

37811-6-II

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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No. 80859-7

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SQUAXIN ISLAND TRIBE,

Appellants,

v.

POLLUTION CONTROL HEARINGS BOARD;  
WASHINGTON, DEPARTMENT OF ECOLOGY, AND  
MILLER LAND AND TIMBER, LLC

Respondents.

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APPELLANT'S OPENING BRIEF

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## **ASSIGNMENT OF ERROR**

The Superior Court erred in affirming those portions of the Pollution Control Hearings Board's ("PCHB" or the "Board") May 19, 2006, Order on Motions and the Board's November 20, 2006, Modified Findings of Fact, Conclusions of Law, and Order ("Final Order") which interpret and apply WAC 173-513-050 to allow the Department of Ecology ("Ecology") to approve a new groundwater withdrawal that reduces seasonal flows in a stream that is closed "all year" to "further consumptive appropriations" under WAC 173-513-040(1).

### **ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

In light of the holding in *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 95, 11 P.3d 726 (2000), that a proposed withdrawal of groundwater must be denied "if it is established factually that the withdrawal will have *any effect* on the flow or level" of a closed surface water, does WAC 173-513-050 allow Ecology to approve a groundwater withdrawal that reduces flows in a stream that is closed to further consumptive appropriation based on a case-by-case determination that a reduction in flows will not result in environmental harm?

### **STATEMENT OF THE CASE**

#### **I. The Deschutes Basin Rule.**

The Water Resources Act of 1971 requires Ecology to adopt rules

which protect the “base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values.” *Postema*, 142 Wn.2d at 94-95; RCW 90.54.020(3)(a) and .040. Pursuant to the Water Resources Act, in June 1980 Ecology adopted rules for the Deschutes River basin, also known as Water Resources Inventory Area (“WRIA”) 13. Chapter 173-513 WAC. The stated purpose of the rules was “to retain perennial rivers, streams, and lakes in the Deschutes River basin with instream flows and levels necessary to provide protection for wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality.” WAC 173-513-020.

In WAC 173-513-040(1), Ecology “determined that further consumptive appropriations would harmfully impact instream values,” and closed Woodland Creek and its tributaries to “further consumptive appropriation.” The closure of Woodland Creek expressly applies “all year,” in contrast with certain other streams in the Deschutes River watershed that are subject only to seasonal closures. *Id.* (compare year round closure for Woodland Creek with seasonal closure of Deschutes River).

In addition to closing surface waters to further consumptive appropriation, the Deschutes Basin rule contains the following provision applicable to groundwater withdrawals:

Future ground water withdrawal proposals will not be affected by this chapter unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter.

WAC 173-513-050. A narrative guidance document issued by Ecology concurrently with the rule explained that it was the “intent of this program to insure that *surface water resources* are protected from significant impacts with respect to the use of adjacent or nearby ground water resources that are known to be in continuity with protected surface waters.” CP 1857 (Exh. 25 at 13) (emphasis added). Consequently, Ecology explained, “[p]roposed wells found to be in significant hydraulic continuity with [protected] surface sources *would be treated in the same manner as a direct diversion from the surface source.*” *Id.* (emphasis added).

## **II. Ecology Proceedings.**

In 2000 and 2003, Miller Land and Timber LLC (“Miller”) submitted applications to Ecology for permits to appropriate groundwater for two proposed residential developments in the Woodland Creek watershed, just north of Lacey. Miller’s first application (No. G2-29951) requested permission to appropriate 172 gallons per minute (gpm) and 45.2 acre-feet (ac-ft) per year of groundwater for the “Pleasant Glade” development. CP 1229 (Final Order at 4 (¶4)). Miller’s second

application (No. G2-30137) sought approval for a groundwater appropriation of 63 gpm and 13 ac-ft per year for the “Carpenter Ridge” development. CP 1230 (*Id.* at 5 (¶6)).

On August 10, 2004, Ecology denied both applications. CP 1230 (Final Order at 5 (¶7)). Ecology found that the proposed withdrawals would capture groundwater that would otherwise contribute to base flows in Woodland Creek and its associated wetlands. *Id.* Ecology took the position that it “must deny any proposed groundwater withdrawals that have the potential to impair flows in Woodland Creek.” CP 1686 (Exh. 7 at 5). Ecology explained that under chapter 173-513 WAC, “Woodland Creek and all of its tributaries are closed to further appropriation” and that “[m]aintaining flows in Woodland Creek is necessary to provide protection for wildlife, fish, water quality and aesthetic values.” *Id.* Accordingly, Ecology concluded that water was “not available for appropriation” from the source in question. *Id.*

On September 9, 2004, Miller appealed the denial of its applications to the Board (PCHB Nos. 04-124 and 04-125). CP 1231 (Final Order at 6 (¶8)). Rather than defending its decisions, Ecology entered into a settlement agreement with Miller that provided for approval of the applications based on a negotiated mitigation plan. *Id.*

