☐ EXPEDITE
☐ No Hearing Set
☒ Hearing is Set:
Date: October 21, 2016
Time: 1:30 p.m.
Judge Gary R. Tabor

SUPERIOR COURT OF STATE OF WASHINGTON

FOR THURSTON COUNTY

MAGDALENA T. BASSETT, DENMAN J. BASSETT, JUDY STIRTON, and OLYMPIC RESOURCE PROTECTION COUNCIL,

Plaintiffs,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Defendant,

CENTER FOR ENVIRONMENTAL LAW & POLICY,

Intervenor.

NO. 14-2-02466-2

PLAINTIFFS' OPENING BRIEF



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TABLE OF AUTHORITIES

**Cases**





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## I. INTRODUCTION

Plaintiffs Magdalena T. Bassett, Denman J. Bassett, Judy Stirton, and Olympic Resource Protection Council ("Plaintiffs") brought this petition for declaratory judgment under the Administrative Procedure Act, Chapter 34.05 RCW, to determine the validity of Chapter 173-518 WAC, the Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area 18 (the "Dungeness Rule"). The Dungeness Rule used a blitzkrieg approach against rural property rights to accomplish objectives the State had already accomplished through negotiations with irrigators and the purchase of water rights to restore flows and habitat. The Dungenss Rule appropriates all the available water in the basin as instream flows without allocating water for human domestic needs, contrary to fundamental state water policy and limited delegations of authority to the Department of Ecology ("Ecology"). Its costs far exceed its benefits, and its "close the basin and require mitigation" approach is not the least burdensome alternative to accomplish the rule's goals, thus violating RCW 34.05.328. Ecology ignored science and economics in favor of preserving flows that don't even exist (and therefore cannot be protected), which supports a ruling that the Dungeness Rule is arbitrary and capricious. Ecology also ignored several statutory requirements in the Water Resources Act and Water Code for appropriating water for instream flow protection with the result that the Dungness Rule also exceeds Ecology's authority. For all of these reasons, the rule should be invalidated.

Among the significant impacts of the Dungeness Rule is the closure of ground water in the basin for new uses in the rural area, including for single family homes and farm animals using permit-exempt wells – the only reliable water supply available. The basin-wide impact of new domestic uses was projected to be only a small fraction of the flows already restored by State purchases of water rights, conservation, and agreements with irrigators. Closing the basin to permit-exempt groundwater uses has huge economic and social consequences to people and



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the construction and realty businesses, which Ecology ignored in its skewed and erroneous cost-benefit analysis. As explained below, Ecology officials painted themselves into a corner with its "close and mitigate" requirement, because the *Foster v. Ecology* decision makes it illegal to use seasonal water rights to mitigate the effects of year-round withdrawals on minimum instream flow water rights. Thus, the Dungeness Rule will not achieve its goal of allowing mitigated rural development and Ecology cannot use OCPI as authority to fill the mitigation gaps.

State agencies like Ecology do not have the authority to make law, they can only carry out tasks delegated by the Legislature, within the bounds of that delegation. Instead of managing and allocating those waters for the maximum net benefit of the people, as directed by the Legislature, Ecology officials went to extreme lengths, including replacement of their economist and the use of flawed legal analyses, to justify a rule that appropriated all the available water in the basin for fish and left the people and private property in the basin high and dry. Ecology's actions were contrary to law, scientific evidence, and economic policy.

## II. STATEMENT OF FACTS

The Dungeness Rule is a "significant legislative rule" as that term is defined in RCW 34.05.328(c)(iii), which requires procedural compliance with certain APA requirements. Ecology violated the APA because: (1) the cost benefit analysis (CBA) for the Dungeness Rule includes numerous false assumptions and analyses about the costs and benefits of the rule and was fundamentally flawed; (2) Ecology erred by determining that the Dungeness Rule was the least burdensome alternative for complying with the goals and objectives for the rule; and (3) Ecology did not adequately coordinate the rule with state and local regulations allowing permit-exempt wells for rural property devolopment.

### A. The CBA includes numerous false assumptions and analyses about the costs and benefits of the rule and was fundamentally flawed.

The CBA relies heavily on two flawed legal theories in order to produce cost/benefit numbers that enable adoption of the rule. The first theory contradicts Ecology's position in


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similar rulemakings in other basins. Previously, Ecology stated that until a basin was closed by rule the owner of vacant land could obtain a residential building permit relying on the exemption in RCW 90.44.050, and that this provided economic value to the landowner.[1] After the draft CBA resulted in numbers where the costs far outweighed the benefits, Ecology received conflicting advice from Stephen North of the AG's Office to the effect that, even prior to the rule, a prospective user of an exempt well has no right to withdraw water, only an "expectation" that holds no value. *ECY056693*. That "expectation" was enough to get a residential building permit with an exempt well, however, using Clallam County's permitting review checklist and the State's Guidelines for Determining Water Availability for New Buildings. *ECY062298-308.*

Ecology's baseline conclusion that the loss of the ability to use an exempt well caused by an Ecology regulation has no cognizable economic impact is demonstrably false. As a result of Ecology's similar rule for the Skagit basin, building permits could no longer be issued based on new exempt wells and residential lots were significantly devalued after being deemed not buildable by the Snohomish and Skagit County Assessors.[2] The Skagit County Assessor devalued 785 parcels affected by the groundwater closure to exempt wells, shifting the tax burden to other properties and impacting several taxing districts in the county.[3]

A second flawed theory underlying the CBA is that the rule provides significant benefits in terms of preventing litigation and increased certainty. Ecology assigned "litigation avoidance" a benefit value of between $2.4 million and $4.7 million, and associated "increased certainty in development" a benefit value of $19.8 million to $62 million. *ECY002395-99*. The "litigation prevention" values assigned to the Dungeness Rule lack any semblence of credibility,

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[1] Bill Clarke comments, *ECY062240-41*, citing WAC Chapter 173-539A, Upper Kittitas Groundwater Rule Concise Explanatory Statement, page 5. "Without the rule, landowners could be expected to continue to develop groundwater supplies under the legal authority of the exemption from permitting found in RCW 90.44.050 and without any mitigation."

[2] See Bill Clarke comments at *ECY062240-41*. In one Snohomish County example, this reduced the property tax valuation of a 1.03 acre lot from $122,000 in 2011 to $40,800 in 2012; a second example shows a reduced value of a 20 acre parcel from $236,000 in 2011 to $39,300 in 2012. *ECY062310-16.*

[3] *See* Appendix 2, an official document outside the Dungeness Rule record for which Plaintiffs request the Court take judicial notice.



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especially in light of the fact that recent Ecology instream flow rules have created more litigation than they have prevented.[4] Ecology's CPA should have assigned litigation cost increases to the adopting of a groundwater closure, not litigation cost savings. *See ECY062240-42.* There is also far less certainty after the rule was adopted that property owners can obtain building permits, because mitigation is not reliably available and the *Foster* case rules out the use of seasonal water rights to mitigate for year-round domestic uses. (*See* Argument IV.B.2 below).

Tryg Hoff is the economist Ecology originally assigned to the prepare the CBA for the Dungeness Rule. In preparing the initial CBA, Hoff estimated that 1800 new households would develop from 2013-2032 using the groundwater exemption (90 per year for 20 years), and the total impact on surface water from indoor water use for this projected growth was only 0.3 cfs. *ECY023952*. The cost to purchase enough water rights in 2013 to offset the impact of all of that growth was only $1188 (.2 cfs = .396 acre feet x $3000 an acre foot = $1188), which caused Hoff to remark, "This is a demonstration of how absurdly micro managed this rule is." *ECY022605*. Ecology hydrogeologist Dave Nazy supported Hoff's analysis of the small impact of projected exempt well uses in the basin, stating:

> "Why should the state spend an incredible amount of time, money and effort claiming to protect streams by trying to control the smallest water users that happen to start using water after some arbitrary date that we have continually pushed back by several years?" *ECY048408.*

Ecology's Water Resources Program Manager, Tom Loranger, described the benefits of the rule for the CBA, which included: (1) new water uses will be more certain and reliable (not subject to litigation) after adoption of the rule; (2) the rule will protect the State's investments in habitat and flow restoration in the Dungeness basin; and (3) the mitigation exchange will assess viability of water rights in the Dungeness that are available for mitigation or change and provide

[4] Since the adoption of the 2001 Skagit Basin lnstream Flow Rule, there have been two Superior Court appeals to the that rule (one to the original 2001 rule, a second to the 2006 amendment to the 2001 rule), the latter resulting in the Supreme Court decision in *Swinomish v. Ecology*, discussed below, and even more litigation directly related to the closure of groundwater to exempt wells, including *Fox v. Skagit County*, 193 Wn.App.254 (2016), for which a petition for review to the Washington Supreme Court is pending.



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a streamlined process for water rights applicants. *ECY023347-48*. Hoff replied that there was no significant benefit to new water users; that the litigation savings argument used in the Kittitas basin didn't apply because that was a closed basin with interrupted senior water rights (whereas the Dungeness basin was open to new appropriation prior to the Dungeness Rule); and the rule might protect some of the State's investment in habitat and flow restoration, but only a small amount because it was preventing only 0.77 cfs of new impacts to surface water across the entire basin. "If you do calculations you will see that this amount of water per stream is basically unmeasureable." *ECY023346.* Hoff also claimed that Loranger was double counting savings of fish and habitat restoration because they already occurred, and he doubted that the rule meets the maximum net benefit test. *Id*.

Following significant research, Hoff concluded that the draft Dungeness Rule would not meet the legal requirements for a CBA at RCW 34.05.328(1)(d). He gave three reasons why the probable economic cost of the rule far exceeded the benefits: (1) the rule eliminates the legal rights of the groundwater permit exemption for all users in the basin, substantially reducing their property values by eliminating legal water availability; (2) on the benefit side, the rule protects less than 1 cubic foot per second of flow throughout the watershed over a 20-year period; and (3) the rule does not affect current permitted rights. *ECY032065-66.* In fact, he characterized the rule as "upside down by a massively negative cost benefit ratio." *Id*.

