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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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SQUAXIN ISLAND TRIBE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, a State agency; TED STURDEVANT, Director of the Washington Department of Ecology, in his official capacity; CHRISTINE GREGOIRE, Governor of the State of Washington, in her official capacity; and MASON COUNTY, a municipal corporation and political subdivision of the State of Washington,

Appellants.

STATE'S OPENING BRIEF

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR .....	3
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
IV.	STATEMENT OF THE CASE .....	4
	A. The Kennedy-Goldsborough Rule, Chapter 173-514 WAC, And Johns Creek.....	4
	B. The Tribe’s 2009 Petition For Rulemaking And Ecology’s Consideration Of—And Response To—That Petition .....	7
	1. The 2009 petition.....	7
	2. Ecology’s consideration of and response to the 2009 petition.....	9
	a. The agency record on petition denial .....	9
	b. Ecology’s denial of the Tribe’s petition.....	13
	C. The Tribe’s APA Appeal To The Governor .....	14
	D. The Tribe’s Lawsuit.....	16
V.	STANDARD AND SCOPE OF REVIEW .....	17
	A. Standard Of Review For The Petition Denial .....	17
	B. Standard Of Review For The Rule Challenge .....	19
VI.	SUMMARY OF ARGUMENT.....	20
VII.	ARGUMENT .....	22

A.	Ecology’s Instream Flow Rulemaking Authority Is Discretionary.....	22
B.	Ecology’s Petition Denial Complies With RCW 34.05.330(1). The Decision Was Supported By Rational Factors And A Rational Decision-Making Process And Was Not Arbitrary And Capricious .....	24
1.	RCW 34.05.330 does not impose a “mandatory duty” to redress the substance of a petitioner’s concerns.....	25
2.	Ecology’s denial of the Tribe’s petition was a well-reasoned decision made with due regard of the facts and circumstances.....	28
3.	The <i>Hillis</i> case supports Ecology’s decision to prioritize its activities. ....	31
4.	This case does not present the “extraordinary circumstances” that were present in the <i>Rios</i> case. ....	33
C.	The Challenged Portions Of The Rule Are Valid.....	37
1.	WAC 173-514-030(4) and WAC 173-514-030(6) are valid. ....	38
2.	WAC 173-514-060(2) is valid.....	42
3.	WAC 173-514-070 and WAC 173-514-010 are valid. ....	44
VIII.	CONCLUSION .....	47

## TABLE OF AUTHORITIES

### Cases

<i>Am. Horse Prot. Ass'n v. Lyng</i> , 812 F.2d 1 (D.C. Cir. 1987).....	28
<i>Buechel v. Dep't of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	31
<i>Defenders of Wildlife v. Gutierrez</i> , 532 F.3d 913 (D.C. Cir. 2008).....	28
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	31, 32, 33
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	27
<i>Natural Res. Def. Council, Inc. v. SEC</i> , 606 F.2d 1031 (D.C. Cir. 1979).....	29
<i>Neah Bay Chamber of Commerce v. Dep't of Fisheries</i> , 119 Wn.2d 464, 832 P.2d 1310 (1992).....	20
<i>Nw. Ecosystem Alliance v. Forest Practices Bd.</i> , 149 Wn.2d 67, 66 P.3d 614 (2003).....	17, 18
<i>Pierce County Sheriff v. Civil Serv. Comm'n of Pierce Cy.</i> , 98 Wn.2d 690, 658 P.2d 648 (1983).....	18
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	18, 31
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	5, 41, 42, 46
<i>Rios v. Dep't of Labor &amp; Indus.</i> , 145 Wn.2d 483, 39 P.3d 961 (2002).....	19, 33, 34, 35, 36, 37

<i>Verizon Nw., Inc. v. Empl. Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	17
<i>Wash. Indep. Tel. Ass'n v. Wash. Utils. &amp; Transp. Comm'n</i> , 148 Wn.2d 887, 64 P.3d 606 (2003).....	19
<i>Wash. Indep. Tel. Ass'n v. Wash. Utils. &amp; Transp. Comm'n</i> , 149 Wn.2d 17, 65 P.3d 319 (2003).....	18
<i>WWHT, Inc. v. FCC</i> , 656 F.2d 807 (D.C. Cir. 1981).....	28, 29

**Statutes**

Laws of 1982, ch. 6, § 8.....	20
RCW 34.04.070 (1982).....	20
RCW 34.04.070(2) (1982).....	20, 22, 38, 46
RCW 34.04.070(4) (1982).....	40
RCW 34.04.330(1).....	27
RCW 34.05.001 .....	28
RCW 34.05.310 .....	9, 24
RCW 34.05.315 .....	9
RCW 34.05.320 .....	9, 24
RCW 34.05.325 .....	9, 24
RCW 34.05.328 .....	9
RCW 34.05.330 .....	25
RCW 34.05.330(1).....	passim
RCW 34.05.330(1)(a)(i).....	25

