



SKAGIT COUNTY BOARD OF COMMISSIONERS

RON WESEN, First District
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December 14, 2012

Chairman Brian Cladoosby and Senate
Swinomish Indian Tribal Community
11404 Moorage Way
La Conner, WA 98257

Mayor Dean Maxwell and Council
City of Anacortes
P.O. Box 547
Anacortes, WA 98221

RE: 1996 Memorandum of Agreement

Greetings,

Thank you for your letters dated December 4 and 6, 2012 regarding Skagit County's withdrawal from the 1996 Memorandum of Agreement ("1996 MOA"). Because they are functionally identical, we provide a single response.

Skagit County was asked by Swinomish and Anacortes to participate in the 1996 MOA, which was held out as a cooperative local stakeholder effort to negotiate an instream flow rule for the Skagit River Basin over a five year period. Skagit County participated to ensure that Skagit farmers and rural landowners would retain some limited access to water along with the strong environmental protections that the 1996 MOA envisioned.

Despite allocating water for rural landowners in its draft form, the 2001 Skagit Instream Flow Rule, when published by Ecology, mistakenly allocated no water whatsoever for Skagit farmers and rural landowners. Several years of litigation ensued.

As of June 2008, the 1996 MOA's intent was accomplished: extremely robust instream flows, and tight restrictions on rural wells. Swinomish voluntarily dismissed the last pending lawsuit. We warmly spoke of an end to conflict over water, and a hopeful new approach. We attach local news coverage.

Several days later, without any discussion, Swinomish filed suit, joined by Anacortes, demanding elimination of the entire water allocation for farmers and rural landowners in the Skagit Basin, a case now before the state supreme court. By doing so, Swinomish and Anacortes materially breached the 1996 MOA, as well as the duty of good faith and fair dealing inherent in the agreement.

Under Washington law, when a party to a contract acts to defeat the purpose of the contract, it constitutes material breach, and the other party is excused from further performance.

As previously noted, Skagit County agreed to participate in the 1996 MOA solely to ensure rural landowners and farmers would retain some reasonable access to water. Your ongoing lawsuit, which seeks to eliminate all water for rural landowners and farmers, completely undermines the stated purpose of the 1996 MOA, and constitutes a material breach of our agreement.

While Swinomish and Anacortes have the right to use the Washington court system to challenge technical details of the Skagit Rule, you are materially breaching the 1996 MOA by demanding invalidation of the water allocation for Skagit farmers and rural landowners.

We tried to address this with you over a period of years by proposing mediation, but your representatives refused to engage, making clear that any further efforts at dispute resolution were futile. Skagit County withdrew from the 1996 MOA because it is evident that further direct interaction between Swinomish and Skagit County over this issue is unlikely to be productive.

We attempted another approach to fix the broken 1996 MOA stakeholder effort, proposing we add agriculture and rural landowner representatives in order to create buy-in for the long-range regional water plans Swinomish and Anacortes propose. Months passed with no response. After we withdrew from the 1996 MOA, you summarily voted down our proposal via the Skagit River Flow Management Committee, exceeding the committee's technical advisory authority, further breaching the 1996 MOA.

Skagit County will continue to perform all its obligations under state law, including enforcement of the 2006 Skagit Instream Flow Rule, to which any 1996 MOA obligations are redundant. The various mutual promises that Anacortes and Swinomish made to each other in the 1996 MOA, referenced in your letters, are completely unaffected by the County's recent withdrawal.

Mayor Maxwell's December 6 letter also claims that Skagit County breached the 2007 County-Anacortes Settlement Agreement, a document signed in the wake of six different unsuccessful legal actions by Anacortes against the County. The 2007 agreement required Anacortes and the County to mutually "work in good faith" on water planning, an obligation Anacortes promptly breached in 2008 by suing to eliminate the entire Skagit water allocation for farmers and rural landowners. Skagit County has no further duties under the 2007 Settlement Agreement either.