Hoff requested a formal opinion from the AG's office to clarify three legal questions affecting the economic analysis: (1) can Ecology appropriate water for only instream flows while permanently closing an open basin to new domestic uses; (2) can Ecology ignore the maximum net benefit requirement; and (3) if the basin isn't closed by rule, do people have a legal right to the exemption? *ECY 072253.* Ecology refused to request a formal opinion from the AG's office, instead providing informal and conclusory comments from Assistant AG Stephen North that were contradicted in other rules and failed to account for the relation back doctrine regarding priority dates for exempt well water rights. *See ECY056692-96, and ECY072196-201*. In these


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exchanges, North, who is not an economist, incredibly insisted that even though property owners can exercise a right to the groundwater permit exemption and establish a water right until a basin is officially closed, there is no value associated with that right. He also asserted that the right does not accrue until water is put to use, as opposed to all other water rights that relate back to the intention to use water. Hoff strongly disagreed with North's economic arguments in these exchanges, and this brief demonstrates that North's legal analysis was indeed flawed. (*See* Argument IV.A & B, below). After Ecology officials attempted to persuade Hoff to alter the draft CBA without a formal AG opinion on the basis of North's advise, Hoff warned them that their changes were not supported by science or Ecology's statutory authority, and offered to be taken off the Dungeness CBA because he could not agree with a "cooked" economic analysis. *ECY003323*.

> "If you are directing me how the analysis should be written, I would have to say you are asking me to break the law. This could be considered gross mismanagement and/or ignoring scientific evidence. … I intend to keep my professional integrity intact despite the program's unusual timelines, changing targets, ignoring the economic evidence and pressure to make me do unlawful things. At this point, I would be happy to relinquish this rule to another agency economist…" *(Emphasis added*) *ECY 003329-30.*

Ecology officials internally responded with inappropriate and very critical humor ("Somebody please check his meds. :-)") *ECY021372*, and planned Mr. Hoff's removal from the project. Program Manager Tom Loranger wrote, "We need to go to plan B if no headway by Tuesday." *Id.* Instead of changing the rule, Ecology chose to reassign Hoff and find someone else to draft a CBA that supported what Hoff thought was illegal, which included no costs for the loss of property rights/values associated with the groundwater closure, but included "benefits" of "increased certainty" and "litigation avoidance." *ECY000027, 35-36, 62-66.* Thus, Ecology implemented their Plan B by pushing Hoff off the project, but Ecology did not fix the problems that Hoff identified.



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Numerous public comments on the draft rule complained about Ecology's rejection of Hoff's CBA and its use of inappropriate assumptions in order to skew the final CBA.[5] Ecology rejected the complaints and warnings from its own economist, the BOCC, a qualified water rights attorney, and the public, and adopted the skewed CBA without substantive changes to the rule. *Compare ECY000027, 35-36, 62-66* with *ECY002355, 2362-63, 2395-99.*

**B. Ecology failed to identify the least burdensome alternative for complying with the goals and objectives for the Dungeness Rule.**

Ecology's purpose for the Dungeness Rule is ostensibly to manage water tradeoffs between instream and out-of-stream uses. Concise Explanatory Statement (CES), *ECY001830 at 1838-40*. The primary objective of the rule is vague, however, stated as "meeting statutory obligations to manage waters for public use and for the protection of instream flows." *ECY001839.* Ecology failed in its obligation to identify the least burdensome alternative to accomplish these goals and objectives.

Ecology admits that the rule does not require that water be put back in streams, that the rules are intended to protect instream resources from future withdrawals of water, and does not affect the use of existing water rights or require cuts in existing water use. *ECY001893.* The objective of restoring flows for fish can only be accomplished through other means, including conservation of existing uses and purchase of existing rights, which had already been achieved

[5] The Port Angeles Business Association commented: "When Mr. Hoff refused to buckle under to political pressure as to how his economic analysis should be prepared and was removed from the rule making team, the analysis was prepared in just a few weeks by employees lacking any familiarity with the WRIA 18 rulemaking process, resulting in this flawed final result." *ECY025673-75*. The Board of Clallam County Commissioners (BOCC) commented that "there is uncertainty among many of our citizens regarding the integrity of the process leading up to the Rule's economic analysis and therefore its validity. We urge you to undertake an independent validation of the study' results, and the assumptions that underpin it." *ECY061534*. Kaj Ahlburg, a co-founder of ORPC, repeated Mr. Hoff's concerns about the CBA, especially concerning the upside down anaylsis of litigation costs, and repeated the BOCC request for an independent CBA. *ECY063385-91*. Marguerite Glover, a prominent local REALTOR, warned Ecology of the impacts on real estate sales and need for property devaluations and relief from taxes. *ECY061239-40*. Ecology was also warned regarding the legal flaws in its CBA by water rights attorney and lobbyist Bill Clarke, who used the example of Ecology's similar groundwater closure in the Skagit Basin to demonstrate that there was no certainty benefit of providing mitigation for exempt wells after closing a basin, and the costs and complexities of requiring mitigation were out of balance with the small benefit obtained. *ECY62221 at 62227-30.*



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by agreements with the Dungeness Irrigators and other existing water right holders using state and federal funding, making the instream flow rule and groundwater closure unnecessary. *See e.g.*, *ECY062224-26; ECY062249-51*. Compared to the decrease in diversions already achieved in this manner, the projected effect of new withdrawals from a build out of homes was only a small fraction of water savings achieved prior to the rule. *See ECY62255-56, 62258-61*.

Hoff and many others informed Ecology there was no need to close the groundwater or develop a mitigation exchange. "Based on population trends you have to find 0.3 CFS in 20 years. Seems like a task that could be accomplished this afternoon." *ECY 018885.* Despite multiple public comments against it, including from Clallam County, Ecology adopted a rule requiring mitigation before the mitigation was available, and meters for rural indoor water usage, even though the projected future flow diminishments were so small that they could not be measured in the basin's streams. This will probably result in more money being spent installing meters than the cost to mitigate all their consumptive water use before the rule went into effect. Washington Realtors proposed an alternative to the rule's closure and mitigation strategy: (1) to analyze future buildout and associated consumptive water use from new exempt wells in sub-basins of concern; (2) determine whether that level of consumptive water use has any measurable effect on streamflows; and (3) if an impact can be shown, utilize Ecology's authority under the Trust Water Program and Water Code to acquire water rights and implement other mitigation strategies. *ECY062221-22.* Many other comments agreed with this approach, including experts and the County BOCC. *ECY025673-5, ECY063385-86 (comment 2), ECY061535 (comment 3).*

Less burdensome alternatives to the rule would have Ecology reserve enough water for future domestic uses without requiring mitigation, because the individual impact to flows was negligible, providing regional mitigation to flows in a more efficient and less complex manner, such as purchasing and relinqishing additional water rights (*ECY018885),* or adopting the rule after the water bank was established with legally adequate mitigation. *ECY001939-40; ECY001948-49.* Ecology's failure to provide any certainty that mitigation required by its rule


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would be available before closing groundwater to new unmitigated uses was the most short-sighted, expensive and complex way that Ecology could have chosen to accomplish its goals in the Dungeness basin.

### C. Ecology did not Adequately Coordinate the Dungeness Rule with State and Local Regulations Allowing Permit-Exempt Wells for Rural Property Development.

Ecology is required to coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter. RCW 34.05.328(1)(i). The primary regulatory impact of the Dungenss Rule is to make Clallam County water availability decisions for land subdivisions and building permits subject to the requirements of the rule, which close groundwater to new unmitigated uses of the exemption at RCW 90.44.050. This strictly limits rural development in the basin to the availability of adequate mitigation in the Dungeness Water Exchange. As demonstrated below in Argument Section IV.B.2, the future availability of mitigation for year-round uses is speculative at best and unobtainable at worst, therefore it is the Dungeness Rule that creates the unavailability of water that GMA, Clallam County and local health department regulations had previously achieved through coordinated planning processes. Under GMA, rural development consistent with rural character is allowed.[6] The BOCC had many questions for Ecology regarding the operation of the Water Exchange mechanism and suggested a simpler approach to purchase or lease instream flow conservation regionally rather than require each new permit applicant to demonstrate legal water availability. *ECY061534-35 (comment3).* The BOCC was rightly concerned that the Dungeness Rule would render existing approved lots undevelopable. *Id. (comment 5).*

How can the Dungeness Rule be coordinated with the local GMA plan and development regulations if it replaced a green light for building permits with uncertainty about the availability

[6] RCW 36.70A.070(5)(b): "The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses."



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of mitigation water for rural development, and if it regulates exempt well uses by disregarding relation-back priority dates, contrary to state water law?

**D. Ecology Failed to Conduct a "Maximum Net Benefits" Analysis, and the Dungeness Rule Fails the Statutory Requirement.**

Ecology made a conscious decision not to determine the "maximum net benefits" (MNB) for the Dungeness Rule, despite appropriating all available water only for fish habitat, and nothing for domestic use. *ECY019828. See ECY 022635-42*. This was despite their economist's plain meaning interpretation of the statute.

> In my opinion using the first line of RCW 90.54.020(3) to appropriate the remaining water in the Dungeness system while disregarding all other listed uses CANNOT maximize the net benefits. It can't because you can describe alternatives (opportunities lost) that have higher value with ease. One that comes to mind is using the last sentence in RCW 90.54.020(3) OCPI for domestic use which happens to be the highest value. Now ANY combination of Domestic use and Fish protection is going to be higher than just fish protection alone. That is how you "maximize the net benefits". *ECY022560; see also ECY 020992.*

Ecology relied on an internal interpretive policy for avoiding MNB analyses when adopting instream flow rules, but an internal policy is not a statutory basis for exercising Ecology's authority. In any case, such a policy is inconsistent with a February 20, 1986 informal opinion by Senior Assistant Attorney General Charles B. Roe to Eugene F. Wallace, then Program Manager for Water Resources, Department of Ecology (the "Roe Memo"). *ECY064235-45*. Mr. Roe knew what the Legislature intended by the MNB language in RCW 90.54.020 – he wrote the 1971 law and was largely responsible for its passage.

