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5 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**  
6 **STATE OF WASHINGTON**

7 THE SWINOMISH INDIAN TRIBAL  
8 COMMUNITY,

9 Appellant,

10 v.

11 WASHINGTON DEPARTMENT OF  
12 ECOLOGY and SKAGIT COUNTY

13 Respondents.

PCHB No.

NOTICE OF APPEAL

14 **APPELLANT AND REPRESENTATIVES**

15 1. Appellant Swinomish Indian Tribal Community (“Tribe”) is a federally  
16 recognized Indian tribe that occupies the Swinomish Reservation in Skagit County,  
17 Washington. The Tribe’s mailing address is 11404 Moorage Way, La Conner, Washington,  
18 98257, and its telephone number is (360) 466-3163.

19 2. The Tribe is represented by:

20  
21 John Arum  
22 Joshua Osborne-Klein  
23 Ziontz, Chestnut, Varnell,  
24 Berley, & Slonim  
25 2101 Fourth Avenue, Suite 1230  
26 Seattle, WA 98121-2331  
Tel. (206) 448-1230; Fax (206) 448-0962  
[jarum@zcvbs.com](mailto:jarum@zcvbs.com)  
[joshok@zcvbs.com](mailto:joshok@zcvbs.com)

Emily Hutchinson  
Stephen LeCuyer  
Swinomish Indian Tribal Community  
Office of the Tribal Attorney  
11404 Moorage Way  
La Conner, WA 98257  
Tel. (360) 466-7248; Fax (360) 466-5309  
[ehutchinson@swinomish.nsn.us](mailto:ehutchinson@swinomish.nsn.us)  
[slecuyer@swinomish.nsn.us](mailto:slecuyer@swinomish.nsn.us)



1           8. Pursuant to the Treaty with the Duwamish, Suquamish, Etc., 12 Stat. 927  
2 (“Treaty of Point Elliott” or “Treaty”), the Tribe possesses the right to fish at its usual and  
3 accustomed fishing areas. These areas include, but are not limited to, Skagit River basin,  
4 including the Carpenter, Fisher, and Nookachamps Creek subbasins (collectively the  
5 “Subbasins”). See *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978).  
6 The Tribe is aggrieved by Ecology’s approval of the Mitigation Plans at issue in this appeal,  
7 which unlawfully allow new withdrawals of water from the Subbasins, diminish water quality,  
8 impact instream resources, impair existing water rights, and adversely affect the ability of the  
9 streams in the Subbasins to produce fish for harvest in the Tribe’s Treaty fisheries.<sup>1</sup>

11           9. In 1996, the Tribe entered into a Memorandum of Agreement (“MOA”) with  
12 Ecology, Skagit County, and several other governmental stakeholders that was intended to  
13 result in the establishment of minimum instream flows to protect fisheries resources in the  
14 Skagit River basin and reduce the use of exempt water wells in areas of Skagit County  
15 experiencing inadequate instream flows as a result of groundwater withdrawal. *Swinomish*  
16 *Indian Tribal Community v. Skagit County*, 138 Wn. App. 771, 774, 158 P.3d 1179 (2007).  
17 The MOA established a science-based process for setting minimum instream flow  
18 requirements for the Skagit River and its tributaries. *Id.*

21           10. Pursuant to the MOA, Ecology adopted regulations in 2001 that established  
22 minimum instream flows for the Skagit River and four of its tributaries (“2001 Instream Flow

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24 <sup>1</sup> While Appellant’s interest arises from the Treaty of Point Elliott, Appellant does not assert, but rather  
25 explicitly reserves, any and all claims to or arising from Appellant’s Federal rights, including but not limited to  
26 claims relating to rights under the Treaty of Point Elliott and Federal reserved rights. See *Postema v. P.C.H.B.*,  
142 Wn.2d 68, 74, 11 P.3d 726 (2000). Adjudication of the existence or extent of Appellant’s Federal rights is  
not at issue in this appeal, and adjudication of such rights would exceed the permissible scope of this proceeding  
under RCW 43.21B.110.