You can remedy your ongoing breach by dismissing your pending lawsuit. Until that happens, Skagit County is not a party to the 1996 MOA, and has no further obligations under the 1996 MOA.

Over the past several years, Skagit County has taken the strongest environmental positions of any county in the state, a shift that Swinomish leadership seems unwilling to recognize. An example is the joint Upper Skagit Indian Tribe/Skagit County restoration of the Hansen Creek alluvial fan. The restoration work was done on County-owned property, involved no conflict, and is the most significant and successful Chinook habitat restoration in the Skagit Basin to date. This work depended entirely on a high degree of trust between County and Tribe, and it offers a far better model for the future than a legacy of confrontation and litigation.

By continuing to use outdated tactics of confrontation against an environmentally proactive county government, you are visibly creating worse environmental outcomes than reasonable cooperation and compromise could easily achieve. For example, in the *Swinomish v. Skagit County* litigation over agricultural critical areas, Skagit County offered Swinomish a number of settlement proposals far more favorable to tribal fishery interests, all rejected, than the outcome ultimately imposed by the state legislature.

The water rights dispute is clearly headed in the same self-defeating direction, and our withdrawal from the 1996 MOA is a retreat from this counterproductive paradigm.

By any measure, the current 2006 Skagit Instream Flow Rule is a tremendous environmental success, forming the model for more recent rules adopted around the state with tribal input and consent. If your lawsuit to invalidate the 2006 Rule is successful, it is certain to lead to many more years of litigation, and a worse environmental outcome. This is why the Department of Ecology is vigorously defending the Rule against your current lawsuit.

We sincerely believe that long-term water plans require being more open, inclusive and transparent, by (1) including agriculture and rural landowners at the table in order to obtain community acceptance; (2) using a qualified neutral mediator to assist us in moving forward from nearly two decades of acrimony; and (3) recommitting to honest and open dialogue. With this in mind, we respectfully ask you to reconsider your position.

We are all here for the long term. Rather than remaining mired in the battles of past generations, we prefer to work in cooperation with Swinomish and other Skagit tribes to prepare our community for the environmental challenges of the future, including the threats that climate change poses.

Skagit County's withdrawal from the 1996 MOA will lead to more litigation only if you choose to continue down that path. We are hopeful you will instead see it as an opportunity to break from the past, reset our relationship, and focus on working together constructively to resolve this issue.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON



KENNETH A. DAHLSTEDT, Chairman



SHARON D. DILLON, Commissioner



RON WESEN, Commissioner

cc: Governor Chris Gregoire
Northwest Indian Fisheries Commission
Governor-elect Jay Inslee
Sen. Mary Margaret Haugen
Sen. Kevin Ranker
Sen. Val Stevens
Rep. Barbara Bailey
Rep. Dan Kristiansen
Rep. Kirk Pearson
Rep. Jeff Morris
Rep. Norma Smith
Rep. Bruce Chandler
Rep.-elect Elizabeth Scott
Rep. Elect Dave Hayes
Rep. Kristine Lytton
The Hon. Rob McKenna
Mr. Robert Ferguson (Attorney General-elect)
Mayor Dean Maxwell and Council (City of Anacortes)
Jennifer Washington (Upper Skagit Indian Tribe)
Norma Joseph (Sauk Suiattle Indian Tribe)
Ted Sturdevant (Dept of Ecology)
Bob Everitt (Dept of Fish and Wildlife)
Robert Powell and Commission (Skagit PUD No. 1)
Eric Johnson (Washington Association of Counties)

Dismissal of water-rights lawsuit signals end to decade of rancor

Skagit Valley Herald staff

A lawsuit that played a part in a bitter legal fight between Anacortes, the Swinomish tribe and Skagit County was put to rest this week when the tribe offered to dismiss the case.