> The intent was, simply stated, that streams with certain values were not to be dried up or reduced to trickles. Rather, flows, usually of an amount extending to a limited portion of a stream's natural flow, were to be retained in order to protect instream values of the stream from total extinguishment. Of import here, the thrust of the 1967 legislation was not designed to maintain a flow in excess of the smallest amount necessary to satisfy the protection and preservation values and objectives just noted. . . . *ECY064242.*



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The Roe Memo discussed and interpreted together both the preservation of instream resources fundamental at RCW 90.54.020(3) and the MNB fundamental at 90.54.020(2) as follows:

> When the two above-quoted fundamentals are read together, the Department of Ecology is required, as it performs its water management responsibilities, to make two determinations related to the retention of waters within a stream. The first determination is to provide for "minimum flows" (or "base flows") as contemplated by RCW 90.22.010 and RCW 90.54.020(3)(a). The second is to determine, after conducting a "maximum net benefits" test as described in RCW 90.54.020(2), whether an additional increment of flow should be provided above "minimum" flows to satisfy instream beneficial uses, such as aesthetic and fisheries uses. *ECY064244*.

Ecology's closure of groundwater to domestic uses and appropriation of all the remaining available water in the basin to instream flow contradicts Mr. Roe's interpretation of the MNB requirement and violates the Water Resources Act, as futher demonstrated in Argument Section VI.C, below.

### E. The Instream Flows Fail to Meet the Requirements of RCW 90.03.290(3)

#### 1. The Dungeness rule minimum flows do not meet the "water availability" prong of the four-part test.

The record demonstrates unequivocally that the minimum flows at WAC 173-518-040 were set at levels that are simply not present in the river. First, it is uncontested the Ecology did not make four-part test findings under RCW 90.03.290(3) for the minimum flows. The flows were established based on recommendations in the 2005 Elwha-Dungeness watershed plan, consultation with the Jamestown S'Klallam Tribe, and the departments of fish and wildlife, agriculture, and commerce, and public input received during the rule-making process. WAC 173-518-040(1).

Ecology's CES for the Dungeness Rule demonstrates their non-compliance with the four-part test. ("Establishment of an instream flow does not require that water always be present at that flow level; it is merely a limitation on when new junior water rights may be exercised") *CES at 17; ECY001854*. ("Although instream flows are not set with the expectation those flows will


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necessarily be in the river, . . .") *Id*. Kris Kaufamn, a former Ecology official who presided over instream flow setting in many other basins in the 1970s and 80s, commented that the flow setting for the Dungeness represented "an optimum or near maximizing habitat flow analysis" and "the Dungeness instream flow proposed in 173-518 WAC is about 116% larger than the average annual flow for the Dungeness River and is 2.0 to 3.3 times greater as a ratio to historic adopted instream flows ...." *ECY018922-25* ("Kaufman comment").[7]

The instream flow levels for the Dungeness River thus far exceed actual flow levels, and are not "minimum flows" as characterized in the Roe Memo. Specifically, the proposed flows for August, September, and October are 180 cfs. WAC 173-518-040, Table IIA. Using the date of September 1, this flow level has only been reached once since 2000, and based on historical flow gauge data, the actual flows are less than the "minimum" flows 78% of the time in July, 89% of the time in August, 93% of the time in September, and 82% of the time in October. *ECY062235; ECY062286-89.* Ecology disregarded hydrologically-defined base flows, relying instead on the "biological or ecological" approach articulated by WDFW's Hal Beecher. *CES at 61, ECY001898*. Thus, the record demonstrates that Ecology appropriated more water to minimum flows than was available in the river, which is not protecting flows. It is protecting potential habitat in the speculative possibility that such flows would be present in the future. Nothing in the authorizing statutes gave Ecology authority to protect potentially available fish habitat on the speculation that higher flows might exist, especially to the exclusion of other fundamentals at RCW 90.54. 020, including domestic drinking water. Ecology's approach tried to achieve "wished for" aspirational flows to optimize potential fish habitat, but fails utterly to satisfy the water availability prong of the four-part test in RCW 90.03.290.

[7] The methodology used for the Dungeness River as proposed in 173-518 WAC takes the fluvial geomorphically defined river system formed by high energy (flow) events and then assesses habitat functions (spawnable areas, juvenile rearing conditions, adult passage, etc.) without regard to normative flow conditions, thereby obtaining significantly higher flows than have historically occurred under a sustained natural flow condition. *Id*.



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**2. The Dungeness rule minimum flows do not meet the "no detriment to the public welfare" prong of the four-part test.**

Ecology's inclusion in the Dungeness rule of "optimum" instream flows that do not equate to actual minimum flows has produced needless hardship for the local community and for property owners and businesses within Clallam County.[8] Having established regulatory instream flows that go far beyond minimum "protection" of the natural environment and essentially preclude new appropriations for out-of-stream uses, Ecology thereupon resorted to the OCPI exception and an unwieldy and expensive well-by-well "mitigation" apparatus to enable future domestic use in the Dungeness basin. WAC 173-518-070, -075, -080, -090, -110. The minimum instream flows and stream closures have the effect of foreclosing rural economic development and new residential uses in the Dungeness basin. This is what compelled Ecology to utilize the OCPI exception in the first place. Ecology made findings that the minimum flows and closures are clearly overridden by the public interest in providing water for domestic water supply, WAC 173-518-080, but now Ecology and CELP contend that the same instream flows can escape the public welfare prong of the four-part test.

It is ironic that Ecology resorted to use of OCPI to create the limited reservations for domestic use, precisely because it was the only way to guarantee any future domestic water availability after appropriating all the water in the basin for instream flows. After the *Swinomish* and *Foster* decisions make it clear that Ecology doesn't have authority to use OPCI to create permanent water rights, and can't use it to approve seasonal mitigation for year-round water uses (*see* Arguments IV.B.1 and IV.E, below), there is no certainty that any water in the basin including the reservations and the Dungeness Water Exchange, is "legally available" for domestic use. That isn't just ironic, it's a violation of the public welfare prong of the four-part test, among other laws.

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[8] *See ECY025673-75, ECY063385-92 (comments 1, 3, 7), ECY062221-22.*



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**F. The Reservations in the Dungeness Rule are Improperly Based on OCPI and Inadequate.**

The CES reiterates the OCPI basis for the domestic water reservations at WAC 173-518-080. *CES at 48 ECY001885.* The CES also underscores the direct linkage between those OCPI-based reservations and the rule's minimum instream flows and closures. *CES at 75, ECY001912*; Each reserve is limited to no more than a 1 percent impact and mitigation is required to replenish the reserves over time. If and where mitigation does not replenish a reserve and it is fully allocated, the rule clearly prohibits new water use until additional mitigation is in place. *CES at 126; ECY001963*; *CES at 128, ECY001965; CES at 130 (response to Comment 170), ECY001967; CES at 417, ECY002254.* As demonstrated in Argument IV.E, Ecology lacked authority to use OCPI to establish these reservations.

With or without the reservations, mitigation isn't available year-round and can't assure water availability in rural areas sufficient to obtain building permits under the *Fox v. Skagit County* standard. (*See* Argument II.B.1, below). Thus, even if the reservations are rescued by ESSB 6513,[9] they are inadequate to supply future domestic needs.

**G. The Dungeness Rule is arbitrary and capricious.**

The Dungeness Rule's groundwater closures, mitigation program, OCPI-based reservations, and maximum depletion amounts are so complicated and uncertain that they fail to deliver a "yes or no" answer whether water is legally available for future domestic and agricultural uses in the rural area. Ecology could and should have addressed impacts from exempt wells on instream flows in a way that does not involve complex and costly regulatory impacts on landowners and local government, especially for such small uses of water. An appropriate analogy is the effect on water availability of the Skagit instream flow rule, described

[9] The Legislature passed a bill in the last session that purports to validate the OCPI-based reservations in the Dungeness Rule. As argued below, ESSB 6513 does not rescue these OCPI-based reservations in the Dungeness Rule or provide the needed certainty that water will be available for domestic uses through the reservations or the Water Exchange.



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in the REALTORS comment letter authored by Bill Clarke.[10] Clarke's comments relate how Skagit County inquired of Ecology after the Skagit Basin 2006 Amended Rule, which also included OCPI-based reservations, whether water was legally available for issuance of building permits based on permit-exempt wells. Ecology's response was so garbled and conditional that the County wrote back asking for a simple "yes or no" answer whether the building permit applicant had a lawful right to water from a permit-exempt well. The County got a response from Assistant Attorney General Alan Reichman explaining that there was no simple "yes or no" answer regarding whether the Skagit Basin Instream Flow Rule made the applicant's water supply interruptible or not, even with a reservation in place. He recommended that the County determine, essentially, that it was the applicant's fault – that "Mr. Crane has not demonstrated evidence of an adequate water supply to support issuance of a building permit under RCW 19.27.097," because mitigation was not currently available in the Carpenter-Fisher subbasin. *ECY062221, at 62227-30.* The same questions will prevail in the Dungeness basin because the "close and mitigate" measures are essentially the same. Regulations that so fail to accomplish their objective of making domestic water supply "more certain" by "avoiding litigation," but in fact have the opposite effect, are willful and unreasoning and taken without regard to the attending facts or circumstances.

The Dungeness Rule also failed to account for substantial flow and habitat improvements already achieved by the State before closing groundwater to small new uses. According to the review conducted by Ecosystem Economics in 2011, approximately 30 cfs of senior water right diversions were acquired and placed in trust by the State. *ECY003438 at 003460*. Ecology should have evaluated the base flow requirements for the Dungeness River and other streams as they

[10] In the 2006 Skagit Basin Amended Rule, like the Dungeness Rule, Ecology provided limited reservations in several subbasins so that landowners could demonstrate uninterruptible water availability from exempt wells, but the allocations were oversubscribed and mitigation was not found to replace them. The impacts of the closures in the Skagit Rule are even greater in Skagit County after the Supreme Court invalidated Ecology's reservations in the *Swinomish* decision.



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exist in 2012, not as they existed over 20 years ago before substantial quantities of water were returned to the river through conservation, settlement agreements, and acquisition of water rights.

As argued elsewhere in this brief, the rule closes groundwater to further appropriation, including for permit-exempt wells, and requires payments into mitigation banking system as a prerequisite to obtaining a building permit, without legal certainty that mitigation is available or reservations are legal, enforceable, and adequate. This expensive, cumbersome, and inadequate mitigation requirement is additional evidence of willful and unreasoning action taken without regard to the facts and circumstances.