Under the settlement agreement, Ecology agreed to approve permits authorizing an appropriation of 80 gpm and 14.8 ac-ft per year for the Pleasant Glade development and an appropriation of 63 gpm and 10.8 ac-ft per year for the Carpenter Ridge development. CP 1235-36 (*Id.* at 10-11 (¶¶18-19)). As mitigation for these withdrawals, Ecology agreed to allow Miller to appropriate *another* 32 gpm and 25.2 ac-ft per year from the same aquifer for “stream augmentation” purposes. *Id.* Under the permits, stream augmentation water pumped from the Pleasant Glade well would be discharged into a pond feeding into Woodland Creek. CP 1232 (*Id.* at 7 (¶11)). As approved by Ecology, all of the stream augmentation water would be provided from June through November; no mitigation is required from December through May even though there would be year-round impacts on stream flows from the proposed withdrawals. *See* CP 919, 925 (Order on Motions at 6 (¶ 8), 12 (¶ 20)). Ecology issued the permits on September 15, 2005. CP 1234 (Final Order at 9-10 (¶17)).

### **III. Board Proceedings.**

The Squaxin Island Tribe (the “Tribe”) is a signatory to the Medicine Creek Treaty, which secures the Tribe’s right of taking fish at all usual and accustomed fishing places. 10 Stat. 1132 (Dec. 26, 1854). The Woodland Creek basin is within the Tribe’s usual and accustomed fishing area, thus providing the Tribe a Treaty-protected interest in the

anadromous fish that spawn in the watershed. CP 1240 (Final Order at 15 (¶30) (citing *United States v. Washington*, 384 F.Supp. 312, 378 (W.D. Wash. 1974), *aff'd*, 520 F.2d 675 (9th Cir. 1975)). Woodland Creek and its tributary, Fox Creek, are important to anadromous fish for spawning habitat, as migration corridors, and are highly critical for the rearing of juvenile fish. CP 1274 (Final Order at 49 (¶ 111)).

Coho salmon, steelhead, and cutthroat trout are most affected by changes in flow and water quality because they are present in the fresh water system for over one year and are more susceptible to warmer temperatures caused by low flows. CP 1274 (Final Order at 49 (¶ 111)). Low flows during any time of the year could impact the ability of these fish to move throughout the fresh water system. CP 1260 (*Id.* at 35 (¶ 79)). The number of returning coho salmon has dropped sharply in the last twenty years, due to degradation and loss of rearing habitat. *Id.*; *see also* CP 1261 (*Id.* at 49 (¶111)). The result is that fewer Squaxin Island Tribal members are able to make their living from fishing. *Id.*

Neither the Tribe nor the Washington Department of Fish and Wildlife (“WDFW”) were involved in the settlement negotiations between Ecology and Miller, but both entities reviewed and commented on Ecoogy’s proposed decisions. CP 1717, 1733 (Exh. 14 at 7; Exh. 15 at 7). WDFW recommended denial of the applications based in part on the need

for year-round stream augmentation. CP 1233-34 (Final Order at 8-9 (¶¶13-15)). The Tribe also recommended denial of the permit applications based on concerns about the adverse effects that additional groundwater pumping could have on surface water flows. CP 1232-33 (*Id.* at 7-8 (¶ 12)). Because these concerns were not fully addressed in Ecology's decisions granting the permit applications, on October 10, 2005, the Tribe appealed the decisions to the Board. CP 407-45 (Tribe's Amended Notice of Appeal).

On February 10, 2006, the Tribe moved for summary judgment seeking, *inter alia*, a ruling that Ecology may not approve a groundwater withdrawal in a closed basin where the best available science indicates that the withdrawal would have *any* adverse effect on stream flows. CP 265-374. On May 19, 2006, the Board issued an order denying the Tribe's motion for summary judgment and rejecting the Tribe's position that any adverse effect on stream flows in a closed basin is sufficient grounds for denial of a groundwater application. CP 924-29 (Order on Motions at 11-16 (¶¶19-29)). Although Ecology failed to require mitigation during the period December through May despite the existence of "year-round effects," the Board concluded that Ecology did not err in concluding that water was available during the non-mitigated months. CP 919, 925-29 (*Id.* at 6 (¶ 8), 12-16 (¶¶20-30)). The Board reasoned that groundwater

withdrawals in the Deschutes Basin are affected by basin closures only if “the withdrawals produce any effects which adversely impact the values identified in WAC 173-513-020,” (*i.e.* wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation and water quality). CP 928-29 (*Id.* at 15-16 (¶¶28-29)).

Following its summary judgment order, the Board held a four-day evidentiary hearing on the merits of the Tribe’s claims that Ecology’s permitting decisions did not meet the requirements of the Water Code and the Deschutes Basin rule. On October 16, 2006, the Board issued its findings of fact, conclusions of law and order, which were modified in a final order dated November 20, 2006. CP 1226-83. Based on the Tribe’s site-specific groundwater model and other evidence submitted by the parties, the Board concluded that water was not available for appropriation during the summer months and that the proposed withdrawals were not in the public interest. CP 1227, 1271-72, 1274 (Final Order at 2, 46-47 (¶106), 49 (¶112)). At the same time, however, the Board concluded that the project’s unmitigated impacts on flows from December through May were by themselves insufficient to justify denial of the applications because the Tribe failed to show adverse impacts to fish during the winter. CP 1275 (*Id.* at 50 (¶113)). The Board’s opinion acknowledges that the Tribe presented “some evidence” that there are periods of low flow during

winter months, but dismisses these as “relatively infrequent” and occurring “during times of drought.” *Id.*

The Board indicated that its order does not preclude Ecology from issuing a preliminary permit to Miller authorizing aquifer testing and does not prevent Ecology from approving Miller’s water rights applications based on new information on the effects that groundwater withdrawals will have on the surface waters of Woodland Creek. CP 1227, 1280 (Final Order at 2, 55 (¶124)).