RCW 34.05.330(3).....	14
RCW 34.05.335 .....	24
RCW 34.05.370 .....	9, 30
RCW 34.05.558 .....	17
RCW 34.05.570(1).....	18
RCW 34.05.570(1)(a) .....	19
RCW 34.05.570(1)(b).....	19
RCW 34.05.570(4).....	17
RCW 34.05.570(4)(c) .....	18
RCW 34.05.574(1).....	19
RCW 34.05.902 .....	19
RCW 75.20 .....	40
RCW 77.85 <i>et. seq.</i> .....	9
RCW 90.03.010 .....	40
RCW 90.03.345 .....	40, 45
RCW 90.22 .....	22, 40, 43
RCW 90.22.010 .....	22
RCW 90.44.050 .....	7, 8, 41, 43, 44
RCW 90.54 .....	23, 40, 43
RCW 90.54.020(3)(a) .....	23
RCW 90.54.040(1).....	23

RCW 90.54.040(2).....	23, 36
RCW 90.54.050(2).....	7, 14, 24
RCW 90.54.130 .....	14

**Regulations**

WAC 173-514.....	1, 2, 4, 5, 7, 8, 17, 21, 40, 44, 46, 47
WAC 173-514-010.....	8, 16, 38, 40, 44, 46
WAC 173-514-020.....	45
WAC 173-514-030.....	8, 38, 41
WAC 173-514-030(2).....	5
WAC 173-514-030(4).....	16, 38, 39, 40, 42
WAC 173-514-030(6).....	16, 38, 39, 40, 42
WAC 173-514-040.....	5
WAC 173-514-060.....	8, 38
WAC 173-514-060(2).....	16, 38, 42
WAC 173-514-070.....	8, 16, 38, 44, 45
WAC 173-539A.....	9, 37

**Rules**

CR 101 .....	24
CR 102 .....	24
CR 103 .....	24
ER 201(b).....	9

**Other Authorities**

<http://www.ecy.wa.gov/programs/wr/instream-flows/dungeness.html/> ..... 9

<https://fortress.wa.gov/ecy/publications/publications/1011029.pdf> ..... 37

## I. INTRODUCTION

The Washington Department of Ecology (Ecology) is charged with managing all of the water resources of the State of Washington. This grant of authority necessarily means that the agency must prioritize its resources towards addressing what the agency deems to be the State's top priorities for water management, particularly when it comes to deploying agency staff to engage in the discretionary act of administrative rulemaking. This case arose out of a 2009 petition for rulemaking filed by the Squaxin Island Tribe (Tribe), which sought an amendment to WAC 173-514, the watershed management rule for the Kennedy-Goldsborough Basin.

There are 62 watersheds in the state. Instream flow rules have been adopted for 28 watersheds. At the time of the Tribe's petition, Ecology was engaged in, or had recently engaged in, rulemaking efforts in watersheds that lacked any existing rule and which also included "fish critical" designations. Through its petition, the Tribe sought to redirect Ecology's rulemaking resources away from higher-priority basins to amending WAC 173-514 with respect to the management of the water resources of Johns Creek, in Mason County.

When Ecology denied the petition, the Tribe filed a petition for judicial review under the Administrative Procedure Act (APA) in Superior

Court, seeking review of Ecology's rulemaking petition denial and also challenging the validity of several sections of the existing Rule.

Instream flow rulemaking is plainly a discretionary agency activity. Exercising that discretion, Ecology had already committed its limited rulemaking resources elsewhere for the present. Nevertheless, the Superior Court held that Ecology had a mandatory duty under RCW 34.05.330(1) to redress the concerns stated by the Tribe in its rulemaking petition and that Ecology's denial of the Tribe's rulemaking petition was arbitrary and capricious. The basis of the Superior Court's ruling was that Ecology's petition denial, and the alternatives the agency offered, were deemed "insufficient" to satisfy what the Court concluded was a statutory mandate to address the Tribe's concerns. The Superior Court resolved the Tribe's claims in favor of the Tribe by remanding the matter to Ecology to commence rulemaking. The Superior Court did not reach the Tribe's claims that challenged the validity of WAC 173-514, presumably because the court thought relief on those claims was unnecessary in light of its decision directing Ecology to engage in rulemaking to amend the Rule. CP 352. Ecology filed the instant appeal and requests the Court reverse the Superior Court and uphold Ecology's petition denial.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by concluding that the language of RCW 34.05.330(1) imposes a *mandatory duty* on an agency to redress the substance of a rulemaking petitioner's concerns. CP 351–352.

2. The Superior Court erred by concluding that the explanation given by Ecology under RCW 34.05.330(1) for denying the Tribe's petition for rulemaking, and the alternatives offered, were not sufficient to comply with the requirements of RCW 34.05.330(1). CP 351–352.

3. The Superior Court erred by concluding that Ecology's denial of the Tribe's petition for rulemaking was arbitrary and capricious. CP 352.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether RCW 34.05.330(1) imposes a mandatory duty on an agency to specifically *redress* the substance of a rulemaking petitioner's concerns. (Assignments of Error 1–3.)

2. Whether the explanation offered by Ecology for its denial of the Tribe's petition, and the alternatives the agency offered to address the Tribe's concerns, complied with RCW 34.05.330(1). (Assignments of Error 1–3.)

3. Whether the Tribe satisfied its burden of demonstrating that Ecology's denial of the Tribe's petition for rulemaking was arbitrary and capricious when the agency's decision and record demonstrated a rational decision-making process that considered watershed priorities, limited agency rulemaking resources, and the need to obtain adequate technical information before rulemaking. (Assignments of Error 1-3.)