## III. STANDARD OF REVIEW

### A. Review of Administrative Rules under APA

The Administrative Procedure Act, at RCW 34.05.570(2), provides for judicial review of administrative rules through the filing of a petition for declaratory judgment. A court shall declare the rule invalid only if it finds that: the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious. RCW 34.05.570(2)(c).[11] An administrative rule cannot amend or change a legislative enactment, and a rule that is inconsistent with the statutes it implements is invalid. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 581 (Wash. 2013); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002); *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998)). Administrative "[r]ules must be written within the framework and policy of the applicable statutes." *Swinomish* at 580 (emphasis added)*; quoting Dep't of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 50, 109 P.3d 816 (2005). A court must declare an administrative rule invalid if it finds that "the rule exceeds the statutory authority of the agency." *Id.*; RCW

[11] The arbitary and capricious standard for review of rules is set forth in Argument IV.G, below.


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34.05.570(2)(c). Rules that are not consistent with the statutes that they implement are invalid. *Swinomish* at 581*; Bostain v. Food Express, Inc.,* 159 Wn.2d 700, 715, 153 P.3d 846 (2007). An agency exceeds its rule-making authority to the extent it modifies or amends precise requirements of statute. *Baker v. Morris*, 84 Wn.2d 804, 809-10, 529 P.2d 1091 (1974).

In *Swinomish* and *Wash. State Hosp. Ass'n v. Dep't of Health, 183 Wn.2d 590, 353 P.3d 1285 (2015)*, the Supreme Court carefully interpreted the meaning of statutory terms used by administrative agencies in the promulgation of rules, and invalidated the rules because the agency gave the terms a broader meaning than intended in the authorizing statutes. In *Swinomish*, the Supreme Court rejected Ecology's interpretation of "overriding considerations of public interest" because it gave Ecology too much discretion and authority to issue reservations of water and was inconsistent with the interrelated statutory scheme of water rights, water allocation, and instream flow protection. In *Wash. State Hosp. Ass'n,* the Supreme Court rejected the Department of Health's interpretation of "sale, purchase, or lease" and invalidated its rule requiring a certificate of need process for any change in the board of directors of a hospital. 183 Wn.2d at 596-97.

**B. <u>General Rules for Statutory Construction</u>**

When construing a statute, the court's goal is to determine and effectuate legislative intent. *TracFone Wireless, Inc. v. Dep't of Revenue,* 170 Wn.2d 273, 281, 242 P.3d 810 (2010); *Campbell & Gwinn, 146 Wn.2d at 9-10.* Where possible, courts must give effect to the plain meaning of the language used as the embodiment of legislative intent. *TracFone, 170 Wn.2d at 281; Campbell & Gwinn, 146 Wn.2d at 9-10*. "We determine plain meaning 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *TracFone, 170 Wn.2d at 281 (quoting Campbell & Gwinn, 146 Wn.2d at 11)*. In general, words are given their ordinary meaning, but when technical terms and terms of art are used, courts give these terms their technical meaning. *Swinomish* at 581; *Tingey v.*


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*Haisch, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007); City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue, 145 Wn.2d 445, 452, 454, 38 P.3d 1010 (2002).*

The court considers the statutory context, related statutes, and the entire statutory scheme when ascertaining plain meaning**.** These considerations are especially important here, at the intersection of instream flow protection, water policy, water rights, and the legal availability of water from permit-exempt wells for building permits and subdivisions. "[R]esolving the meaning of a statutory provision concerning water rights almost always requires consideration of numerous related statutes in the water code. *Swinomish* at 582, *citing Campbell & Gwinn*, 146 Wn.2d at 12-17, and *Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 77-83, 11 P.3d 726 (2000).*

### C. Deference to Agency Interpretations is not Warranted Here

An agency's interpretation of a law is not entitled to deference by a reviewing court if the interpretation does not require the agency's expertise, *Willowbrook Farms v. Ecology*, 116 Wn. App. 392, 66 P.3d 64 (2003); if the statue is not ambiguous, *Theodoratus*, 135 Wn.2d at 589; or if the agency's interpretation conflicts with the statute. *Swinomish,* at 588-591; *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997); *Waste Mgmt. of Seattle, Inc. v. Utils & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). The court should not grant deference to Ecology's interpretation of the statutes involved in this case because, just as the Supreme Court held in *Swinomish*, it conflicts with the statutory scheme.

## IV. ARGUMENT AND AUTHORITY

### A. The Priority Date for Exempt Wells is Determined by the Relation-Back Doctrine

The Dungeness Rule states that the priority date for exempt wells will be the date that water is put to beneficial use. In other words, according to the rule, if a landowner drilled a well, applied for and obtained a building permit and construction loan, built a house and connected it to the well prior to the effective date of the rule, but didn't turn on and start using the water until


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after the rule went into effect, the landowner's water right would be junior to the rule and subject to the closure and mitigation requirement, thus interruptible and an inadequate water supply. This feature of the Dungeness Rule is contrary to Washington water law and exceeds Ecology's statutory authority. WAC 173-518-010(3) states:

> This chapter applies to the use and appropriation of surface and groundwater in the Dungeness River watershed begun after the effective date of this chapter. Unless otherwise provided for in the conditions of the water right in question, this chapter shall not affect: …
> (b) Existing groundwater rights established under the groundwater permit-exemption where regular beneficial use began before the effective date of this chapter. (Emphasis added).

This provision violates the relation-back doctrine that is part of the historical common law of water rights, and how the Legislature codified the relation back doctrine.

> The relation back doctrine was created under the principles of equity to allow an appropriator to receive as a priority date the date the appropriator first initiated the use of water and not later when the appropriation was completed. The ability to receive the early priority date depended on the appropriator's diligence in applying water to use.

*An Introduction to Washington Water Law*, Office of the Attorney General, January 2000, at 111:27, citing RCW 90.03.340 and *Hunter Land Co. v. Laugenour*, 140 Wn. 558, 565 (1926). When water right permits are issued under the Water Code, it is with a priority date that relates back to the notice date – the date of application. RCW 90.03.340. This is the statutory version of the relation back doctrine. The groundwater permit exemption at RCW 90.44.050 is silent as to the priority date of permit-exempt water rights. Because there is no application for a permit-exempt groundwater right, common law relation back doctrine must apply to determine the priority date of an exempt well water right and the reasonable diligence required to preserve such priority date. The analogous point in time would be the notice of intent filed by a well driller, or date of application for subdivision, which provides notice of intent to create lots with homes that will be supplied with groundwater. So long as the project is developed and completed with due diligence, the priority date relates back to the date of the notice or application.


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Ecology is not a legislature and has no authority to change this provision of Washington's water law by defining the priority date of permit-exempt wells in a rule. Revising a feature of state law is solely within the province of the legislature. Ecology cannot point to any legislative delegation of authority to change or define the priority date of permit exempt water rights or the relation back doctrine, by rule or otherwise. It simply lacks this authority.

The relation back doctrine is relevant to the process used to develop new housing in order to provide certainty to lenders, builders, and home buyers. If the right to use water for domestic use is not actually obtained until the time of beneficial use, lenders and homebuilders are at significant risk that water may not be available. In the development process, the time from when a construction loan is issued to when the house is completed by a builder and then sold to a homebuyer can often take a number of years. During this period of time, the local government will have to determine whether water is available under RCW 19.27.097 in order for a building permit to be issued. The priority date for this type of project relates back to when the project was first initiated, to protect the investments of the lender and builders, and so that consumers know that water will be available for their homes.

### B. For Purposes of the CBA and LBA, Ecology Erred in Determining that Future Users of Exempt Wells Would Not Be Cost-Impacted Because They Had No Rights Affected by the Dungeness Rule

The economic analyses in the CBA and LBA treat future permit-exempt well uses, such as the building of a home, as though they possessed no legal rights and hence lost no value by being denied free access to groundwater. This is based on the Ecology's erroneous understanding about the priority date of exempt well water rights as argued above, as well as the following two arguments relating to "adequate water supply" and the inadequacy of seasonal water rights to mitigate for year-round uses. Tryg Hoff was right that Ecology's error completely skewed the cost-benefit and least burdensome alternative analyses. It also renders the Dungeness Rule arbitrary and capricious.



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**1. The minimum instream flows at WAC 173-518-040 significantly impact property rights and values by preventing unmitigated exempt well uses from qualifying as an "adequate water supply" for building permits.**

Contrary to Ecology's analysis that preventing new unmitigated exempt well uses did not reduce the value of land or take away any rights of rural property owners in the Dungeness Basin, the effect of adopting minimum instream flows was clearly to eliminate exempt wells as a source of "adequate water supply" under RCW 19.27.097. At a minimum, this subjects those properties to a requirement to pay for mitigation from a state-approved water bank, but as the next argument section points out, mitigation banks have legally uncertain geographic applicability and are unlikely to provide more than seasonal mitigation for new uses, which is not enough to establish an adequate water supply under RCW 19.27.097.

No water right permit is required for a use of 5,000 gallons per day or less of groundwater for domestic purposes, RCW 90.44.050, hence the term "groundwater exemption" or "exempt wells." In other words, by legislative mandate, these small uses of groundwater do not have to apply to Ecology for a permit or demonstrate under the four-part test of RCW 90.03.290(3) whether water is available, whether the use is beneficial, whether the use will impair existing rights, or whether the use will be detrimental to the public welfare. The groundwater exemption was adopted with the Groundwater Code in 1945 and has survived numerous legislative attempts to limit it. The Legislature struck a balance with the exemption, guaranteeing at least a minimal amount of water to make reasonable use of rural land that is exempt from the complications, delays and expense of water rights permitting. *Campbell & Gwinn,* 146 Wn. 2d at 16. Exempt wells can establish water rights like other permitted water rights under the prior appropriation doctrine and subject to the "first in time, first in right" principle. *Campbell & Gwinn*, at 17 n.8.