#### **IV. Superior Court Proceedings.**

Aggrieved by the Board’s decision allowing groundwater withdrawals that reduce flows in Woodland Creek during the winter months and establishing a standard for proving adverse impacts that makes it more difficult to enforce stream closures in the Deschutes watershed, the Tribe petitioned the Thurston County Superior Court for review of the Board’s decision under the Administrative Procedure Act. CP 3-88. Miller also petitioned for review of the Board’s decision. On October 17, 2007, without issuing a written opinion, the Superior Court dismissed both petitions and affirmed the Board’s decision. CP 100-02. This timely appeal followed.

## SUMMARY OF ARGUMENT

In *Postema*, the Supreme Court held that “a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have *any effect* on the flow or level of the surface water.” 142 Wn.2d at 95 (emphasis added). The Board departed from this principle when it held that WAC 173-513-050 permits Ecology to approve groundwater withdrawals that seasonally reduce natural flows in a closed stream in the Deschutes River watershed based on a case-by-case determination that the reduction in flow is not likely to result in environmental harm. The Board erred in applying this erroneous legal interpretation to uphold Ecology’s approval of groundwater withdrawals that will reduce winter flows in a stream that is closed to further consumptive appropriations on an “all year” basis.

The Board’s departure from *Postema* was unjustified because the language of Deschutes watershed rule is virtually identical to the watershed rules interpreted in *Postema*. Compare WAC 173-513-050 with WAC 173-509-050. Furthermore, the plain language and the administrative history of the Deschutes Basin rule demonstrates that the intent of the rule was to prohibit new groundwater withdrawals that would diminish flows in closed streams or impair minimum instream flows.

Ecology's regulatory determination in WAC 173-513-040(1) that "further consumptive appropriations" from Woodland Creek and other closed streams would "harmfully impact instream values" precludes issuance of groundwater rights that reduce flows in a closed stream based on an individualized evaluation of environmental harm.

### STANDARD OF REVIEW

The issue presented in this appeal concerns a matter of statutory interpretation and thus raises a pure question of law which the Court reviews *de novo*. *Waste Management of Seattle v. Utilities and Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). Under the *de novo* standard of review, the Court may substitute its interpretation of the law for that of the agency. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004); *Postema*, 142 Wn.2d at 77; RCW 34.05.570(3)(d)). In conducting this review, the Court gives *no* weight to the Board's interpretation of statutes or regulations. *Port of Seattle*, 151 Wn.2d at 593-94.

While the Court may afford deference to *Ecology's* interpretation of provisions the agency is charged with administering, it may do so only if the provisions are ambiguous. *Port of Seattle*, 151 Wn.2d at 593; *Postema*, 142 Wn.2d at 77. Deference is due only to an agency's *official* interpretation, *Burton v. Lehman*, 153 Wn.2d 416, 426, n.4 103 P.3d 1230

(2005), and will not be afforded to interpretations that are “inconsistent with the agency’s administrative practice.” *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001); *see also United States v. Mead*, 533 U.S. 218, 228 (2001) (degree of deference afforded depends on “the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”) Furthermore, an agency’s interpretation will not be accorded deference if it conflicts with a statute. *Postema*, 142 Wn.2d at 77. Ultimately, it is up to the Court to determine the meaning and purpose of statutes and regulations. *Id.*

## ARGUMENT

### **I. A Proposed Withdrawal of Groundwater in Hydraulic Continuity with a Closed Stream Must Be Denied if the Withdrawal Will Have Any Effect on the Flow of the Stream.**

Under the State’s water law, all natural groundwater is declared to “belong to the public.” RCW 90.44.040. Groundwater is subject to appropriation by private parties under the terms of the Groundwater Code, chapter 90.44 RCW, which requires an applicant for a new groundwater right to apply for and obtain a permit from Ecology.<sup>1</sup> RCW 90.44.050.

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<sup>1</sup> The Groundwater Code exempts groundwater withdrawals of less than 5,000 gallons per day for domestic and certain other uses (“exempt wells”) from the permit requirement. RCW 90.44.050; *see Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 8-9, 43 P.3d 4 (2002). The proposed groundwater withdrawals at issue here exceed 5,000 gallons per day and so are fully subject to the permit requirement.

Once an application is submitted, Ecology must investigate the application pursuant to RCW 90.03.290. *See* RCW 90.44.060 (providing that groundwater applications shall be made as provided for in RCW 90.03.250 through .340). Before issuing a permit to appropriate groundwater, 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.” *Postema*, 142 Wn.2d at 79 (citing RCW 90.03.290).