4. Whether the Tribe has met its burden to demonstrate that the challenged sections of WAC 173-514 are invalid.<sup>1</sup>

#### IV. STATEMENT OF THE CASE

##### A. **The Kennedy-Goldsborough Rule, Chapter 173-514 WAC, And Johns Creek**

Chapter 173-514 WAC, Instream Resources Protection Program, Kennedy-Goldsborough Water Resource Inventory Area 14 ("WRIA" 14) was adopted in 1984. This Rule applies to surface waters in WRIA 14, a watershed in Mason County, Washington, that includes Johns Creek, the primary focus of the Tribe's petition. Johns Creek is approximately 8.3 miles in length, draining eastward into central Oakland Bay. It is utilized

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<sup>1</sup> As explained at pages 37-46, below, the Court did not expressly rule on the Tribe's challenge to certain sections of the administrative rule at issue. However, in the event this Court considers these claims, Ecology is briefing this issue.

by coho salmon, which were enhanced by a state hatchery at the time WAC 173-514 was adopted.<sup>2</sup> WRF-013.<sup>3</sup>

WAC 173-514 sets minimum instream flows<sup>4</sup> for Johns Creek that vary seasonally from a low flow of 7 cubic feet per second (c.f.s.) during summer months to a high of 45 c.f.s. during the winter. WAC 173-514-030(2). The Rule also closes Johns Creek to all consumptive uses of water from October 1 to November 15. WAC 173-514-040. The purpose of the seasonal closure is to protect early chum salmon runs. WRF-029. The established minimum instream flows frequently are not met during summer low flow periods. ARP-044. The Tribe's petition raised concerns about these low flows in Johns Creek.<sup>5</sup>

In adopting WAC 173-514, Ecology based the instream flows in the watershed on physical data collected by Ecology regarding the hydrology of the streams in the watershed and the instream flow

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<sup>2</sup> The Johns Creek hatchery, which was a "major contributor" to the summer chum run, closed in 1991. ARP-016.

<sup>3</sup> There are three components to the administrative record Ecology submitted to the Court: the Water Resources Original Rule File, cited as "WRF"; the Agency Record compiled in response to the petition, cited as "ARP"; and the relevant record documents pertaining to the Tribe's appeal to the Governor's Office, cited as "GOV." Clerk's Papers are cited as "CP." The index of the administrative record is filed at CP 122-128.

<sup>4</sup> Instream flow rulemaking is discussed below at pages 22-24.

<sup>5</sup> Throughout its briefing below, the Tribe implied that the fact of unmet flows by itself should compel regulatory action. This suggestion is incorrect. The Supreme Court rejected such an argument, stating "we reject the premise that the fact that a stream has unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 93, 11 P.3d 726 (2000). The Court recognized that determining impairment requires more specific analysis, including evaluation of the number of days flows are not met, the time of year, seasonal fluctuations, and the cause of the unmet flows. *Id.*

requirements for instream resources, particularly anadromous fish. WRF-023. Ecology specifically considered information provided by the Washington Department of Game, the Washington Department of Fish, and the Squaxin Island Tribe. WRF-024. Ultimately, Ecology used a 50 percent exceedance level in setting instream flows in WRIA 14 (a flow that is available on the average of 1 out of 2 years on a given day of the year). WRF-207.

The Department of Fisheries supported the proposed rule and urged its adoption, even though the recommended flows were “less than optimum for fish production,” because the rule “will be a significant step in the protection of instream resources”; Fisheries specifically commended Ecology staff for their “efforts and resourcefulness.” WRF-114.

The Tribe’s comments recognized that the “proposed minimum flows are not the optimum flows for fish but are a compromise that provides some measure of fish protection yet allows for further utilization by man,” and declined to support the proposed flows because they were not optimum. WRF-001–002. The Tribe also expressed concern that exemptions for single domestic and stock uses from regulated streams in WRIA 14 would impact instream resources to the detriment of fish. *Id.*

In response to the Tribe, Ecology stated its disagreement that any withdrawal<sup>6</sup> would impact stream resources because it believed the impacts of domestic and stock uses would be “minimal” (0.2 c.f.s. or less), and the impacts on stream resources would not be measurable. WRF-208. Ecology further responded that where the cumulative effects of single domestic use could be a problem, the regional staff had authority to deny or condition permits to address the problem. *Id.*

Ecology adopted WAC 173-514 in 1984. Despite its initial objections, the Tribe did not file any legal action to challenge the validity of the Rule until it commenced this case in 2010.

**B. The Tribe’s 2009 Petition For Rulemaking And Ecology’s Consideration Of—And Response To—That Petition**

**1. The 2009 petition.**

In December 2009, the Tribe filed a petition under the APA, RCW 34.05.330(1), requesting that Ecology engage in administrative rulemaking to address issues concerning the Johns Creek Basin.<sup>7</sup> The

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<sup>6</sup> The term “withdrawal” has more than one meaning in water law and the water code. In the context of the groundwater code, RCW 90.44.050, the term means a physical taking of water from the ground for an individual groundwater right, permitted or not. The term can also refer to a regulatory action that prevents all future appropriations from a particular water source, as in RCW 90.54.050(2). To avoid any possible confusion, the words “basin withdrawal” will be used in this brief where the term relates to the latter use of this term: the withdrawal of groundwater in a basin from future new appropriations.

