment period, County Commissioners and/or  
10 employees attended several meetings regarding the Instream Flow Rule, including the meeting where  
11 Parties to the 1996 MOA requested that the Rule cover exempt wells, but County representatives  
12 failed to comment, either orally or in writing, on the draft rule. Thus, prior to the effective date of  
13 the Rule, the County made no objection to the fact that the Rule included the Upper Skagit Basin or  
14 to the fact that the Rule applied to wells for which no permit is required under RCW 90.44.050  
15 (“exempt wells”).

16 3.14 On April 14, 2001, the Skagit Instream Flow Rule, WAC ch. 173-503, became  
17 effective. WAC chapter 173-503 prohibits groundwater withdrawals when there is hydraulic  
18 continuity between the surface water and the proposed groundwater source, unless the groundwater  
19 can be withdrawn without interfering with stream flow levels during a period of stream closure or  
20 with maintenance of minimum instream flows. This prohibition applies to permitted wells, WAC  
21 173-503-060, as well as to exempt wells. WAC 173-503-070; RCW 90.44.030.

22 3.15 Under state water law and the prior appropriation doctrine, instream flows set by rule  
23 are a water right with a priority date corresponding to the date of Rule adoption. Therefore, the  
24 priority date of the Skagit Instream Flow Rule (WAC ch. 173-503) is April 14, 2001. New water  
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INJUNCTIVE AND DECLARATORY RELIEF - 5**

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1 rights issued after April 14, 2001, including those for exempt wells, are thus “junior” to the instream  
2 flow level set by the Rule. This means that use of junior wells is subject to interruption, *i.e.*, the taps  
3 must be turned off, during periods when the instream flow levels set by the Rule are not reached.

4 3.16 While Ecology initially calculated that 200 cfs would be available for withdrawals  
5 junior to the Instream Flow Rule, WAC 173-503-050(1), the Rule states that, “[i]f further  
6 information demonstrates that [that] amount . . . should have been less than two hundred cubic feet  
7 per second, ecology [sic] will not be bound by the two hundred feet per second number when  
8 processing individual water rights applications.” WAC 173-503-050(3).

9 3.17 In each of the years since the Instream Flow Rule went into effect, the level of the  
10 river flows was not high enough to reach the minimum flows provided in the Rule for at least some  
11 part of the year.

12 3.18 In the Skagit River Basin, as elsewhere in the Puget Sound Lowlands, pumping  
13 groundwater from an exempt well almost invariably affects the flow levels of either the Skagit River  
14 mainstem or one of its tributaries, and such effects can be experienced over several square miles.

15 3.19 Upon information and belief, most new exempt wells in the Skagit Basin impair the  
16 flows of the Skagit River by further depleting the Skagit River mainstem during periods of the year  
17 when the minimum flows are not met.

18 3.20 RCW 19.27.097 requires the County, prior to issuing a building permit, to verify the  
19 existence of “adequate water supply for the intended use of the building.” *Id.* The availability  
20 required by RCW 19.27.097 is legal as well as physical availability. In other words, a potential  
21 exempt well user must show legal entitlement to withdraw adequate potable water to meet the  
22 building’s needs before a building permit may be issued.

23 3.21 Because of the importance of water for day-to-day activities, water supply for  
24 domestic uses must be available on a continuous basis, throughout all parts of the year.

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26 27 28 <b>COMPLAINT OF SWINOMISH INDIAN TRIBAL COMMUNITY AND SAUK-SUIATTLE INDIAN TRIBE AGAINST SKAGIT COUNTY FOR INJUNCTIVE AND DECLARATORY RELIEF - 6</b>	<b>SWINOMISH INDIAN TRIBAL COMMUNITY OFFICE OF TRIBAL ATTORNEY 11404 MOORAGE WAY / P.O. BOX 817 La CONNER, WA 98257 PH: (360) 466-3163 FAX: (360) 466-5309</b>
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1 3.22 Exempt wells in the Skagit River Basin constructed after April 14, 2001 are  
2 interruptible (*i.e.*, the taps must be turned off) whenever the instream flow levels set in WAC ch.  
3 173-503 are not met. Such interruptible water sources do not meet the requirements for an adequate  
4 reliable supply of water needed to authorize the issuance of a building permit under RCW 19.27.097,  
5 or subdivision of land under RCW 58.17.