RCW 19.27.097, enforceable by counties, requires applicants for building permits to demonstrate they have an adequate water supply for the proposed structure. Typically in rural areas where there is no public water system, including large parts of the Dungeness Basin, permit


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applicants will drill a well and provide a well log and water quality test to satisfy this requirement. Nothing else has been required to demonstrate water availability for a building permit unless Ecology withdraws the groundwater from further appropriation by rule under RCW 90.54.050, as it did in the Upper Kittitas watershed because it was an adjudicated and over-appropriated basin, or unless Ecology closes the groundwater in an instream flow rule by making it subject to new minimum instream flows or stream closures. Clallam County was issuing building permits based on exempt wells up until the adoption of the rule. *See* Clallam County Code Section 21.01.130 at Appendix 4.

Permit-exempt wells that are junior to an instream flow rule can be interrupted if the instream flow level is not being met. Interruptible water sources do not meet the requirements for an adequate reliable supply of water needed to authorize issuance of a building permit under RCW 19.27.097. *Fox v. Skagit County*, 193 Wn. App. 254, 280, 2016 Wash. App. LEXIS 711, 733 (2016); *petition for review pending*. Without the "senior" minimum flow water right, a subsequent permit exempt well water use would not be interruptible, and would be permitted by county building officials under RCW 19.27.097. Thus, contrary to Ecology's reasoning that landowners only possessed an "expectation" but not a right to an uninterrupted supply of groundwater, landowners could obtain a building permit with an exempt well before the effective date of the rule, but not after, at least not without the mitigation that is argued in the next section to be too uncertain and likely unavailable.

To summarize, when the new minimum flow water rights were created at WAC 173-518-040, later established permit-exempt groundwater uses became junior to the minimum flows and interruptible when they are not met. Interruptibility of a ground water right renders it inadequate as a water supply for a building permit under RCW 19.27.097. This is a significant loss of property rights and values that Ecology wrongly overlooked in its economic analyses for the CBA and LBA in violation of the APA.


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**2. Mitigation banks seeded with irrigation rights cannot provide year-round mitigation and water availability to exempt well uses, therefore Ecology's groundwater closure and mitigation program fails to allow domestic uses and fails multiple APA requirements.**

In *Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015), the Supreme Court rejected a mitigation plan for a water right permit that had out-of-kind mitigation to cover the periods of time when water-for-water replacement mitigation was unavailable.

> [T]he mitigation plan does not mitigate the injury that occurs when a junior water right holder impairs a senior water right. The water code, including the statutory exception, is concerned with the legal injury caused by impairment of senior water rights—water law does not turn on notions of "ecological" injury. Our cases have consistently recognized that the prior appropriation doctrine does not permit even de minimis impairments of senior water rights. *Postema*, 142 Wn.2d at 90. Therefore, we reject the argument that ecological improvements can "mitigate" the injury when a junior water right holder impairs a senior water right. 184 Wn.2d at 476-77.

The senior water referred to in *Foster* was a minimum instream flow adopted by Ecology, like the minimum flows in the Dungeness Rule. The impact of this very recent ruling on the Dungeness Rule is significant. It throws Ecology's calculus (that new domestic uses could still be permitted with mitigation) completely out the window, because domestic uses are year-round and the only senior water rights available as mitigation are seasonal irrigation rights. Under *Foster*, a seasonal irrigation right cannot be used to mitigate the "legal injury" that occurs to a senior instream flow water right during the non-irrigation season when any new use has a hit on the river, no matter how de minimus that impact might be. This renders all future efforts in the basin to mitigate new groundwater uses completely uncertain, and may result in building permit moratoriums unless the Dungeness Rule is invalidated.

The *Foster* decision came two years after the Dungeness Rule went into effect, but the effect of the *Foster* decision on the availabilty of mitigation for new groundwater uses should have been anticipated by Ecology before adopting the rule. Ecology ignored public comments requesting that mitigation be in place prior to the adoption of the rule. Ecology's haste to adopt


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the rule and close groundwater in the basin was both arbitrary and capricious and a fatal flaw in its economic analyses of the rule.

### C. Ecology Exceeded its Statutory Authority by Failing to Make Maximum Net Benefit Findings Before Appropriating Water Only for Instream Flows for Fish and Not for Domestic Uses

The statutes relating to the allocation of water to minimum instream flows (MIFs) and other uses have a common overlapping purpose and have been described by the Supreme Court as a "statutory scheme" which it interprets together to determine the plain meaning of the statutes and the legislature's intent. *Swinomish* at 582. Those parts of chapters 90.22 and 90.54 RCW relating to instream flow protection and competing water resource policies can and must be harmonized with the Administrative Procedure Act (chapter 34.05) and the Water Code (chapter 90.03) in order to determine the minimal procedural requirements for creating new instream flow water rights like those adopted in the Dungeness Rule. Ecology's authority to set MIFs by rule is limited by legislative mandates in these statutes. An instream flow rule that ignores these mandates, including the maximum mandate, exceeds Ecology's authority and is invalid.

#### 1. The Statutory Scheme for Allocating Water Relies on Determining the Maximum Net Benefits for In-Stream and Out-of-Stream Uses.

Instream flow protection serves important state interests by protecting the health of natural watersheds, including preservation of fish production, water quality, recreation, navigation, power production, and scenic and aesthetic values. In 1969 the Legislature authorized the newly created Department of Ecology to establish MIFs and lake levels throughout the state. RCW 90.22.010. The 1969 law, however, did not mandate the creation of MIFs, and did not provide a set of legislative directives for the allocation of water to MIFs or other water uses. Two years later, the Water Resources Act of 1971 (the Act) established fundamental state policy for the utilization and management of the waters of the state including the retention of "base flows" in perennial rivers and streams and the preservation of water for domestic and other out of stream uses. The purpose of establishing these policies was to insure


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that waters of the state are protected and fully utilized for the greatest benefit to the people of the state. RCW 90.54.010(2). Among other fundamental policy directives enumerated in Act, the Legislature declared:

> "Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values," RCW 90.54.020(3)(a) (emphasis added).
>
> "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." RCW 90.54.020(5) (emphasis added).

To determine how to allocate water among these competing uses, the Legislature directed Ecology to allocate waters based on securing the "maximum net benefits for the people of the state."

> Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:
> …
> (2) Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost. … RCW 90.54.020(2) (emphasis added).

The legislature's use of the word "shall" in each of these directives is significant. The word "shall" creates a mandatory duty for Ecology when allocating water, unlike the word "may." *Akrie v. Grant*, 178 Wn. App. at 512. By creating potentially conflicting duties as to the allocation of water, the legislature also created the need for a balancing test to comply with those duties. Maximum net benefits (MNB) is that balancing test. Thus, the legislature required Ecology to provide for fundamental water needs that compete with each other, required Ecology to allocate water among those needs by using a balancing test, and then defined that test. It is self-evident that Ecology cannot thereafter allocate waters to only one of the fundamental water needs to the detriment of the other without using the balancing test required by the legislature. It would be absurd to conclude that the legislature intended for Ecology to allocate all available


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water in a river or stream to instream flows as a matter of priority, thereby precluding the allocation of water to serve other fundamental domestic water needs, without complying with the MNB requirement. General rules of statutory construction require avoidance of such absurd or strained results. *State ex rel. Evergreen v. WEA*, 140 Wn.2d 615, 632, 999 P.2d 602 (2000).

The MNB directive was elaborated by a 1979 statute that was codified in the Water Code at RCW 90.03.005, which states in part:

> It is the policy of the state to promote the use of public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and retention of waters within streams and lakes in sufficient quantity to protect instream and natural values and rights. … (Emphasis added).

Here, "maximum net benefits" refers to both diversionary uses and also to instream uses. *Swinomish* at 600. Again, this demonstrates that the legislature did not intend for Ecology to ignore out-of-stream water needs when allocating water to instream flows.

RCW 90.54.040 directs Ecology, through the adoption of administrative rules such as the Dungeness Rule, to "develop and implement in accordance with the policies of this chapter" a comprehensive water resources program for future decisions on water resource allocation and use. Ecology has exclusive authority among state agencies to adopt MIFs. RCW 90.03.247. Reservations for future uses are another type of water allocation made by Ecology in some but not all of its instream flow rules.

Under the state water code, minimum flows and levels established by administrative rules such as the Dungeness Rule are appropriations of water.

> The statutes plainly provide that minimum flows, once established by rule, are appropriations which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows. RCW 90.03.345; RCW 90.44.030. A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired.



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*Postema*, 142 Wn.2d at 81 (emphasis added). Water necessary to meet established minimum flows and levels is not available for appropriation to other uses. *Swinomish* at 578; RCW 90.03.345. Applications for water permits relating to streams with MIFs must be conditioned to protect the MIFs. RCW 90.03.247. "Instream flows established in [the Dungeness Rule] are water rights and will be protected from impairment by any new water rights commenced after the effective date of this chapter and by future water right changes and transfers." WAC 173-518-040(3). Without question, under the statutory scheme adopted by the legislature, the Dungeness Rule instream flows are both appropriations and allocations of water by Ecology, with the effect of limiting or foreclosing future appropriations of water for other uses. Thus, the balancing test was required.

**2. Ecology Must Comply with the MNB Mandate before Adopting Minimum Instream Flows, Otherwise it Will Be Too Late**

It is unknown whether the Dungeness Rule would pass the MNB test because Ecology hasn't done one. Balancing the MNB in the context of adopting MIF rules could favor reserving water for future domestic and other uses of water, or it could lead to an accommodation of both sets of interests. The critical role and mandate of the MNB directive is that Ecology must publicly weigh these options and decide on allocations of water according to the maximum benefits for the people of the state before allocating most or all of the remaining water in a basin to only one use while precluding other uses of water. To hold otherwise would be to grant Ecology authority to protect all stream flows first without a balancing test, and then to weigh the maximum net benefits of allocating what is essentially an empty pot. That would be a meaningless exercise that violates both the spirit and intent of the legislature's MNB directive, tantamount to authorizing Ecology to shoot first and ask questions later.

Once MIFs have been established, "no statute [has] been brought to our attention that requires any further weighing of interests … and none requiring that economic considerations influence permitting decisions once minimum flows are set." *Swinomish*, 178 Wn.2d at 585


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(citing *Postema*, 142 Wn.2d at 82-83). In other words, if Ecology does not make a MNB finding when establishing a MIF, it will be too late, and the MNB directive cannot thereafter be satisfied.