<sup>7</sup> The current petition is the Tribe’s second petition. The Tribe filed a similar petition in 2008. ARP-052–061. Ecology denied it and offered alternatives to address the Tribe’s concerns in that petition, and the Tribe did not appeal. ARP-090–091.

petition included an assertion that groundwater withdrawals associated with permit-exempt wells<sup>8</sup> may be impacting flows in Johns Creek. ARP-142–160. The Tribe asserted that at least 208 permit-exempt wells had been drilled in the basin since Ecology adopted WAC 173-514. Ecology did not dispute that use of basin groundwater may capture water that is destined for Johns Creek. ARP-086.

In this petition, the Tribe requested several comprehensive amendments to the 1984 Rule: (1) closing Johns Creek year round, rather than seasonally; (2) withdrawing all waters in the basin from further appropriation (basin withdrawal); (3) prohibiting all new groundwater withdrawals or diversions in the basin absent an Ecology approved investigation showing that new water uses would cause no impairment of the stream flow; (4) anticipating regulation of junior groundwater and surface water withdrawals in the basin; and (5) revising and removing certain provisions of the rule that the Tribe maintains are inconsistent with Washington Water Law. ARP-142–160.<sup>9</sup>

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<sup>8</sup> Under RCW 90.44.050, the Legislature has exempted certain categories of small uses of groundwater, including single and group domestic uses and industrial uses that are less than 5,000 gallons per day, from water permitting requirements.

<sup>9</sup> The Tribe's petition suggested amendatory language for WAC 173-514-010, -030, -060, and -070. ARP-149–152.

**2. Ecology's consideration of and response to the 2009 petition.**

**a. The agency record on petition denial**

Under RCW 34.05.330(1), an agency has 60 days to respond to a petition for rulemaking.<sup>10</sup> Upon receiving the Tribe's petition, the agency began assessing the merits and the potential impact of granting the request, recognizing that higher priority rulemaking efforts could be derailed if rulemaking was pursued in Johns Creek. The agency's regional director specifically noted the need to "closely consider how [the Tribe's] request about a basin closure relates to other water resource issues in the state, particularly in Kittitas County."<sup>11</sup> ARP-162. A subsequent agency document also noted the "resources to do rule amendment would displace work underway in other priority WRIAs (18,<sup>12</sup> 16, lower Columbia)." ARP-180-181. At the same time, the Governor's proposed budget reduced staffing for instream flow work by 2.5 full time employees,

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<sup>10</sup> This stands in sharp contrast with agency rulemaking which can take upwards of 6 to 12 months to complete required public notices, hearings, required studies, and responses to public comments documents, as well as compilation of a formal rule record. Rulemaking timelines are found in RCW 34.05.310, .315, .320, .325, .328, .370.

<sup>11</sup> At the time Ecology received the Tribe's petition, the agency was engaged in administrative rulemaking in Kittitas County, specifically working towards adopting a controversial permanent rule that withdrew from appropriation all groundwaters within the upper portion of the county. See WAC 173-539A (the Upper Kittitas groundwater rule); [http://www.ecy.wa.gov/programs/wr/cro/kittitas\\_wp.html](http://www.ecy.wa.gov/programs/wr/cro/kittitas_wp.html).

<sup>12</sup> Through the Statewide Salmon Recovery Strategy, 16 basins in the state where low flows are a known limiting factor to salmon populations have been designated "fish critical." RCW 77.85 *et. seq.* Under ER 201(b) the Court may take judicial notice that WRIA 18 is the Dungeness Basin, which, like the Kittitas, is one of the 16 fish critical basins in which Ecology has been engaging in rulemaking efforts. See <http://www.ecy.wa.gov/programs/wr/instream-flows/dungeness.html/>.

making it necessary to consider potential decreased staffing levels in responding to the petition. ARP-162.<sup>13</sup>

By January 2010, Ecology's Water Resources Program Manager had tasked a program hydrogeologist with determining what it would cost to conduct a hydrogeological evaluation of WRIA 14, as the agency was considering such a study as part of a possible response to the petition. ARP-164. This hydrogeologist estimated a study "to provide a technical basis to inform future decisions about water use in the Johns Creek subbasin" would cost \$200,000. *Id.*

At the same time, the regional director continued to assess the impact rulemaking in the Johns Creek subbasin would have on rulemaking in other watersheds:

We acknowledge the Tribe's argument that the state should withdraw waters from appropriation until sufficient data is available to make sound decisions. *Unfortunately this same statement is true for other streams in our state – and there are neither the resources nor widespread support to infuse the resources to amend or adopt state rules for these basins. . . .* If the study justifies closure of the basin, then rule amendment should be done.

ARP-172–173 (emphasis added).

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<sup>13</sup> In January 2010, Ecology's Water Resources Program Manager indicated in an e-mail message to agency senior managers that if the proposed budget cuts were implemented, "our capacity would be much reduced to make any new commitments not to mention meet the ones already made." ARP-177.

By mid-to-late January 2010, agency staff and management were preparing to brief Ecology's Director on the petition, including options for the Director to consider in deciding on a response to the petition. A draft agenda for a meeting with the Director dated January 20, 2010, lists "Possible Options" as well as the "pros" and "cons" of each option. ARP-175. This information was included in a formal briefing paper considered by Ecology's Senior Management Team during its meeting on January 22, 2010. ARP-179-181.