The Groundwater Code “emphasizes the potential connections between groundwater and surface water and makes evident the Legislature’s intent that groundwater rights be considered a part of the overall water appropriation scheme.” *Postema*, 142 Wn.2d at 80 (quoting *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 226 n.1, 858 P.2d 232 (1993)). Hydraulic continuity between ground and surface waters is also recognized in the Water Resources Act of 1971. RCW 90.54.020(9). Accordingly, when Ecology determines whether to issue a permit for the appropriation of public groundwater, Ecology must “consider the interrelationship of the groundwater with surface waters, and must determine whether surface water rights would be impaired or affected by groundwater withdrawals.” *Postema*, 142 Wn.2d at 80-81.

The Water Resources Act of 1971 requires Ecology to protect the “base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values.” *Postema*, 142 Wn.2d at 94-95 (quoting RCW 90.54.020(3)(a)). Ecology is “directed” to promulgate regulations “to insure that existing regulatory programs are in accord with the water resource policy” of the Act. RCW 90.54.040(2). Ecology carries out this obligation by promulgating watershed rules which establish minimum instream flows, *see* RCW 90.22.010, as well as other restrictions such as stream closures. *Postema*, 142 Wn.2d at 95 (citing RCW 90.03.247).

Once established by rule, a minimum flow constitutes an existing right which may not be impaired by subsequent appropriations. *Postema*, 142 Wn.2d at 81 (citing RCW 90.03.345; RCW 90.44.030). In contrast, stream closures adopted by rule “embody Ecology’s determination that water is not available for further appropriations” from the surface water source. *Id.* at 95. A stream closure limits Ecology’s authority to issue new water rights because unavailability of water is “a basis on which a water permit application must be denied under RCW 90.03.290 independent of the question whether a withdrawal would impair an existing right. *Id.*

In *Postema*, 142 Wn.2d at 77-95, the Court addressed at length the relationship between the Groundwater Code and restrictions adopted under the Water Resources Act to protect surface waters. *Postema* involved consolidated appeals of numerous Ecology decisions to deny applications for groundwater permits because either: (1) the groundwater was in hydraulic continuity with surface water sources where minimum flows were not met for a substantial part of the year, or (2) the groundwater was in hydraulic continuity with surface water sources that were closed to further appropriation.<sup>2</sup> 142 Wn.2d at 74. In both instances, the appellants claimed that the likely effects of their proposed groundwater withdrawals on regulated surface waters were too small to warrant denial of their applications. *See id.* at 94.

With respect to minimum instream flows, the Court rejected appellants' position that a groundwater application may be denied only if there is a "direct and measurable effect on surface waters using standard stream measuring equipment" or a "significant measurable effect on stream flows." *Postema*, 142 Wn.2d at 82, 92. The appellants argued that the standards for assessing the impacts of groundwater withdrawals in

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<sup>2</sup> *Postema* actually involved two cases: (1) *Jorgensen v. Pollution Control Hearings Board*, No. 67786-7, which itself involved four consolidated appeals arising in the Green-Duwamish, Snohomish and Cedar-Sammamish watersheds; and (2) *Postema v. Pollution Control Hearings Board*, No. 67549-0, an appeal arising in the Snohomish watershed. *See* 142 Wn.2d at 75-76, 116.

Ecology's regulations for particular watersheds ("WRIAs") authorized withdrawals that would have only *de minimis* effects on minimum instream flows. *Id.* at 82, 83-86. The Court disagreed, reasoning that the "relevant statutes and administrative regulations do not contain appellants' proposed standards" and that the relevant statutes, particularly RCW 90.03.290, "do not authorize a *de minimis* impairment of an existing right." *Id.* at 92. Accordingly, the Court held, "where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial is required." *Id.* at 93.

The Court then turned to the question of stream closures. Relying on its earlier ruling relating to minimum instream flows, the Court rejected arguments that a denial of a groundwater application on account of a stream closure must be based on either a "direct and measurable" or "significant measurable" effect on the flow or level of the closed stream. *Postema*, 142 Wn.2d at 94. While acknowledging that a stream closure is not a water right entitled to protection under RCW 90.03.345, the Court held that this distinction was not dispositive because stream closures embody Ecology's determination that water is unavailable for appropriation, which constitutes an independent basis for denial of a

groundwater application. *Id.* at 94-95. Accordingly, the Court held that:

a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity *must be denied* if it is established factually that the withdrawal will have *any effect* on the flow or level of the surface water.

*Id.* (emphasis added). The Court proceeded to apply this standard to several of the consolidated appeals, including two appeals involving groundwater applications in the Green-Duwamish watershed (WRIA 9). *Id.* at 103-07 (Black River Quarry), 107-11 (Covington Water District).

Only Justice Sanders dissented from these holdings. He criticized the majority for defining “impairment” as “any effect, no matter how insignificant, on the quantity of surface water, even through there will be no real life effect on any of the interests which the Water Code is designed to protect.” *Postema*, 142 Wn.2d at 132. Judge Sanders concluded that:

[A] proper construction of the statute requires a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity be denied only if it is established factually [that] the withdrawal will have an *appreciable and material adverse effect on the minimum flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic, other environmental values or navigation.*

*Id.* at 132 (emphasis added).