Ecology's policy of not performing a MNB analysis for MIF rules violates two important canons of statutory interpretation. First, statutes related to the same subject matter or having the same purpose should be read *in pari materia*, or as together constituting one law. *State v. Yokley* (*In re Yim*), 139 Wn.2d 581, 592, 989 P.2d 512 (1999); *Premera v. Kreidler*, 133 Wn. App. 23, 36, 131 P.3d 930 (2006). Second, and very critical here, is the canon that a court (or administrative agency) must not interpret a statute in a way that renders any portion of the statute meaningless or superfluous. *Broughton Lumber Co. v. BNSF Ry.*, 174 Wn.2d 619, 634, 278 P.3d 173 (2012); *Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001). The MNB directive at RCW 90.54.020(2) has no meaning if interpreted to apply only after all available water in a basin is allocated to MIFs, because all subsequent permits and uses of water will be conditioned upon and cannot impair those MIFs. The consequences of the Supreme Court's strict impairment standards relating to MIFs in *Postema*, its prohibition in *Swinomish* on creating reservations that impair MIFs, and its prohibition on the use of OCPI for out-of-kind or out-of-time mitigation in *Foster*, are that Ecology must perform the MNB analysis before allocating water to MIFs. It is the only time that a MNB analysis makes any sense because doing so after the fact is simply too late to accomplish a meaningful result that balances the public interest between instream and out-of-stream uses of water.

### D. Ecology Exceeded its Statutory Authority by Failing to Make Findings under RCW 90.03.290(3) Before Adopting the Dungeness Rule

When ruling on the Plaintiffs' summary judgment motion on this issue on January 8, 2016, this Court stated that there was not a "clearly established legal principle" that the four-part test is required every time a minimum flow rule is established. While there is certainly more context in the rulemaking record on this question, as surmised by the Court, the established legislative policy does exist. RCW 90.03.010 provides:


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> The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. (Emphasis added.)

This statute establishes three foundations principles applicable to the four-part test issue. First, the waters of the Dungeness Basin belong to the public and the state's power to regulate those waters must be exercised consistent with the the Water Code. Second, Ecology can only appropropriate waters for instream flows in the manner provided in the Water Code, which includes the four-part test at RCW 90.03.290(3). Third, the phrases "in this chapter" and "in the manner provided" also incorporate the MNB requirement of RCW 90.03.005 discussed in the last section, which is an additional legislative policy mandate that must be carried out by Ecology in the exercise of its functions in the Water Code. The MNB requirement can be harmonized with the public interest prong of the four-part test, but neither procedural requirement can be ignored by Ecology when creating instream flow water rights.

By creating a MIF water right with a particular numerical flow level and a priority date, Ecology is forever appropriating the waters of a river up to that level for instream flow purposes. That appropriation of water is permanent, and, as decided in the *Postema* and *Foster* cases, forever excludes other future uses of the same water by establishing a senior water right that must be protected from impairment, even from de minimus effects. Because it is a permanent appropriation for instream flow purposes, and creates a water right with a priority date, the four-part test of RCW 90.03.290 is necessary to comply with the full range of public policy directives and procedures in RCW 90.54.020, RCW 90.03.005 and RCW 90.03.290, including the MNB test. As with the MNB requirment, the four-part test does not prevent Ecology from adopting MIF water rights at specific levels of flow and permanently protecting those levels from impairment, but RCW 90.03.010 and 90.03.345 compel Ecology to make the four-part test


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findings in order to do so, precisely because they have the status of water rights with priority dates that can preclude other uses of water.

The statutes authorizing MIFs do not exempt the appropriation of water for MIFs from the four-part test of RCW 90.03.290, which predated chapter 90.54 RCW. The Legislature is presumed to be aware of existing law requiring the four-part test for new water rights. If it intended to exempt MIF water rights from that test, it could and should have stated that exemption expressly in the statutes when they gave MIFs the status of water rights with priority dates. The Legislature did not.

**1. Because Instream Flow Regulations are Appropriations with Priority Dates, They Must Meet the Four-Part Test of RCW 90.03.290**

RCW 90.03.345 provides:

> **Establishment of reservations of water for certain purposes and minimum flows or levels as constituting appropriations with priority dates**. The establishment of reservations of water for agriculture, hydroelectric energy, municipal, industrial, and other beneficial uses under RCW 90.54.050(1) or minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment. … (Emphasis added).

The Supreme Court interpreted this provision as requiring the four-part test before adopting reservations of water.

> "Reservations of water under RCW 90.54.050 constitute appropriations of water. RCW 90.03.345 (a reservation of water is an appropriation having as its priority date the effective date of the reservation). Reservations of water must therefore meet the same requirements as any appropriation of water under the water code. "[B]efore a permit to appropriate may be issued, Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare."

*Swinomish*, at 588-89 (emphasis added); citing *Postema, 142 Wn.2d at 79* and RCW 90.03.290(3). RCW 90.03.345 treats MIFs and reservations identically, giving both the status of appropriations with priority dates.


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The Water Code is based on the common law doctrine of prior appropriation. Under the Water Code, any later appropriation cannot impair a MIF water right or reservation with an earlier priority date. RCW 90.03.290(3). This effect of creating MIFs as water rights is admitted and overt in the Dungeness Rule at WAC 173-518-040(3), which provides:

> Instream flows established in this rule are water rights and will be protected from impairment by any new water rights commenced after the effective date of this chapter and by future water right changes and transfers.

Logically, if reservations must meet the four-part test because of RCW 90.03.345, as already interpreted by the Supreme Court, there is no reason why MIF water rights can escape the same statutory requirement to meet the four-part test. It is consistent with the statutory scheme interpreted by the Supreme Court in *Postema* and *Swinomish* that before Ecology adopts a rule creating MIFs as water rights with priority dates, thereby prohibiting later appropriations from impairing the MIFs, Ecology must make the same findings as required for any other water right under the Water Code. Ecology adopted the Dungeness Rule before the *Swinomish* decision, but that does not exempt the Dungeness Rule from the same statutory mandates and limitations that led the Supreme Court to invalidate the Skagit Basin MIF rule in *Swinomish*. The Supreme Court's interpretation in *Swinomish* and the plain language of RCW 90.03.010 apply to the Dungeness Rule because it establishes that MIFs and reservations are appropriations of water that, like all other appropriations of water, must meet the four-part test at RCW 90.03.290(3).

**2. Protecting Optimal Flows for Fish Violates the Availability Prong of 90.03.290(3) Because Water Must be Available at the Source before it can be Appropriated.**

The plain language of RCW 90.03.290(3) provides, "if it shall find that there is water available for appropriation for a beneficial use … [the Department] shall issue a permit stating the amount of water to which the applicant shall be entitled." The question is whether there is water available, not whether there is potential habitat if water were available. Because this is an issue of first impression – no previous case has challenged an Ecology instream flow rule for


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violating the four-part test – there is no case law on this point. It is a mental stretch, however, to find a statutory interpretation of "water available for appropriation" that supports Ecology's position that "minimum" instream flows can be set to achieve "optimum" habitat conditions for fish, regardless of the quantities of water available in a stream.

Ecology established MIFs at WAC 173-518-040 not based on hydrology of the river (water that is physically available in the stream), it set flows at habitat-protective levels to protect potential fish habitat if such higher, optimal flows are ever present in the river. *See* facts and citations at pp. 11-12, above. This was inconsistent with Ecology's mandate to protect "base flows" as characterized in the Roe Memo and the Kaufman Comment, and it is entirely disconnected from the Water Code's concept of managing and regulating waters according to their availability. Although Ecology relies on the Elwha-Dungeness Watershed Plan as the source of the flow recommendations, WAC 173-518-040(1), reliance on a watershed plan does not excuse compliance with applicable law. Nothing in the watershed planning statute, RCW chapter 90.82, allows either a planning unit or Ecology to ignore applicable statutes before appropriating water for instream flow. *See* RCW 90.82.080; 90.82.085.

The rule asserts that the instream flows are water rights, but how can they be water rights if the water is not there?

**3. It is Detrimental to Public Welfare to Protect Optimal Flows for Fish While Closing the Basin to Other Uses.**

Setting "optimal" minimum flows beyond physical water availability in order to achieve "maximum" fish habitat, while at the same time closing streams and groundwater to future domestic uses, violates the "no detriment to the public welfare" prong of the four-part test.

By appropriating all available flows (and some unavailable flows) for fish habitat and none for domestic use, the Dungeness instream flow water rights are foreclosing water usage already found to be consistent with the public interest. The limited groundwater uses that are exempt from permitting under RCW 90.44.050 were exempted by the legislature from the four-


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part test, including the public welfare prong, which equates to a legislative determination that such uses are consistent with the pubic welfare. An appropriation that prevents future domestic use of the exemption is therefore contrary to a legislative determination of the public welfare. In fact, Ecology made findings in the Dungeness Rule that the minimum flows and closures are clearly overridden by the public interest in order to provide water for domestic water supply. WAC 173-518-080(1). Ecology did not make four-part test findings for the Dungeness instream flows, but its OCPI finding clearly demonstrates that Ecology believed that the instream flows, by themselves, were contrary to the public welfare and needed to be overriden to provide some limited uses of the exemption. Ecology could have satisfied the public welfare prong with MNB findings, but did not.

**4. When Harmonized with RCW 90.03.290(3), MNB is Both a Legislative Policy and a Procedural Requirement**

What is MNB in the context of the Dungeness Rule and Ecology's creation of MIF water rights? Is it a policy, a procedural requirement, or both?

RCW 90.54.020 sets forth multiple directives that are potentially, if not necessarily, inconsistent with one another. For example, how can the State protect both base flows for various environmental purposes and adequate water for domestic use, which requires the diversion of water, without creating some conflicts? It makes no sense that the Legislature intended that only one of these objectives have priority and that other objectives take a secondary or conditional place in line, unless of course that is what the Legislature said in the statute. In fact, RCW 90.54.020 is silent with respect to the relative priority of the various fundamentals listed there. MNB is not merely a policy, then, because it doesn't determine the outcome.