Six options were prepared for the Director's consideration: (a) amend the existing rule and close the basin; (b) issue an administrative order finding that water is not available for appropriation for outdoor use unless mitigated and allowing indoor use only; (c) issue a general order and "determination and finding" to all parties in interest in WRIA 14 that water is not available for outdoor uses and directing indoor use only for new residential permits unless outdoor use is mitigated; (d) negotiate a memorandum of understanding (MOU) between the Tribe, Mason County and Ecology regarding review of water availability for new wells; (e) withdraw water from further appropriation (basin withdrawal) until a technical study is completed; and (f) deny the petition and seek funding for further investigation to assess impacts of well use on Johns Creek. *Id.*

The Tribe's petition requested amendment and closure (option (a)). Among the "pros" discussed for that option: its responsiveness to the Tribe's request, which would reduce the likelihood of appeal; and its potential to prevent further depletion in flows until a study is done. ARP-180. Among the "cons" discussed for that option: resources to perform a rule amendment would displace work already underway in other priority basins; amendments likely would not cover all of the Tribe's interests in WRIA 14; development could occur in the basin only where there was access to water supplied by the City of Shelton; potential misinformation may come from the action similar to reactions triggered by rulemaking for Kittitas County; other basins in the state face similar difficulties, raising questions of why the agency is acting in isolation in Johns Creek; closing the basin may spur additional similar petitions; and the Governor's proposed budget cuts for instream flow rulemaking signals that water management rulemaking currently is a low priority for the state in contrast to other activities. ARP-180. The agency also recognized that negotiating an MOU between the Tribe, County, and Ecology would be "resource intensive." *Id.*

Ecology prepared a public communication and outreach plan regarding the Tribe's petition, and held a public meeting in Mason County on February 8, 2010, with presentations regarding the petition and issues

in the basin. At that meeting, an agency hydrogeologist offered a presentation that concluded “[m]ore study is needed to properly understand the hydrology of Johns Creek.” ARP-200.

Indeed, in advance of Ecology’s decision on the Tribe’s petition, the agency sought funding for a hydrology study of the basin, submitting a detailed proposal to the Environmental Protection Agency (EPA) for a \$290,840 grant to fund a study of Johns Creek. ARP-219. The grant request explained that “Ecology needs a better understanding of the hydrology of the basin to properly develop appropriate water management options.” ARP-220.

**b. Ecology’s denial of the Tribe’s petition**

Forced to respond to the Tribe’s petition within 60 days, under RCW 34.05.330(1), Ecology denied the Tribe’s petition on February 19, 2010, and instead offered alternatives to address the Tribe’s concerns. ARP-238–239. In the denial letter, Ecology stated two reasons for denying the petition: (1) Ecology staff reductions and potential new cuts were already limiting the agency’s ability to do comprehensive work on instream flow rule development across the state; and (2) additional information regarding the hydrology and hydrogeology of Johns Creek Basin was needed before a comprehensive rule amendment could be

undertaken. ARP-238–239. The denial letter explained that the agency was attempting to secure funding to conduct the necessary study. *Id.*

The letter also explained that the agency considered the Tribe’s request that the agency withdraw waters from appropriation through a basin withdrawal emergency rule, to be followed by adoption of a permanent rule under the authority of RCW 90.54.050(2), but “[I]ike the rule amendments requested by the Tribe, this approach would require a large commitment of Ecology staff time.”<sup>14</sup> *Id.*

The letter offered two alternatives to granting the petition: (1) that the agency would seek funding for a study; and (2) that the agency would issue a directive to Mason County that the county limit new residential development to in-house domestic uses of water only.<sup>15</sup> *Id.*

### **C. The Tribe’s APA Appeal To The Governor**

The Tribe appealed Ecology’s denial of the petition to the Governor under RCW 34.05.330(3). By letter dated May 5, 2010, the Governor denied the appeal, pointing to the limited nature of Ecology’s resources and its competing priorities:

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<sup>14</sup> Withdrawals of water from appropriation by rule include requirements in addition to those for formal rulemaking under the APA: “Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department shall consult with the standing committees of the house of representatives and the senate having jurisdiction over water resource management issues.” RCW 90.54.050(2).

<sup>15</sup> RCW 90.54.130 allows Ecology to recommend land use policy modifications to local governments for the purpose of protecting water resources.

It is an unfortunate reality that Ecology does not have the resources to achieve all its statutory goals, at least not all at once. *The recently passed supplemental budget made an additional small reduction in Ecology's budget for in-stream flow work.* The agency is faced with prioritizing its limited resources to work in those areas where it believes it can achieve the greatest environmental results.

GOV-053b (emphasis added). The Governor's denial further states:

The Tribe's petition identifies a number of statutory and rule provisions that empower Ecology to protect senior rights, including in-stream flows, and to review and update agency water resource rules. *Most of these provisions are permissive, where the agency is authorized or encouraged to take action, but is not required to do so.* For example, the Legislature provided that Ecology "may by rule" withdraw certain waters of the state from additional appropriation. (RCW 90.54.050) *Additionally, the Legislature recognized in RCW 90.54.040 that Ecology must prioritize the problems of allocation and use of waters of the state.* After careful review, I find it is a matter of agency discretion whether or not to undertake the consultation and rulemaking procedures outlined in Chapter 90.54 RCW and Chapter 34.05 RCW. Ecology has exercised its discretion in accordance with the legal requirements of the Administrative Procedures Act.