In this case, the Board twice rejected the Tribe’s position that groundwater withdrawals affecting closed streams in the Deschutes watershed are governed by the *Postema* standard, *i.e.* that a proposed

withdrawal of ground water must be denied if the withdrawal will have *any effect* on the flow of closed surface waters. CP 924-29 (Order on Motions at 11-16 (¶¶19-30); CP 1268-70 (Final Order at 43-45 (¶¶97-103)). Instead, the Board concluded that an adverse effect on flows is sufficient to justify denial of a groundwater permit application only if the reduction in flows results in adverse impacts to the values identified in WAC 173-513-020, *i.e.* “protection for wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality.” CP 928-29 (Order on Motions at 15-16 (¶¶ 28, 29)). The Board applied its erroneous interpretation of the Deschutes rule in concluding that mitigation was not required to offset reductions in the natural flows of Woodland Creek that would result from groundwater withdrawals occurring during the months of December through May. *See* CP 925 (Order on Motions at 12 (¶ 20)); CP 1275 (Final Order at 50 (¶113)).

The Board’s interpretation of the rule and its holding on mitigation for wintertime flow reductions is flatly at odds with *Postema*’s rejection of a “significance” threshold for effects to flows in closed streams. *See* 142 Wn.2d at 94. Indeed, by requiring a case-by-case showing that a reduction in flows resulting from a proposed withdrawal will affect the environmental values listed in WAC 173-513-020, the Board’s ruling is

most consistent with the reasoning of the *Postema* dissent. 142 Wn.2d at 132 (Sanders J. dissenting).

As shown in the following sections, the Board offered no persuasive justification for its deviation from *Postema*. Moreover, its construction of the Deschutes rule conflicts from the plain language of the rule and the intent of the rule's drafters. Accordingly, the Board's interpretation and its ruling on wintertime mitigation must be set aside.

## **II. The Board Was Bound by the Holding in *Postema* When Interpreting the Deschutes Basin Rule.**

The Board justified its departure from *Postema* on the basis that the rules at issue in *Postema* were materially different from the Deschutes rule at issue in this case. CP 926 (Order on Motions at 13 (¶23)). However, two of the appeals adjudicated in the *Postema* litigation (Black River Quarry and Covington Water District) involved the Green-Duwamish watershed (WRIA 9) rule, chapter 173-509 WAC, which is virtually identical in its structure and operative language to the Deschutes rule at issue here.<sup>3</sup> Both of these rules contain similar provisions

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<sup>3</sup> In the Black River Quarry appeal, the Court upheld Ecology's denial of an application to withdraw water from "wells within the Soos-Creek subbasin of the Green-Duwamish watershed, WRIA 9," on the basis of findings that the proposed withdrawal "would reduce flows in Covington Creek where water is unavailable because of stream closure." *Postema*, 142 Wn.2d at 103, 106-07. The Covington Water District appeal involved the "same subbasin" as Black River Quarry, *id.* at 107, and the Court reviewed a Superior Court holding that there was substantial evidence that the proposed use of groundwater would reduce flows in closed waters and thereby "*clearly have an adverse impact upon*

establishing stream closures. *Compare* WAC 173-509-040(1) *with* WAC 173-513-040(1). More importantly, both rules also contain virtually identical provisions governing the relationship between surface water restrictions and proposed groundwater withdrawals. The Green-Duwamish rule at issue in *Postema* provides:

Future ground water withdrawal permits will not be affected by this chapter unless such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter.

WAC 173-509-050. The Deschutes rule at issue here employs almost the same language:

Future ground water withdrawals will not be affected by this chapter unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter.

WAC 173-513-050.

Plainly, the Board's departure from the holding in *Postema* cannot be justified by the very slight differences in wording between these two provisions.<sup>4</sup> Given the similarities between the two rules, the Board erred

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*the surface water system contrary to chapter 173-509 WAC.*" *Id.* at 109 (emphasis added).

<sup>4</sup> The Board's ruling appears to have been based on its mistaken belief that *Postema* related specifically to the *Puyallup* watershed rule (found at WAC 173-510-050). *See* CP 926 (Order on Motions at 13 (¶23)). In fact, however, the *Puyallup* watershed rule was not directly applicable to the applications at issue in *Postema*. The *Puyallup* rule was discussed in *Postema* because it was cited by the appellants to support an argument regarding the interpretation of the watershed rules that did apply to their applications. *See* 142 Wn.2d at 85 (noting that *Puyallup* rule "comes closer to supporting [appellants']

by not following the holdings of *Postema* when interpreting and applying the Deschutes rule in this case.

**III. The Board's Interpretation of the Deschutes Basin Rule Is Contrary to the Rule's Plain Language and the Intent of the Rule's Drafters.**

Even if the Board were not legally bound to interpret the language of the Deschutes rule in the same way that the Court interpreted the Green-Duwamish rule in *Postema*, the Board's interpretation of the Deschutes rule still could not be sustained because it is contrary to the rule's intent.