The tribe had sued the county in Snohomish County Superior Court in 2004, seeking a moratorium on rural wells and claiming the county had violated a 1996 contract among those with a stake in water rights and water management in the county.

The moratorium was denied, but an appeals court upheld the tribe's assertion that the county had violated the contract when county commissioners said in 2001 that they weren't bound by it.

In 2006, the state Department of Ecology and the county agreed to allow a certain number of exempt wells in low-flow streams, which the tribe believed could threaten salmon and which led to a flurry of lawsuits from Anacortes, a water provider that has the tribe as one of its major customers.

The Anacortes lawsuits have since been settled, and the tribe asked a Snohomish County judge to dismiss its case on Tuesday. A hearing on the dismissal is scheduled for July 24.

Swinomish attorney Marty Loesch said the county recently has taken a different approach to the 1996 contract, or memorandum of agreement. The county has played an active role in a water management committee created by the agreement, he said.

"It's a little premature to declare victory, but we're in a place where we can say, let's play this out and see where it goes," Loesch said.

County Chief Civil Prosecutor Will Honea said the lawsuit marked the end of a "painful" process that ended well, with assurances of adequate flow levels for salmon and a limit on the number of rural wells.

"Despite the past decade of acrimony and litigation that it took to get here, this is a real success story," Honea said.



**SKAGIT COUNTY
BOARD OF COMMISSIONERS**

**DON MUNKS, First District
KENNETH A. DAHLSTEDT, Second District
SHARON D. DILLON, Third District**

June 30, 2008

Mayor Dean Maxwell and Council
City of Anacortes
904 6th Street
Anacortes, WA 98221

**RE: City of Anacortes Proposed Intervention in Challenge to Skagit River
Instream Flow Rule by Swinomish Tribe**

Greetings,

We understand that the City of Anacortes intends to intervene in the Swinomish Tribe's lawsuit against the State of Washington over the Skagit River Instream Flow Rule ("Rule"). We write to counsel caution, and urge restraint.

The Swinomish Tribe recently dismissed its lawsuits against Skagit County over water rights, praising the County for our cooperative work on regional water planning. Shortly thereafter, without discussing the matter with the County as the 1996 Memorandum of Agreement requires, the Swinomish Tribe filed suit against the State of Washington, seeking to invalidate the Rule. Substantively, it is our understanding that the Swinomish Tribe seeks even more restrictions on rural wells in eastern Skagit County.

The County's main concern, which we have repeatedly expressed to the Swinomish Tribe, is that any regulatory regime must ultimately be implemented by the County's land use regulations. If the Rule and thus the County's implementing regulations are grounded in a negotiated litigation settlement with the Swinomish Tribe rather than science in the record, the entire regulatory scheme will very likely be brushed aside in court by the many landowners who object to the inability to use rural wells (and thus their land) where public water is unavailable. A regulatory regime sure to fail is worse than none at all.

Despite our repeated invitations, the Swinomish Tribe refuses to intervene or otherwise help the County defend against individual landowner challenges to the various regulatory restrictions on water resources that the Swinomish Tribe has insisted the County adopt, in effect abandoning the County to shoulder the load alone. In a world of climactic uncertainty, Skagit County is fully committed to our program of leading the nation in reducing reliance on exempt wells. Because the burden of enforcing this program is the County's alone, we have an obligation to our taxpayers to ensure that the regulatory framework we adopt is both legally and scientifically defensible.

The Skagit River Instream Flow Rule is the first successful effort to delimit the use of exempt wells in rural areas where public water is unavailable, guaranteeing adequate instream flows for salmon in perpetuity. For these and other reasons, Ecology Director and former Washington Environmental Council President Jay Manning has called the 2006 Skagit River Instream Flow Rule "the best instream flow rule in the State." Unsurprisingly, the State of Washington has pledged to vigorously defend the Skagit River Instream Flow Rule against the Swinomish Tribe's challenge.