RCW 90.54.020 does, however, set forth a method for resolving conflicts among the competing fundamental policies of that section, and for allocating water despite the apparent conflict of objectives, according to MNB. As argued above, MNB is part of the statutory scheme for allocation of water that must, as directed by the Supreme Court, be read together with other


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statutes concerning the allocation or appropriation of water between instream and out-of-stream uses. Reading the statutes together as a common scheme, the Legislature did not intend for Ecology to create MIF water rights that are, unlike all other water rights, exempt from the four-part test. It intended that any such permanent allocation of water pass a public interest evaluation, as represented by the MNB directives in RCW 90.54.020 and RCW 90.03.005 and the public welfare prong of the four-part test of RCW 90.03.290(3), before an MIF obtains the status of a water right with priority date that must be protected against impairment by all subsequent attempts to appropriate water. This looks more like a procedure. The timing of this public interest review, like any other procedure, is critical because it must happen before it is too late to have any consequence. *See* Argument IV.C, above.

Water necessary to meet a MIF water right is permanently unavailable for appropriation to other uses. *Swinomish* at 578; RCW 90.03.345.

> "[Minimum] flows are not a limited water right; they function in most respects as any other water appropriation. As such, they are generally subject to our State's long-established "prior appropriation" and "first in time, first in right" approach to water law, which does not permit any impairment, even a de minimus impairment, of a senior water right." *Foster* at 471.

> "**A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired.**" *Foster* at 472, citing *Postema*, 142 Wn.2d at 82.

The ultimate result of these significant consequences is a building permit moratorium such as has occurred in the Skagit basin following the Supreme Court's rejection of Ecology's reservations of water for future uses in the *Swinomish* case. With no legal source of water supply, properties in the Dungeness basin could also be permanently stranded, unbuildable, and unusable. In other words**, if Ecology does not make the four-part test findings when creating a MIF water right, it will be too late to reconsider the public interests involved in that allocation of water.** After *Foster*, it also clear that Ecology cannot replace a public interest


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finding before adopting MIF water rights with a public interest finding after-the-fact (i.e., with an OCPI finding for a permanent use of water). What is the use of a public interest evaluation if it is too late to have any consequence?

### E. Ecology Exceeded its Statutory Authority by Adopting Reservations in the Dungeness Rule Using the OCPI Exception, Rather than the Four-Part Test

#### 1. Ecology's Use of OCPI is Contrary to New Supreme Court Precedent

The inherent problem with the Dungeness rule is that Ecology's approach to creating OCPI-based reservations that conflict with MIF water rights and stream closures has been soundly rejected by the Supreme Court in *Swinomish* and *Foster*. Further, the Supreme Court held that reservations must be adopted using the four-part test of RCW 90.03.290(3), which Ecology did not do. Even the 2016 Legislature's attempt to safeguard the reservations at WAC 173-518-080 is ineffective to cure these problems with Ecology's water for fish first – water for people later process in the Dungeness Rule. *See* ESSB 6513.PL at Appendix No. 5. In light of *Swinomish* and *Foster*, the reservations in the Dungeness rule were improperly adopted in excess of Ecology's statutory authority, did not comply with the four-part test, and do not provide adequate legal availability of water for domestic uses to accomplish Ecology's purpose of allowing new rural domestic uses to purchase mitigation and obtain a building permit. The whole process for mitigating new water uses in the Dungeness Rule is a house of cards that collapsed after *Swinomish* and *Foster*, and ESSB 6513.PL can't put Humpty Dumpty back together again.

The Dungeness Rule includes reservations of water for future uses that were adopted by Ecology with an OCPI finding instead of using the four-part test for water appropriations. WAC 173-518-080(1). The Supreme Court later determined in *Swinomish* that Ecology lacks statutory authority to adopt reservations using OCPI. Then in *Foster*, the Supreme Court held that OPCI could only be used to authorize temporary uses of water and only for a public purpose. To the contrary, the reservations at WAC 173-518-080 purport to authorize water for permanent


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domestic uses (which are not public), which reserves "shall be debited when mitigation water is unavailable." The OCPI finding in WAC 173-518-080(1) clearly provides that use of the reserves for future domestic supply would have the potential for negative impacts on instream resources. Therefore, as a matter of law, the reservations are invalid because they attempt to accomplish what the Supreme Court has expressly ruled cannot be accomplished with OCPI.

RCW 90.54.020(3)(a) provides:

> (3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:
>
> (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. (Emphasis added.)

In *Swinomish*, the Supreme Court reiterated its earlier interpretation of the OCPI clause in *Postema* as a "narrow exception." 178 Wn.2d at 584 (emphasis in original). The Court further interpreted the "public interest" qualifier in OCPI as different from "beneficial use" and stated that "exempt wells for domestic use on a noninterruptible basis [is] a private use, generally speaking, not a public use." 178 Wn.2d at 587.

Ecology defended the use of OCPI in the Skagit Basin instream flow rule as a "water management rule for a particular watershed as a whole, and that reservations provide a way for future applicants to apply for permits to use the water for the designated beneficial uses, notwithstanding the adoption of minimum instream flows that would otherwise prevent the issuance of future water rights. *See* 178 Wn.2d at 585. That is precisely the purpose of the reservations in the Dungeness Rule. WAC 173-518-080(1). The Supreme Court rejected Ecology's defense of the OCPI-based Skagit reservations, stating:

> We see no meaningful difference between water reservations that reserve water for future individual applicants to obtain the right to put the water to those beneficial uses and individual applicants who presently seek to appropriate water for the same beneficial uses, insofar as impairment of the minimum or base flows


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> is concerned. In both instances, the result is a water right held by an individual to the detriment of the existing minimum flow water right.

*Swinomish* at 586.

The Court went on to analyze the OCPI exception in the context of the statutory scheme of all the water allocation statutes and the prior appropriation doctrine, and concluded that Ecology's interpretation of the OCPI exception "is inconsistent with the entire statutory scheme" including the prior appropriation doctrine. *Swinomish* at 586-89. The Court's analysis concluded that Ecology must adopt reservations using the four-part test for water rights at RCW 90.03.290(3), and could not do so using the OCPI exception. *Swinomish* at 588-89, *citing Postema*, 142 Wn.2d at 79 and RCW 90.03.290(3). The Court went on to state:

> Nothing in the language used in RCW 90.54.020(3)(a) says that the overriding considerations exception is intended as an alternative method for appropriating water when the requirements of RCW 90.03.290(3) cannot be satisfied for the proposed appropriation. This end-run around the normal appropriation process does not accord with the prior appropriation doctrine and the detailed statutes implementing the doctrine.

*Swinomish* at 590. That is a very clear statutory interpretation by the Supreme Court that Ecology lacks statutory authority to adopt reservations using the OCPI exception, and that Ecology cannot use OCPI as an "end run" around the normal appropriation process of RCW 90.03.290(3).

In *Foster*, the Supreme Court made two additional rulings regarding OCPI that are controlling in this case and eviscerate not only the reservations in the Dungeness Rule, but the whole scheme of protecting MIFs first then requiring mitigation for domestic. First, the Court interpreted the word "withdrawal" in the OCPI exception as applying only to temporary uses of water.

> We hold that the OCPI exception does not allow for the permanent impairment of minimum flows. If the legislature had intended to allow Ecology to approve permanent impairment of minimum flows, it would have used the term "appropriations" in the OCPI exception. It did not. The term "withdrawals" of water, however, shows a legislative intent that any impairment of minimum flows must be temporary. The plain language of the exception does not authorize



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> Ecology to approve Yelm's permit, which, like the reservations in Swinomish, are permanent legal water rights that will impair established minimum flows indefinitely. *Foster* at 475.

Second, as demonstrated above in Argument Section IV.B.2, the Court rejected a mitigation plan that included out-of-kind mitigation to cover the periods of time when water-for-water replacement mitigation was unavailable.

*Swinomish* and *Foster* apply directly to Ecology's adoption of reservations in the Dungeness Rule. Ecology used OCPI instead of the four-part test to adopt the reservations at WAC 173-518-080. The Dungeness Rule acknowledges that the reservations cover future uses that would have negative impacts on the MIFs and closed streams protected by the rule, and those future uses are permanent and private, twice exceeding the scope of the "narrow exception" as interpreted by *Swinomish* and *Foster*. The reservations in the Dungeness Rule should have been adopted using the four-part test of RCW 90.03.290(3). If they had, they might be valid and sufficient to accomplish Ecology's objective to allow limited use of the permit exemption for domestic uses.

**2. ESSB 6513 Doesn't Cure the Dungeness Reservations**

The 2016 Legislature adopted ESSB 6513 (Chapter 117, Laws of 2016) to address OCPI-based reservations in the Wenatchee Instream Flow Rule (WAC 173-545-090) and the Dungeness Rule, but the bill cannot cure the legal defects described above or rescue the Dungeness Rule from invalidation. Appendix 5. First, it is important to note that ESSB 6513 only addresses the reservation section of the Dungeness Rule and makes no attempt to "validate" or otherwise approve any other section of the rule, including those adopting MIFs and closing streams to further appropriation. It is telling that the Legislature was aware of the impact of the *Swinomish* case on reservations in the Dungeness Rule and was presumably aware of this pending challenge to the rule as well, but did nothing to preserve or validate anything else in the rule relating to the protection of instream flows. It is important to note what the bill provides and what it doesn't:


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> NEW SECTION. Sec. 1. A new section is added to chapter 90.54 RCW to read as follows: (1) The department shall act on all water rights applications that rely on the reservations of water established in WAC 173-518-080 or 173-545-090, as those provisions existed on the effective date of this section. The legislature declares that the reservations of water established in WAC 173-518-080 and 173-545-090, as those provisions existed on the effective date of this section, are consistent with legislative intent and are specifically authorized to be maintained and implemented by the department. (Emphasis added.)

The words "water rights applications" refers applications filed for specific allocations of a reservation pursuant to RCW 90.03.345, not to future exempt water uses or building permit applications. If the Legislature intended to direct the processing or approval of building permit applications relying on the reservations in the Dungeness Rule, it could have said so, but did not. Second, by stating that the Dungeness reservations are "consistent with legislative intent" and are "authorized to be maintained and implemented" the Legislature is clearly at odds with the Supreme Court's rejection of similar reservations in *Swinomish*. Given that tension between two branches of the government on the same issue, the court should interpret and apply ESSB 6513 narrowly so as not to create a separation of powers issue.