The Court "interprets a WAC provision to ascertain and give effect to its underlying policy and intent." *Department of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). To determine that intent, the court looks first to the language of the rule. *Id.* If a regulation is clear on its face, its meaning must be derived from its plain language alone. *Id.*; *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If it is ambiguous, the Court resorts to principles of statutory construction, administrative history, and relevant case law to assist in interpreting it. *Cannon*, 147 Wn.2d at 57; *Broschart v. Employment Security Dept.*, 123

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position *than the regulations applying to the WRIAs actually involved here*"). Because the Puyallup rule did not apply to the WRIAs actually involved in the *Postema*, whatever differences between that rule and the Deschutes rule cannot support the Board's departure from *Postema*.

Wn. App. 257, 266, 95 P.3d 356 (2004) (court may “consider administrative history and any administrative documentation explaining the rule’s intended purpose and effect to determine a regulation’s meaning”). Administrative rules and regulations are interpreted as a whole, giving effect to all the language and harmonizing all provisions to avoid unlikely, strained or absurd results. *Cannon*, 147 Wn.2d at 57; *Keller*, 143 Wn.2d at 277; *Boeing Co. v. Gelman*, 102 Wn. App. 862, 869, 10 P.3d 475 (2000). No portion of a regulation may be rendered meaningless or superfluous. *Keller*, 143 Wn.2d at 277.

In this case, the Board’s interpretation of the Deschutes rule is contrary to its plain language, which simply cannot be read to allow consumptive groundwater withdrawals that seasonally reduce flows in closed surface waters. The rule plainly provides that Woodland Creek is closed to “further consumptive appropriation” on an “all year” basis, WAC 173-513-040(1), and this stream closure affects future groundwater withdrawals that are verified to have an adverse impact “on the surface water system.” WAC 173-513-050. The plain language of the rule is thus entirely consistent with the holding in *Postema* that a groundwater application must be denied if will have “any effect” on the flow or level of closed surface waters. *Postema*, 142 Wn.2d. at 95.

The Board rested its departure from the holding in *Postema* on the phrase “contrary to the intent and objectives of this chapter” at the end of WAC 173-513-050. *See* CP 927 (Order on Motions at 14 (¶24)). The Board reasoned that this language means that groundwater withdrawals are not affected by stream closures unless they produce effects which adversely impact the values identified by WAC 173-513-020.<sup>5</sup> Notably, however, the *identical* language is also found in the Green-Duwamish rule in *Postema*, WAC 173-509-050. As held in *Postema*, this language does not modify the basic principle that new groundwater withdrawals cannot reduce natural flows in a closed stream. 142 Wn.2d at 95.

The Board’s interpretation of WAC 173-513-050 also reads key portions of WAC 173-513-040(1) out of the rule, violating the cardinal principle that an interpretation may not render any portion of a regulation meaningless or superfluous. *Keller*, 143 Wn.2d at 277. In WAC 173-513-040(1), Ecology closed Woodland Creek to “further consumptive appropriations” on an “all year” basis, based on an express determination that such appropriations “would harmfully impact instream values.” The stream closures effectuated in WAC 173-513-040(1) thus reflect a

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<sup>5</sup> WAC 173-513-020 provides that the “purpose of this chapter is to retain perennial . . . streams, . . . in the Deschutes River basin with instream flows . . . necessary to provide protection for wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality.”

regulatory determination that further reductions in the natural flows of Woodland Creek at *any* time of year *would* harm the environmental values set forth in WAC 173-513-020. The Board improperly ignored the regulatory determination made in WAC 173-513-040(1) when it held that a permit denial must be based on a case-by-case showing that a reduction in flows would result in an adverse impact to instream values. *See Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 356-57, 932 P.2d 158 (1997) (SEPA categorical exclusion rule precludes case-by-case analysis of environmental effects of particular actions); *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 126, 989 P.2d 102 (1999) (“whole point of a general classification scheme is to eliminate the necessity for individual site inspections and evaluations”) *rev. denied*, 141 Wn.2d 1007 (2000). In doing so, and by holding that wintertime reductions in the natural stream flows in Woodland Creek need not be mitigated, the Board rendered superfluous the categorical determination of harm set forth in WAC 173-513-040(1).

The Board’s interpretation of the Deschutes rule is not entitled to deference. *Port of Seattle*, 151 Wn.2d at 593-94. While Ecology will likely argue that the Court should defer to *its* interpretation of the rule and uphold the decision not to require mitigation for wintertime reductions in

flows, Ecology's interpretation is not entitled to deference either because, as shown previously, the rule is not ambiguous and Ecology's interpretation conflicts with the relevant statutes and case law. *Id.* at 593; *Postema*, 142 Wn.2d at 77.