1 Rule”). At the time, Ecology stated that these regulations were designed to retain sufficient  
2 flows in the Skagit River and its tributaries to provide for the protection and preservation of  
3 wildlife, fish, scenic, aesthetic, and other environmental and navigational values, as well as  
4 recreation and water quality. WAC 173-503-020. The minimum flow levels established in the  
5 2001 Instream Flow Rule constitute appropriations under the Water Code with a priority date  
6 of appropriation of April 14, 2001. RCW 90.03.345.

8 11. Although Skagit County was a party to the MOA, it challenged the 2001  
9 Instream Flow Rule and demanded that Ecology establish “reservations” of water that would  
10 not be subject to the minimum instream flows. Ecology eventually acceded to the County’s  
11 demands and agreed to promulgate amendments to the 2001 Instream Flow Rule, which  
12 became effective on June 15, 2006 (“2006 Rule Amendments”).

14 12. The 2006 Rule Amendments “reserved” 25 cubic feet per second (“cfs”) of  
15 water in the Skagit River for future residential, commercial/industrial, municipal,  
16 stockwatering, and agricultural uses that would not be subject to the minimum instream flows  
17 established in Chapter 173-503 WAC. WAC 173-503-073(1). The 2006 Rule Amendments  
18 divided this reservation between each Skagit River tributary or “subbasin management unit.”  
19 WAC 173-503-074. Under the 2006 Rule Amendments, once a tributary or subbasin  
20 reservation is fully allocated, water is no longer available and the tributary or subbasin is  
21 automatically closed to further appropriation. WAC 173-503-073(5); *see also* WAC 173-503-  
22 060(1).

24 13. Once a subbasin is closed, the 2006 Rule Amendments allow an applicant or  
25 governmental agency to obtain an exception to the closure by submitting “a scientifically  
26 sound mitigation plan” that is “approved by the department.” WAC 173-503-060(1)(c).

1 Ecology may only approve a mitigation plan if the proponent can demonstrate that the  
2 mitigated withdrawal will not impair senior water rights, including instream flow rights,  
3 adversely impact instream resources, or diminish water quality. *Id.* An approved mitigation  
4 plan must include a monitoring and reporting plan, including a quality assurance/quality  
5 control plan, to ensure that the mitigation is effective. *Id.* It also must include conditions that  
6 the plan be implemented as long as the associated water right is used and that any water  
7 provided for mitigation purposes be prohibited from being applied to any other purpose. *Id.*

9       14. In limited circumstances, the 2006 Rule Amendments allow Ecology to award a  
10 50 percent septic recharge credit to the reservations when water is withdrawn from a subbasin  
11 and discharged by the water user into the same subbasin via an individual or community on-  
12 site septic system. WAC 173-503-073(7)(c). At the time Ecology promulgated the 2006  
13 Rule Amendments, the agency confirmed that septic recharge credit was not to be awarded  
14 under WAC 173-503-073(7)(c) for discharges of septic effluent by users of public water  
15 systems that import water into a subbasin (“imported water”). Ecology stated that recharge  
16 credit for imported water “could potentially be a component of a mitigation proposal which  
17 would have to be approved by Ecology after application.” *See* Responsiveness Summary and  
18 Concise Explanatory Statement for the Adoption of Chapter 173-503 WAC at 148 (May 2006).  
19

20       15. In 2008, Ecology reversed course and announced it would give recharge credit  
21 for discharges of imported water without submission of a scientifically sound mitigation plan.  
22 This decision had the effect of significantly increasing the amount of water Ecology would  
23 allow to be appropriated for new non-interruptible withdrawals under the reservations. Had  
24 Ecology not reversed its position on the imported water issue, the reservation quantity used in  
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1 the Carpenter/Fisher subbasin from 2001 to 2007 would have exceeded the amount allowable  
2 under the 2006 Rule Amendments by over 2,700 gallons per day (“gpd”).