*Id.* (emphasis added).

Notwithstanding her denial, the Governor stated that she would still direct Ecology to take certain actions within the agency's existing resources to protect Johns Creek from further flow degradation, for example securing funding for a study of the basin. *Id.*

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#### D. The Tribe's Lawsuit

On June 3, 2010, the Tribe filed suit in Thurston County Superior Court, filing a "Petition for Judicial Review of Agency Action and of the Validity of an Administrative Rule, and for Declaratory Judgment." CP 5-97. The Tribe's suit contained five specific counts related to two types of claims. Counts 1 to 3 alleged certain violations of the APA related to Ecology's petition denial, while Counts 4 and 5 sought a declaration that certain sections of the 1984 rule are invalid.<sup>16</sup> CP 23-28.

On March 16, 2011, Judge Paula Casey issued a letter opinion ruling that Ecology's denial of the Tribe's rulemaking petition was "arbitrary and capricious"; that RCW 34.05.330(1) imposed a *mandatory duty* on Ecology; and that Ecology's explanation for denying the petition, and the alternatives the agency offered through its denial, were not sufficient to satisfy the statutory mandate she found in RCW 34.05.330(1). CP 266-268. The final Order, dated September 20, 2011, memorialized those rulings<sup>17</sup> and remanded to Ecology to "engage in rulemaking as requested in the Tribe's 2009 petition." CP 352. Ecology timely appealed.

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<sup>16</sup> Specifically, the Tribe seeks to have the Court declare invalid WAC 173-514-030(4), -030(6), -060(2), -070, and -010. CP 19-22, 28.

<sup>17</sup> The Order stated: "Ecology had a mandatory duty under RCW 34.05.330(1) to specifically address the concerns raised by the Tribe in its rulemaking petition. Ecology's response to the petition failed to meet its mandatory duty, and, as a result, Ecology's denial of the Tribe's petition was arbitrary and capricious." CP 352.

## V. STANDARD AND SCOPE OF REVIEW

The Tribe challenges two different agency decisions, Ecology's denial of the Tribe's petition for rulemaking in 2010, and Ecology's original 1984 adoption of WAC 173-514. Under the APA, these agency decisions are subject to different standards of review.

The Court sits in the same position as the Superior Court and applies the APA standards directly to the administrative record. *Verizon Nw., Inc. v. Empl. Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The Court here, therefore, must evaluate the Tribe's respective claims under the appropriate standard of review and upon the appropriate record. In reviewing Ecology's denial of the Tribe's petition for rulemaking in 2010, the appropriate administrative record is the record for the petition denial (ARP). In reviewing the Tribe's challenge to WAC 173-514, the appropriate administrative record is the 1984 rule file (WRF).

### A. Standard Of Review For The Petition Denial

Any person may petition an agency to adopt, amend, or repeal a rule. RCW 34.05.330(1). An agency's denial of a petition for rulemaking is subject to judicial review under the APA as "other agency action" reviewable under the standards in RCW 34.05.570(4). *Nw. Ecosystem Alliance v. Forest Practices Bd.*, 149 Wn.2d 67, 74, 66 P.3d 614 (2003). Review is based on the agency record. RCW 34.05.558. Relief will only

be granted if the court determines the decision to forego rulemaking is unconstitutional, outside the agency's authority, arbitrary and capricious, or made by unauthorized persons. RCW 34.05.570(4)(c). "If an agency decides to deny a petition for rulemaking, it may do so because there is existing rulemaking ongoing or because the agency lacks resources or has other priorities. In this event, the reviewing court has a complete record, including the reasons for denial, that it can review to determine the propriety of the denial." *Nw. Ecosystem Alliance*, 149 Wn.2d at 79. The party challenging agency action—in this case the Tribe—bears the burden of demonstrating the invalidity of such action. RCW 34.05.570(1).

The "one who seeks to demonstrate that action is arbitrary and capricious must carry a heavy burden." *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce Cy.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). An action is arbitrary or capricious if it "is willful and unreasoning and taken without regard to the attending facts or circumstances." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (quoting *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003)). Where there is room for two opinions, an action was not arbitrary and capricious, even though the court might have reached a different conclusion. *Port of Seattle*, 151 Wn.2d at 589. "[N]either the existence of contradictory evidence nor the possibility of

deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.” *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002) (citations omitted).

“In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1); *Rios*, 145 Wn.2d at 501–02 n.12. The court reviews the record to determine if the result was reached through a process of reason, “not whether the result was itself reasonable in the judgment of the court.” *Rios*, 145 Wn.2d at 501.

#### **B. Standard Of Review For The Rule Challenge**

The party challenging an administrative rule has the burden of demonstrating its invalidity. RCW 34.05.570(1)(a). The validity of a rule is determined as of the time the agency took the action adopting the rule. RCW 34.05.570(1)(b). Here, that is 1984.