As a result of the State's robust commitment to defend the Rule as written, Skagit County has no plans at this time to intervene in the Swinomish Tribe's lawsuit against the State. First, we believe that intervention by various local governments will accomplish little besides politicizing what is, at its core, a technical and scientific issue. Second, the State's good relations with the Swinomish Tribe will allow efficient government-to-government discussions likely to reach a reasonable resolution of the Swinomish Tribe's grievances. Finally, we are reluctant to resume paying outside legal counsel many more hundreds of thousands of dollars to litigate over water rights when, as is clearly the case here, local government's participation in the conflict is entirely optional if not unhelpful.

With the foregoing in mind, we would encourage the City to reconsider its plans to intervene. There appears to be no critical City interest directly at issue in the Swinomish Tribe's litigation, which is focused on the County's ability to allow rural wells in the eastern half of Skagit County. If the County can find grounds for restraint under the circumstances, we presume the City might as well.

We also urge the City to consider the larger picture. The City has by far the largest water reservation from the Skagit River basin, to which the City has the Swinomish Tribe's agreement via the 1996 MOA. In consideration, the Swinomish Tribe receives wholesale water from the City at low rates. Skagit County endorsed this scheme in 1996 with the understanding that there would be some reasonable approach to exempt rural wells in the eastern part of Skagit County. After many years of acrimony and litigation, the State in 2006 adopted what is easily the most restrictive instream flow rule in the State of Washington. The status quo is highly favorable to the City of Anacortes and its wholesale water customers, and litigation is seldom predictable. Because there would seem to be little positive that could come out of this litigation for the City, we would urge the City use caution in embarking on a new course of litigation.

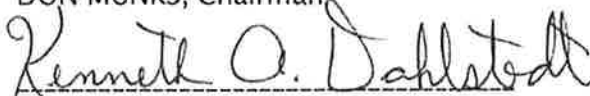
Instead, we urge the City to continuing working cooperatively with the County and others through the Skagit River Flow Management Committee to monitor and adaptively manage water resources, as required by 1996 Memorandum of Agreement and the City's December 2007 settlement with the County and Ecology. We look forward to continuing our work with the City in partnership on this and other issues.

Sincerely,


BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON



DON MUNKS, Chairman



KENNETH A. DAHLSTEDT, Commissioner



SHARON D. DILLON, Commissioner



March 25, 2009

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RE: Proposal for Neutral Third Party Facilitation in *Swinomish Indian Tribe v. State*,
Thurston County Cause No. 08-2-01403-4

Dear Counsel:

The purpose of this letter is to urge the parties to the current legal challenge to the Skagit River Basin Instream Flow Rule to engage a neutral third-party facilitator to assess and report on (1) the willingness of all the parties to participate in settlement discussions and (2) the potential for settling the current lawsuit and avoiding future lawsuits on the out-of-stream and instream uses of the Skagit River Basin. The County would join such a professionally facilitated process.

For the last 15 years, our respective clients have been struggling to find a balance to instream and out-of-stream uses of the Skagit River that satisfies the worthy but competing interests of the fish, wildlife, and human communities. Disagreements among our clients have been brought before several boards and courts at enormous expense to our community.

When the Swinomish Indian Tribal Community filed the current lawsuit against the State, the County decided that it could not justify the expense of intervening. The State Department of Ecology agreed to mount the defense on its own. We urged the City of Anacortes not to join and regretted when it intervened in the case. At the time, we believed no meaningful, lasting result could be obtained, and scarce public funds would be wasted. We continue to believe this.

Since the current challenge was filed on June 11, 2009, we have witnessed the parties' legal wrangling over the exact framing of the legal issues, which documents may or may not have been inadvertently disclosed, and what remains confidential.

Months have passed, many pleadings have been filed, and attorney fees paid. It is reasonable to expect more months of written and oral argument just to determine what makes up the official record to be reviewed by the court. After that, there will be additional months of argument before the superior court, likely proceeding through several years of appeal.