3           16. The Tribe challenged the 2006 Rule Amendments in the Superior Court for  
4 Thurston County on substantive and procedural grounds, including substantive challenges to  
5 the validity of the water reservations and the septic recharge provision described above. One  
6 of the Tribe’s procedural claims was that Ecology’s 2008 decision to award a general credit for  
7 discharges of imported water was a rule adopted without adherence to Administrative  
8 Procedure Act (“APA”) mandatory rulemaking procedures. *Swinomish Indian Tribal*  
9 *Community v. Ecology*, No. 08-2-01403-4, Tribe’s First Amended Petition for Review at ¶ 48  
10 (Oct. 10, 2008). The Superior Court dismissed the Tribe’s APA rulemaking claim on the  
11 ground that Ecology’s decision to award recharge credit for imported water was not a “rule” as  
12 defined in the APA. *Swinomish Indian Tribal Community v. Ecology*, No. 08-2-01403-4 (Dec.  
13 18, 2009) (Order). The Court did not hold on the merits that the 2006 Rule Amendments allow  
14 Ecology to award a general recharge credit for imported water in the absence of a scientifically  
15 sound mitigation plan. The Tribe’s remaining claims are still pending before the Thurston  
16 County court.

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19           17. In 2009, Skagit County submitted the two Mitigation Plans at issue in this  
20 appeal to Ecology for approval pursuant to WAC 173-503-060(1)(c). Those Mitigation Plans  
21 ask Ecology to credit the Carpenter/Fisher Creek subbasin and the Nookachamps Creek  
22 subbasin reservations at the rate of 80 gpd for each new connection to the Skagit PUD water  
23 system, which imports water into these subbasins.

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25           18. On December 30, 2009, Ecology issued two orders approving the Mitigation  
26 Plans. In those orders, Ecology asserted its “belie[f] that a mitigation plan is not required

1 under WAC 173-503 in order to account for the imported water credit as described in the  
2 mitigation plan.” *E.g.*, Ecology Order Approving Mitigation Plan for Eligible Ground Water  
3 Withdrawals in the Carpenter/Fisher Creek Subbasin at 1. Nonetheless, recognizing the need  
4 to have its reservation accounting protocol “documented,” the agency concluded that “Skagit  
5 County has demonstrated to the department’s satisfaction that when the mitigation is  
6 implemented the proposed withdrawal(s) will not impair senior water rights, including  
7 instream flow rights, adversely impact instream resources, or diminish water quality.” *Id.*  
8 Ecology’s orders approving Skagit County’s Mitigation Plans are the subject of this Appeal.  
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#### 10 GROUND FOR APPEAL

11 19. Ecology’s orders approving the Mitigation Plans violate WAC 173-503-  
12 060(1)(c), the Water Codes, the State Environmental Policy Act (“SEPA”), and other  
13 applicable law for the following reasons:  
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15 a. **Ecology may only grant reservation recharge credit for imported**  
16 **water pursuant to a scientifically sound mitigation plan.** Ecology’s orders approving the  
17 Mitigation Plans erroneously assert that “a mitigation plan is not required under WAC 173-503  
18 in order to account for the imported water credit . . . .” This position violates WAC 173-503-  
19 060(1), WAC 173-503-073(3)(h), and WAC 173-503-073(7)(c), and is inconsistent with  
20 Ecology’s statement in the Concise Explanatory Statement for the 2006 Rule Amendments, all  
21 of which provide that credit for imported water may be allowed, if at all, only pursuant to “a  
22 scientifically sound mitigation plan” that “is approved by the department.”  
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24 b. **The Mitigation Plans are not scientifically sound.** The Mitigation  
25 Plans award a uniform 50 percent recharge credit for each user of imported water that  
26 discharges septic effluent into an on-site septic system. A uniform septic recharge credit is not