In reviewing a challenge to a rule, the Court evaluates the rule under the version of the APA that was in effect when the rule was adopted. *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 905-906, 64 P.3d 606 (2003) (citing RCW 34.05.902). Here,

the applicable statute is former RCW 34.04.070.<sup>18</sup> Under former RCW 34.04.070(2):

[T]he court shall declare the rule invalid only if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

Former RCW 34.04.070(2) provided a standard of review narrower than the one provided under the current APA. “As our earlier cases made clear, this was a very limited standard of review. Regulations were afforded a presumption of validity, and were overturned only if they were inconsistent with the legislation implemented by the rules.” *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 469, 832 P.2d 1310 (1992) (citations omitted).

Under this rigorous standard of review, the Tribe cannot demonstrate that the challenged sections of the 1984 rule are invalid.

## VI. SUMMARY OF ARGUMENT

The fundamental flaw in the Superior Court’s decision was the court’s erroneous interpretation of RCW 34.05.330(1). The court wrongly viewed that statute to require that an agency response redress the *substance* of a petitioner’s concerns. Such an interpretation is not supported by the language of the statute and inappropriately invades

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<sup>18</sup> See Laws of 1982, ch. 6, § 8.

agency discretion. Moreover, this interpretation of RCW 34.05.330(1) effectively allows petitioners to control rulemaking. RCW 34.05.330(1) mandates only that an agency respond to a rulemaking petition and address the concerns raised therein, offering alternatives to what is sought by the petition “where appropriate.” The statute does not disturb an agency’s normal discretion in rulemaking. Here, Ecology fully complied with RCW 34.05.330(1).

In denying the petition, the record shows that Ecology engaged in a rational and thoughtful decision-making process. Ultimately, the agency declined to pursue the requested rulemaking because such an effort would require the agency to divert its limited rulemaking resources away from higher priority basins where rulemaking was already underway and resources invested. Moreover, the record demonstrates that technical information that would be a necessary part of deciding on an appropriate regulatory course in John’s Creek was lacking. Hence the agency made a rational decision to seek funding for a study of the basin before launching into rulemaking. Ecology’s denial of the Tribe’s rulemaking petition was not arbitrary and capricious.

The Tribe also cannot satisfy its burden of demonstrating that the challenged sections of WAC 173-514 are invalid under the standard of

review in former RCW 34.04.070(2). The 1984 rule was adopted consistent with agency authority.

This Court should reverse the Order of the Superior Court, affirm Ecology's denial of the Tribe's petition, and dismiss the Tribe's rule challenge.

## VII. ARGUMENT

### A. Ecology's Instream Flow Rulemaking Authority Is Discretionary

Ecology's authority to set instream flows is derived from a number of statutes, which all demonstrate the discretionary nature of instream flow rulemaking and statutory basin withdrawals of water from certain water bodies to preclude the establishment of future new water uses.

The 1967 Minimum Water Flows and Levels Act, RCW 90.22, states that Ecology "*may* establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." RCW 90.22.010.<sup>19</sup>

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<sup>19</sup> This statute also requires Ecology to set flows when a request is made by the Department of Fish and Wildlife.

The Water Resources Act of 1971, RCW 90.54, addresses “base flows”<sup>20</sup> and provides Ecology with discretionary rulemaking authority that allows the agency to best determine how to manage water resource allocation and use statewide:

The department, *through the adoption of appropriate rules*, is directed, as a matter of high priority to insure that the waters of the state are utilized for the best interests of the people, to develop and implement in accordance with the policies of this chapter a comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use. *The department may develop the program in segments so that immediate attention may be given to waters of a given physioeconomic region of the state or to specific critical problems of water allocation and use.*

RCW 90.54.040(1) (emphasis added).

RCW 90.54.040(2) provides Ecology with discretionary authority to “modify existing regulations and adopt new regulations, *when needed and possible.*”<sup>21</sup> (Emphasis added).

The 1971 Water Resources Act also states that the Director of Ecology “may by rule” withdraw various waters of the state from additional appropriation “[w]hen sufficient information and data are

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<sup>20</sup> “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.” RCW 90.54.020(3)(a).

<sup>21</sup> This provision indicates that the Legislature has conferred discretion on Ecology, in deference to the agency’s subject matter expertise, to determine when and where to adopt rules under the statute, and that the Legislature recognizes that rulemaking might not always be possible, as in the current case.

lacking to allow for the making of sound decisions . . . until such data and information are available.” RCW 90.54.050(2).

**B. Ecology’s Petition Denial Complies With RCW 34.05.330(1). The Decision Was Supported By Rational Factors And A Rational Decision-Making Process And Was Not Arbitrary And Capricious**

The Tribe challenges Ecology’s denial of its petition for rulemaking submitted under RCW 34.05.330(1).<sup>22</sup> The statute imposes specific obligations on an agency when reviewing a petition. Unlike the formal rulemaking process, which typically takes many months to complete,<sup>23</sup> an agency’s response to a petition must be issued in only 60 days. RCW 34.05.330(1). If the agency denies the petition, it must

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<sup>22</sup> RCW 34.05.330(1) provides:

Any person may petition an agency requesting the adoption, amendment, or repeal of any rule. The office of financial management shall prescribe by rule the format for such petitions and the procedure for their submission, consideration, and disposition and provide a standard form that may be used to petition any agency. Within sixty days after submission of a petition, the agency shall either (a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or (b) initiate rule-making proceedings in accordance with RCW 34.05.320.