We see no future in the direction of the current expensive and divisive debate, and believe that the ultimate outcome will put all of our clients in no better position for a lasting resolution of these important matters.

The Swinomish Tribe and the City seek to invalidate the 2006 amendments to the State's 2001 Instream Flow Rule, and to have the 2001 Rule left in place. As you will recall, the County challenged the 2001 Instream Flow Rule because it was unworkable. Ecology concurred with the County and, through settlement in 2006, agreed to amend the 2001 Instream Flow Rule.

In settling that challenge in 2006, the County reserved the right to bring substantive claims against the 2001 Instream Flow Rule if the 2006 amendments are invalidated. Among other things, the County was and remains concerned that the indefensible set of assumptions about water usage inherent in the 2001 Rule would result in an arbitrarily-based prohibition on lawful uses of property, and, in turn, lead to a broad "revolt" by impacted property owners. Under that scenario, the County would be virtually alone in bearing the burden of defending against the inevitable legal challenges and damages claims; however none of the parties to the current dispute would benefit from the resulting legal uncertainty and community animosity.

If Ecology is successful in its defense of the 2006 amendments, Swinomish Tribe and the City will presumably appeal up to the State Supreme Court. The Swinomish Tribe has also indicated it will search for other legal venues to challenge the water allocation in the Skagit River Basin.

On the other hand, if the Swinomish Tribe and the City are successful in invalidating the 2006 amendments, Ecology may also file appeals and/or begin a new round of rule amendments. In the interim, the County will have to consider how it can best work with all the Skagit River Basin stakeholders under the still-unworkable 2001 Rule. How should the County spend its scarce public funds: Ignore the 2001 Rule and wait for an enforcement action? Join in the appeal process? Work on further amendments to both the State and County regulations at the risk of another round of appeals? Consider whether the parties have breached their agreements under the 1996 Memorandum of Agreement?

There is little question that the parties each have a wide variety of litigation-based tactics they can pursue - employing necessary staff and attorneys for many years, while failing to address the practical reality of the situation. Continuing to develop and pursue tactics to out-manuever other governmental entities is an old way of thinking that does little to address the instream resources at issue, and the realities of continued out-of-stream uses. The parties will

March 25, 2009

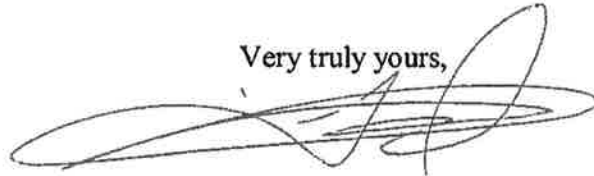
expend an enormous amount of time as well as public and Tribal funds over the next years at a time when financial resources are scarce and crucial public services strained. Community goodwill will be harmed, fostering a divisiveness within the Skagit River Basin communities that ripples far beyond the water resources arena.

The Swinomish Tribe and the City appear willing to allow the last 15 years of litigation to continue. Skagit County believes following this path is a mistake that will ultimately leave the Skagit River Basin community in no better position for a lasting resolution of these important matters.

As a small step in an alternative direction, I ask that each of you speak with your respective clients and ask if they will agree to a limited engagement of a neutral third party. That neutral party will then meet with each party to the current litigation and Skagit County separately to assess and report on the willingness of all parties to participate in settlement discussions with the goal of settling this lawsuit and, even more importantly, avoiding future lawsuits on the out-of-stream and instream uses of the Skagit River Basin.

Skagit County is willing to consider a third-party facilitator suggested by any of the parties. After you have had an opportunity to consult with your clients, please contact me at 206-382-9540.

Very truly yours,

A handwritten signature in black ink, appearing to read "Terese Richmond", with a large, sweeping flourish extending to the left.

Terese (T.C.) Richmond
GordonDerr LLP
Attorneys for Skagit County

cc: Skagit County Commissioners
Will Honea