It is notable that the Legislature did not amend the OCPI statute and did not mention the *Swinomish* decision or make any effort to interpret OCPI in a manner different than the Supreme Court. This means that the Supreme Court's interpretation of OCPI is unaffected by ESSB 6513. As a result, the court can apply ESSB 6513, but only narrowly, so that it does not counter the Supreme Court's interpretations of OCPI. Thus, the Dungeness reservations at WAC 173-518-080 cannot be interpreted as authorizing any permanent water uses or private uses of water. The result is that the Dungeness reservations do not accomplish their purpose of authorizing future domestic uses of water on a permanent basis, and this must be taken into account in analyzing whether the rule meets APA standards and is consistent with Ecology's statutory authority.

### F. Ecology Exceeded its Statutory Authority by Adopting Surface Water Closures in the Dungeness Rule



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The justification for closing numerous streams in the Dungeness rule is murky at best, but one thing is clear: to the extent based on protection of "minimum instream flows" for which water is not actually available, the closures are contrary to the Supreme Court's interpretation of the Water Code in *Swinomish*.

Ecology's purpose of closing streams in the Dungeness basin was to make water "unavailable" from that source for future appropriation in order to prevent impairment of senior water rights or detriment to public interest.

> "Closure" means that water is no longer available for future appropriations without mitigation to offset the use. This is due to a finding by ecology that further appropriations from the closed stream(s) or hydraulically connected groundwaters would impair senior water rights or cause detriment to the public interest.

WAC 173-518-030. WAC 173-518-050 states:

> [B]ased on recommendations in the watershed plan, historical and current low stream flows, and the need to protect existing water rights, water is not reliably available for new consumptive uses from the streams and tributaries in the Dungeness River watershed listed in Table III … Therefore, Bagley, Bell, Cassalery, Gierin, Matriotti, McDonald, Meadowbrook, and Siebert creeks, and unnamed tributaries to the Dungeness River, are closed year round."

Ecology's only statutory authority to close streams by rule is set forth in RCW 90.54.050, but that was not the basis for the closures in the Dungeness Rule. This statute provides:

> [T]he department may by rule adopted pursuant to chapter 34.05 RCW:
> …
> (2) <u>When sufficient information and data are lacking</u> to allow for the making of sound decisions, <u>withdraw various waters of the state from additional appropriations until such data and information are available</u>. Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department <u>shall</u> consult with the standing committees of the house of representatives and the senate having jurisdiction over water resource management issues.



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That was not, however, the basis for the closures in the Dungeness Rule. In the CES, Ecology explains that the closures are based upon a finding that water is not available,[12] not that information is lacking. The CES expands upon this justification as follows: "An 'administrative closure' is a term used to describe a finding that water is not available for new diversions from a specific surface water body based on a recommendation from the Director of Washington State Fish and Wildlife made pursuant to RCW 77.57.020." *CES at 78 (response to Comment 75) Id*. However, RCW 77.57.020 does not authorize a closure by rule. RCW 77.57.020 relates only to a case-by-case evaluation of permit applications. Nothing in RCW 77.57.020 overrides Ecology's duty to investigate each permit application under RCW 90.03.290, or suggests that Ecology may by rule circumvent its duty to investigate each permit application.

The CES attempts to explain Ecology's historical practice of closing streams in other instream flow rules:

> "Closure" is a term of art historically used by the courts, Ecology, and Ecology's predecessor agency. It signifies a determination that water is not available for appropriation from a surface water or groundwater source. It has appeared in water management rules throughout the state since the 1970s.

*CES at 37 (response to Comment 19) ECY001874*. "Closure" may be a "term of art" to Ecology, but it is not derived from the Water Code. Ecology's historical practice is simply not an acceptable substitute for statutory authority. *See generally Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Ecology also used the same "OCPI" approach to support water reservations in several other water management rules, but that did not stop the Supreme Court in *Swinomish* from invalidating Ecology's use of OCPI in the Skagit rule. Ecology's "terms of art" are especially suspect when they are inconsistent with statutory language.

Finally, Ecology also explains that the stream closures in the Dungeness rule are predicated upon its authority to promulgate minimum instream flows by rule: "Ecology has

[12] "This rule does not withdraw water from further appropriations because of a lack of information pursuant to RCW 90.54.050. The closure of surface water bodies is based on a finding that water is not available." CES at 78 (response to Comment 74) *ECY001915.*



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closed (or seasonally closed) surface water bodies that chapters 90.22 and 90.54 RCW direct us to protect." *CES at 110 (response to Comment 134) ECY001947. Compare* WAC 173-518-040, Tables II-A and II-B, with WAC 173-518-050, Table III. RCW chapters 90.22 and 90.54 authorize Ecology to establish minimum instream flows or base flows. But those statutes do not (except in circumstances involving insufficient data or information, which Ecology has already explained do not exist here) authorize closure of a stream by rule for the purpose of protecting senior water rights, including minimum instream flows.

It thus appears that the purpose of stream closures in the Dungeness rule result from Ecology's desire to protect "biological or ecological" minimum instream flows – flows which are not now achieved in those streams.[13] Ecology lacks authority to establish by rule a "closure" intended to protect an *ultra vires* minimum instream flow, and to prohibit permit-exempt groundwater withdrawals under RCW 90.44.050 based upon such "closed" streams, or to require mitigation of such impacts.

Generally speaking, Ecology must evaluate the availability of water on a case by case basis for water right applications, as provided in the four-part test. Closing a source by rule eliminates the ability of applicants or exempt well users to demonstrate that water may be available for a particular use in a particular place and manner. Therefore it is critical that Ecology comply with all statutory requirements for closing or withdrawing waters because it takes away the statutory process for determining impairment, availability, and public welfare on a case-by-case basis. RCW 90.03.290 requires Ecology to investigate each application for a water right permit, "and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied." RCW 90.03.290(1); see also RCW

[13] *See, e.g.*, Memorandum from Paul J. Pickett and Brad Caldwell to Brian Walsh and Cynthia Nelson re Flows at proposed Instream Flow regulatory control stations in the Dungeness portion of WRIA 18 (February 8, 2012), Table 2 *(ECY004838-44*); CES at 54 (Comment 51)(*ECY001891*).



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90.03.290(4) ("In determining whether or not a permit shall issue upon any application, it shall be the duty of the department to investigate all facts relevant and material to the application").

In light of the complete absence of legal authority and lack of any particularized findings to support Ecology's determination that water is not available from the closed streams, it is no wonder that many members of the local community believe that Ecology began with the objective of precluding use of the groundwater permit exemption in RCW 90.44.050, and then worked backward from there to arrive at the stream closures in the Dungeness rule. The stream closures at WAC 173-518-050 exceed Ecology's statutory authority and should be invalidated.

**G. The Dungeness Rule is Arbitrary and Capricious**

Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

To determine if Ecology acted in an arbitrary or capricious manner, it is necessary to understand its responsibilities with regard to the public waters of the state. *Hillis*, at 383. As demonstrated above, Ecology is responsible for protecting minimum instream water resources for various environmental purposes and for protecting adequate water supply for domestic uses. To the obvious extent that these fundamental legislative purposes may be in conflict, Ecology is required to make its decisions according to the maximum net benefits for the people of the state. After all, it is the peoples' water, and the State, through Ecology, only exercices a trust responsibility to act in the peoples' interest.

Not only did Ecology refuse to make MNB findings, or to consider the public interest in adequate water supply under the four-part test, but Ecology appropriated more water for fish than exists naturally in the basin, creating minimum instream flow water rights with priority dates that foreclose future appropriations for domestic, agricultural or other uses without mitigation. This was all done based on assumptions that later proved to be false and inconsistent with the prior appropriation doctrine according to the Supreme Court's *Swinomish* and *Foster* decisions.


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Ecology also attempted to make new law regarding the priority date of permit-exempt wells, without any delegation of authority from the Legislature, in order to subject more domestic uses to the streams closures and mitigation requirements.

Ecology's actions were taken with full knowledge that they were inconsistent with the law and/or that they failed to comply with APA rule-making standards, but they barrelled ahead with the rule anyway. The comments summarized above from Ecology economist Tryg Hoff, and comments from Washington REALTORS/Bill Clarke cited throughout this brief were warnings to Ecology that its draft rule exceeded its authority and would not accomplish its purpose. Ecology's failure to correct these problems in the final rule demonstrates is willful and unreasoning behavior, taken without regard for the consequences.

Further, there is no indication Ecology accounted for improvements to instream flows prior to the rule through the purchase of senior water rights as a result of State grant funding. Those voluntary programs were far more effective than the rule's MIF water rights and closures will be to restore flows and habitat to the Dungeness basin. Not only are impacts from potential future domestic uses incredibly small (0.77 cfs basin-wide over 20 years) compared to flows in the Dungeness and even to flows already restored (over 30 cfs), but the rule does nothing to regulate or bring about conservation from existing water right holders, which would be far more effective in accomplishing flow restoration and improved habitat.

All of the facts outlined in this brief demonstrate a pattern of conduct on Ecology's part to ignore fundamental state water policy, economic impacts, and pertinent facts relating to current stream conditions, and to overprotect the basin from the extremely limited impacts from projected new domestic uses while severely discounting or ignoring the value of those uses. Ecology developed a complicated rule requiring mitigation for all new water uses in the basin without a proven mitigation strategy, when it could have accomplished greater protection of instream flows by purchasing less than one cfs of water rights. By protecting all available water in the basin for fish and none for people, and without appropriate consideration of the maximum


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net benefits for the people, Ecology acted in a willful and unreasoning manner without consideration of the true effects of its actions. This is a classic case of arbitrary and capricious action by a state agency.

## V. CONCLUSION

For the reasons set forth above, the Court should declare that the Dungeness Rule is invalid and grant such other relief that the Plaintiffs are entitled to.

DATED this 29th day of July, 2016.

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## VI. APPENDICES

**1.** Chapter 173-518 WAC

**2.** Skagit County Assessor -- Well Restriction Assessment Information

**3.** An Introduction to Washington Water Law, Office of the Attorney General, January 2000, at III:27-32

**4.** Clallam County Code Sections

**5.** ESSB 6513.PL

**6.** Ecology's Rule-Making Record, in numerical order



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