Even if the Deschutes rule were ambiguous, the Court should look for guidance to Ecology's longstanding, official interpretation of the rule, *Burton*, 153 Wn.2d at 426, n.4; *Broschart*, 123 Wn. App. at 266, and not to inconsistent interpretations advanced by Ecology for the first time in this litigation. *See Skamania County*, 144 Wn.2d at 43; *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212-13 (1988). For example, in a narrative guidance document issued in 1980 when the Deschutes rule was first promulgated, Ecology explained that under the rule "[p]roposed wells found to be in *significant hydraulic continuity* with [protected] surface sources would be *treated in the same manner as a direct diversion* from the surface source." CP 1857 (Exh. 25 at 13) (emphasis added). Because it is uncontested that WAC 173-513-040(1) would not allow Ecology to approve a direct surface diversion which reduces the flow in a closed stream, it follows from this interpretation that Ecology may not approve a consumptive groundwater withdrawal that is shown by the best available science to have the same adverse effect on flows.

Indeed, Ecology's *original* decision denying Miller's permit applications in this case unequivocally states that "Ecology *must* deny any proposed groundwater withdrawals that have the *potential to impair flows* in Woodland Creek." CP 1656 (Exh. 7 at 5) (emphasis added). Ecology explained that "Woodland Creek and all its tributaries are closed to further appropriation" and that [m]aintaining flows in Woodland Creek is *necessary to provide protection for wildlife, fish, water quality and aesthetic values.*" *Id.* (emphasis added). The reasoning in Ecology's original decision is entirely consistent with the Tribe's view that, given the regulatory determination made in WAC 173-513-040(1), any artificial reductions in the natural flows of Woodland Creek are *per se* harmful to the environmental values listed in WAC 173-513-020 and may not be permitted under WAC 173-513-050.

Ecology's longstanding interpretation of the Deschutes rule is consistent with the basic principle, articulated by the Court in *Postema*, that a groundwater application must be denied if will have "any effect" on the flow or level of closed surface waters. 142 Wn.2d. at 95. Indeed, in *Postema* itself, Ecology took the position that "where a proposed withdrawal would reduce the flow in surface waters closed to further appropriations, *denial is required* because water is unavailable and withdrawal would be detrimental to the public welfare." 142 Wn.2d at 94

(emphasis added). As discussed previously, the language of the Deschutes rule is virtually identical to that of the Green-Duwamish rule at issue in *Postema*.<sup>6</sup> Thus, to the extent any deference is due Ecology's interpretation of the Deschutes rule, the Court should defer to the interpretation advanced in the 1980 guidance document, Ecology's original decision on Miller's applications, and in *Postema*, not the inconsistent positions advanced for the first time in this case. *Skamania County*, 144 Wn.2d at 43.

In short, analysis of the plain language and history of the Deschutes rule leads inescapably to the conclusion that a groundwater application in the Deschutes Basin must be denied if it is established that the withdrawal will have "any effect" on the flow or level of closed surface waters. *Postema*, 142 Wn.2d. at 95. Because the Board departed from this principle when it decided that reductions in flows in Woodland Creek resulting from groundwater withdrawals occurring from December through May need not be offset by stream augmentation, its decision should be reversed.

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<sup>6</sup> Given the close similarities in the two rules, Ecology is barred by both judicial and collateral estoppel from advancing any interpretation of the Water Code and WAC 173-513-050 that is inconsistent with position taken in *Postema* and adopted by the Court in that case. *Arikson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007); *In re Detention of Stout*, 159 Wn.2d 357, 378, 150 P.3d 86 (2007).

**IV. The Remaining Justifications Offered by the Board for Its Decision Are Without Merit.**

In its two orders, the Board offered several additional justifications for its departure from *Postema*, none of which are persuasive. First, quoting *Postema*, 142 Wn.2d at 97, the Board suggested that it was necessary to “reconcil[e]” the four-part test of RCW 90.03.290 with WAC 173-513-050 because “administrative rules and regulations cannot amend or change statutory requirements.” CP 929 (Order on Motions at 16 ¶30)). But the quoted passage from *Postema* relates to the Court’s rejection of Ecology’s position that a showing of hydraulic continuity would be sufficient to justify denial of a permit, even if adverse effects on stream flows could not be established. *Postema*, 142 Wn.2d at 97-98. By contrast, the standard advocated by the Tribe in this case is not based on “hydraulic continuity” but, consistent with *Postema*, requires a showing of “impairment” of instream flow rights or “adverse effects” to flows in a closed stream. *Id.* at 93, 95. In *Postema*, the Court carefully reviewed the Water Code and other statutes and found that the “no impairment” and “any effects” standards best reflected the legislature’s intent. *See id.* at 92 (“RCW 90.03.290 plainly permits no impairment of an existing right”); *id.* at 95 (stream closures embody Ecology’s determination that water is not

available for further appropriations, which is an independent “basis on which a water permit must be denied under RCW 90.03.290”).

The Board also justified its ruling on the basis that “a reduction in stream flow does not necessarily equate to harm in the quality of the natural environment.” CP 1269 (Final Order at 44 (¶100)). The Board suggested that if a reduction in stream flow occurs only during the winter months when there is ample flow, “it is difficult to see how the water is not ‘available’ for appropriation or how it is adversely impacting the base flows ‘necessary to provide protection for [environmental values]’ as required by WAC 173-513-020.” *Id.* The problem with this reasoning is that Ecology has already closed Woodland Creek “all year” to “further consumptive appropriations” on the basis of a determination that such appropriations “*would* harmfully impact instream values.” WAC 173-513-040(1) (emphasis added). When deciding individual water rights appeals, the Board has no authority to second-guess or overturn determinations made by Ecology in rules implementing the Water Resources Act. *Inland Foundry*, 98 Wn. App. at 124; *City of Seattle v. Department of Ecology*, 37 Wn.App. 819, 822-23, 683 P.2d 244 (1984).