1 supported by sound science or any site-specific hydrological analysis demonstrating that  
2 recharge from septic discharges of imported water will fully mitigate the impacts to existing  
3 State water rights, water quality and instream resources from new groundwater withdrawals.  
4 *See Manke Lumber Co. v. Dep't of Ecology*, 1996 WL 656039, \*4 (PCHB Nov. 1, 1996)  
5 (“Septic groundwater recharge has not been shown to be an acceptable mitigation of  
6 groundwater withdrawals.”); *Covington Water Dist. v. Dep't of Ecology*, 1996 WL 752664, \*8  
7 (PCHB Nov. 27, 1996) (“[T]he use of septic systems, with resulting partial recharge of ground  
8 water, should not be the basis for granting a [groundwater] right.”). As an example, Ecology  
9 and the County failed to assess the impacts resulting from the differences in location and  
10 timing of the septic recharge from imported water compared to the new withdrawals to be  
11 mitigated.  
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14 c. **The Mitigation Plans fail to address impacts on water quality.** The  
15 water imported pursuant to the Mitigation Plan is likely to be chemically treated, yet there has  
16 been no assessment of the impact that those chemicals and their byproducts will have on water  
17 quality in small tributaries. In addition, although the Mitigation Plans allow new non-  
18 interruptible withdrawals from the Subbasins not otherwise authorized, the Mitigation Plans  
19 fail to account for the impact to water quality in the Subbasins resulting from the additional  
20 septic discharges associated with these new withdrawals and the possibility of septic system  
21 failures. Ecology and Skagit County have also failed to assess the impact on water quality in  
22 the Subbasins resulting from substituting septic recharge for natural base flows.  
23

24 d. **The Mitigation Plans fail to address impacts to instream resources.**  
25 Neither Ecology nor Skagit County has evaluated the impact of discharges of imported water  
26 on the homing ability of salmonids returning to the Skagit Basin to spawn.

1                   e.       **The Mitigation Plans fail to protect senior State water rights in the**  
2 **Skagit River basin, including the State instream flow right.** Recharge from septic  
3 discharges of imported water will not fully mitigate the impacts to existing State water rights  
4 (including the State instream flow right) from new appropriations authorized under the  
5 Mitigation Plans. Furthermore, the water from septic discharges by users of imported water  
6 credited to the reservations under the Mitigation Plans legally belongs to existing, senior State  
7 water right holders (including the State instream flow right). Because there is insufficient  
8 water available to fulfill existing, senior State water rights, water from septic discharges by  
9 users of imported water is not available for new appropriations. Finally, Ecology improperly  
10 awarded “mitigation” credit for discharges of imported water commencing prior to the  
11 effective date of the 2006 Rule Amendments and the date of its approval of the Mitigation  
12 Plans.  
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14                   f.       **The Mitigation Plans lack adequate monitoring/reporting**  
15 **provisions.** The Mitigation Plans fail to provide any mechanism for monitoring whether septic  
16 discharges credited under the plans will be effective at offsetting the impacts from new  
17 withdrawals. *See Squaxin Island Tribe v. Ecology*, No. 05-137, 2006 WL 3389969, \*28  
18 (PCHB Nov. 20, 2006). Such monitoring is critical in light of considerable evidence that  
19 septic recharge has been previously found to not be an effective method for mitigating surface  
20 water withdrawals. *See Manke Lumber, supra; Covington Water, supra.* The Mitigation Plans  
21 also fail to provide a mechanism for debiting the reservations when septic discharges that had  
22 been awarded credits are subsequently converted to sewer system discharges and are therefore  
23 no longer eligible for reservation credits.  
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1 d. An order vacating Ecology's approval of Skagit County's Mitigation  
2 Plans for failing to comply with WAC 173-503-060(1)(c), the Water Codes, SEPA, and other  
3 applicable law; and

4 e. Other just relief.

5 DATED this 28 day of January, 2010.

6 Respectfully submitted,

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9 By: JOK  
10 John B. Arum, WSBA No. 19813  
11 Joshua Osborne-Klein, WSBA No. 36736  
12 Ziontz, Chestnut, Varnell, Berley & Slonim  
13 2101 Fourth Ave., Suite 1230  
14 Seattle, WA 98121-2331  
15 Tel. (206) 448-1230; Fax (206) 448-0962  
16 [jarum@zcvbs.com](mailto:jarum@zcvbs.com)  
17 [joshok@zcvbs.com](mailto:joshok@zcvbs.com)

18 By: JOK for Emily Hutchinson  
19 Emily R. Hutchinson, WSBA No. 38284  
20 Tribal Attorney  
21 Swinomish Indian Tribal Community  
22 Office of the Tribal Attorney  
23 11404 Moorage Way  
24 La Conner, WA 98257  
25 Tel. (360) 466-7248; Fax (360) 466-5309  
26 [ehutchinson@swinomish.nsn.us](mailto:ehutchinson@swinomish.nsn.us)