6 3.23 Despite the lack of availability of an adequate water supply from exempt wells, the  
7 County has issued and continues to issue building permits which will rely on exempt wells both in  
8 the Lower Skagit Basin, below the PUD pipeline crossing at Sedro Woolley, and above the pipeline  
9 crossing in the Upper Skagit Basin. Additionally, the County does not require property owners to  
10 connect to public water systems when public service is available.

11 3.24 The County's actions as described in Paragraph 28 violate RCW 19.27.097 and the  
12 County's obligations under the 1996 MOA.

#### 13 IV. CLAIMS OR CAUSES OF ACTION

##### 14 4.1 Breach of Contract

15 A. Paragraphs 3.1 through 3.24 are incorporated by reference.

16 B. The County's continued issuance of building permits which rely on exempt wells in  
17 the Skagit Basin downstream of the PUD pipeline crossing at Sedro Woolley and its failure to  
18 require property owners to utilize available public water service violate the 1996 MOA.

##### 19 4.2 Violation of RCW 19.27.097

20 A. Paragraphs 3.1 through 3.24 are incorporated by reference.

21 B. In issuing building permits after the Instream Flow Rule went into effect that rely on  
22 exempt wells in the Skagit Basin, both upstream and downstream of the PUD pipeline crossing at  
23 Sedro Woolley, the County violates RCW 19.27.097 because the flow requirements in the Instream  
24 Flow Rule, WAC ch. 173-503, are not being met during some days per year and most of the wells  
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**COMPLAINT OF SWINOMISH INDIAN TRIBAL  
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TRIBE AGAINST SKAGIT COUNTY FOR  
INJUNCTIVE AND DECLARATORY RELIEF - 7**

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1 constructed are in hydraulic continuity with the Skagit River.

2 **V. PRAYER FOR RELIEF**

3 Plaintiff Tribes requests that judgment be entered against the Defendant as follows:

4 **5.1 Declaratory Judgment**

5 A. A declaration and/or judgment that the County's actions as described in  
6 Paragraphs 3.1 through 3.24 and 4.1 above constitute breach of contract.

7 B.. A declaration that the County's actions as described in Paragraphs 3.1 through  
8 3.24 and 4.2 violate RCW 19.27.097.

9 **4.2 Injunctive Relief**

10 A. The Court should permanently enjoin the County  
11 (1) from issuing building permits that rely on exempt wells in the Skagit Basin  
12 downstream of the Sedro Woolley pipeline crossing in violation of the 1996 MOA and from  
13 otherwise breaching the 1996 MOA, and

14 (2) from issuing building permits that rely on exempt wells in the Skagit Basin  
15 both upstream and downstream of the Sedro Woolley pipeline crossing in violation of RCW  
16 19.27.097.

17 **4.3 Other Relief**

18 A. The Court should award the Tribes any further or additional relief in law or  
19 equity, including statutory attorneys' fees and costs, that the Court deems equitable or just.

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27 **COMPLAINT OF SWINOMISH INDIAN TRIBAL  
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28 INJUNCTIVE AND DECLARATORY RELIEF - 8**

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1 DATED this 27 day of August, 2004.

2 SWINOMISH INDIAN TRIBAL COMMUNITY

3  
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12 SAUK-SUIATTLE INDIAN TRIBE

13 By: Rebecca Leonard by a ET  
14 Regina Hovet, WSBA No. 33645  
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27 COMPLAINT OF SWINOMISH INDIAN TRIBAL  
28 COMMUNITY AND SAUK-SUIATTLE INDIAN  
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