Furthermore, the adverse environmental effects of a small reduction in natural flows may be difficult to establish even though many similar reductions taken together will have significant environmental

effects.<sup>7</sup> A regulatory stream closure or a minimum stream flow protects against unforeseen or cumulative environmental effects by establishing rules of general applicability that prohibit *any* reduction in the natural flow of a closed stream or *any* impairment of a minimum instream flow. Such prophylactic rules avoid the need for case-by-case application of the Water Resource Act's policies in every case, and thereby "insure" that Ecology's water rights decisions are "in accord with the water resource policy" established in the Water Resource Act. RCW 90.54.040(2). By insisting on a case-by-case showing of environmental harm as a requisite for enforcing stream closures, the Board's decision undermines Ecology's regulatory determination that stream closures are necessary to prevent harm to "instream values," WAC 173-513-040(1), thereby compromising the ability of the rules to insure compliance with the policies of Water Resources Act. *See, e.g., Dioxin/Organochlorine Center*, 131 Wn.2d at 356-60 (allowing case-by-case environmental analysis would undermine purposes of categorical exclusion rule).

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<sup>7</sup> The Board's findings in this case illustrate this point. The Board's acknowledges that the Tribe presented "some evidence" that there are periods of low flow during winter months when fish could be harmed by reductions in flows, but the Board dismissed these as "relatively infrequent" and occurring "during times of drought." CP 1275 (Final Order at 50 (¶113)). Furthermore, the Board rejected the Tribe's claim that the applications should be denied on account of cumulative impacts. CP 1276-78 (*Id.* at 51-53 (¶¶ 117-19)). The Board's ruling thus appears to permit a small amount of harm to occur from individual withdrawals and does nothing to address the cumulative impacts of many small withdrawals.

The Board also maintained that its decision is supported by *Hubbard v. Department of Ecology*, 86 Wn. App. 119, 125, 936 P.2d 27 (1997), which prohibited new groundwater withdrawals only when the withdrawals would produce an effect on a river when minimum flows are not maintained. CP 1270 (Final Order at 45 (¶101)). But the Board ignored the fact that Woodland Creek is subject to a *stream closure*, not a minimum instream flow, and that the stream closure expressly applies on a year-round basis. While reductions in flows may not impair existing rights during times in which river flows exceed regulatory minimums, *see Postema*, 142 Wn.2d at 93, water is unavailable for appropriation at any time when stream closures are in effect. *Id.* at 95.

Finally, the Board's interpretation of WAC 173-513-050 is erroneous because it mistakenly conflates the Water Code's water availability inquiry with the public welfare analysis. As held in *Postema*, stream closures "embody Ecology's determination that water is not available for further appropriations." 142 Wn.2d at 95. However, under the Board's ruling, a showing of harm to the environment, commonly addressed as part of the public interest inquiry, *see, e.g.*, CP 1274 (Final Order at 49 (¶ 112)), must be made before a groundwater right can be denied on the basis that water is unavailable. CP 929 (Order on Motions at 16 (¶ 29)). But as the Board itself recognized "all four criteria in RCW

90.03.290 are *separate* determinations that Ecology must make prior to issuance of a water right permit.” CP 923 (*Id.* at 10 (¶16)) citing *Hillis v. Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997) (emphasis added). Because the water availability and public interest determinations are separate, the Board erred by making water availability in a closed basin turn on an case-by-case showing of environmental harm.

In summary, under WAC 173-513-050, as with the rules at issue in *Postema*, any diminution of surface water flows requires denial of a groundwater permit application affecting a closed stream. As the Board acknowledged, it is uncontested in this case that Ecology’s reports of examination provide no compensation or mitigation for diminished stream flows resulting from project withdrawals occurring from December through May. *See* CP 919, 925 (Order on Motions at 6 (¶7) and 12 (¶20)). Because Ecology’s failure to require mitigation for impacts on flows during December through May was contrary to the Water Code and the Deschutes Basin rule, the Board’s decision holding that mitigation was not required for these impacts should be reversed.

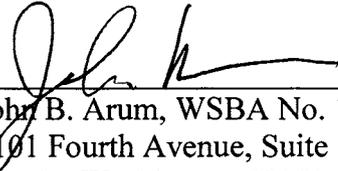
### CONCLUSION

For the reasons set forth herein, the Court should hold that under the Water Code and the Deschutes Basin rule, Ecology must deny a proposed withdrawal of groundwater if it is established factually that the

withdrawal will have *any effect* on the flow or level of a closed surface water. The Court should reverse the Board's erroneous interpretation of WAC 173-513-050 and its holding that Ecology need not require mitigation to offset the effects on flows in Woodland Creek occurring from December through May.

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