<sup>23</sup> Under the APA, formal rulemaking begins with a pre-proposal public notice of inquiry (CR 101), RCW 34.05.310, followed by a noticed of proposed rule (CR 102), RCW 34.05.320, and concluding with a final rulemaking decision (CR 103), RCW 34.05.335. The APA establishes minimum and maximum timeframes for some of the rulemaking steps, and the level of interest from the public can drive timeframes for completion. For example, prior to adopting a rule, an agency is required to prepare a Concise Explanatory Statement which responds to comments on the proposed rule made by members of the public. RCW 34.05.325. If a large number of comments are submitted, the agency’s time for responding may be lengthened.

provide written responses to the concerns raised in the petition.  
RCW 34.05.330(1)(a)(i).

Here, the Tribe's challenge to Ecology's denial of its petition fails for two reasons. First, RCW 34.05.330(1) does not impose a mandatory duty upon an agency to specifically *redress* the substance of a rulemaking petitioner's concerns. The finding of a mandate in this statute is the false foundation upon which the Superior Court concluded Ecology's denial of the Tribe's petition was arbitrary and capricious.

Second, Ecology's denial of the Tribe's petition was rational and well-reasoned. The Tribe cannot demonstrate that Ecology acted in a willful and unreasonable manner without regard for the facts and circumstances, where the administrative record shows that granting the petition would have forced Ecology to redirect its rulemaking resources from other rulemaking efforts in basins with more pressing needs and in which the agency was already substantially invested and to commence rulemaking when necessary technical data was lacking.

**1. RCW 34.05.330 does not impose a "mandatory duty" to redress the substance of a petitioner's concerns.**

Under RCW 34.05.330(1), if an agency denies a petition for rulemaking, it must do so within sixty days of receiving the petition, and must do so in writing "stating (i) its reasons for the denial, specifically

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*addressing* the concerns raised by the petitioner.” (Emphasis added.) The Superior Court erroneously accepted the Tribe’s argument that this statute imposes a mandatory duty on the agency to specifically *redress* the *substance* of the Tribe’s concerns, and that Ecology’s response to the petition was insufficient.<sup>24</sup> The Superior Court’s decision is in error.

The statutory requirement to “specifically address . . . the concerns raised by the petitioner” does not impose a mandate on the agency to substantively solve those concerns. Rather, the statute requires an agency, *in its denial letter*, to speak to the petitioner’s concerns; *i.e.* to give reasons for the denial that acknowledge and respond to the petitioner’s concerns. To “specifically address” a petitioner’s concerns under RCW 34.05.330(1) is to demonstrate due consideration by the agency of the concerns raised by a petitioner.

To read the statute as requiring an agency to redress the substance of a petition, as the Superior Court did here, potentially leads to the result that any time a petition is filed, an agency must *redress* that petitioner’s substantive concerns or face a judicial determination that the denial was arbitrary and capricious. “The court must also avoid constructions that

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<sup>24</sup> The Superior Court held that “Ecology had a mandatory duty under RCW 34.05.330(1) to specifically address the concerns raised by the Tribe in its rulemaking petition.” CP 352; *See also* CP 268 (“By its terms and its context within the Administrative Procedure Act, I find the language of the statute to be mandatory.”); CP 351 (“The language of RCW 34.05.330(1) is mandatory.”).

yield unlikely, absurd or strained consequences.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). The Superior Court’s ruling interpreting RCW 34.05.330(1) as imposing a mandate on Ecology to *redress* the Tribe’s concerns is erroneous and turns the discretionary activity of rulemaking into a mandatory one controlled by petitioners.

Here Ecology’s denial meets the statutory requirements of RCW 34.04.330(1). Ecology timely issued a written denial to the Tribe’s petition. The denial states Ecology’s reasons for denial—(1) staff reductions and cuts that had already limited the agency’s ability to conduct instream flow rulemaking even in higher priority basins; and (2) the need to conduct a study to better understand the hydrology and hydrogeology of the Johns Creek area before engaging in comprehensive rulemaking. ARP-239–240. These reasons “specifically address” the Tribe’s concerns by carefully acknowledging those concerns and explaining Ecology’s reasons for not redirecting its resources from other statewide priority activities to revise the existing Rule.

In sum, Ecology’s denial and the alternatives offered<sup>25</sup> to address the Tribe’s concerns regarding Johns Creek comply with the requirements

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<sup>25</sup> Here, the Court also improperly considered whether the alternatives the agency offered would *redress* the Tribe’s concerns: “I am satisfied that neither the explanation given by [Ecology] for denial of rulemaking, *nor the alternatives proposed*, are sufficient [to comply with the statutory mandate].” CP 268 (emphasis added). If an agency offers alternatives to address a petitioner’s concerns and those alternatives, in

of RCW 34.05.330(1). The Superior Court misinterpreted RCW 34.05.330(1) and should be reversed.

**2. Ecology’s denial of the Tribe’s petition was a well-reasoned decision made with due regard of the facts and circumstances.**

The Tribe cannot satisfy its burden to demonstrate that Ecology’s denial of the petition was arbitrary and capricious under the APA.

“‘[A]n agency’s refusal to institute rulemaking proceedings is at the high end of the range’ of levels of deference we give to agency action under our ‘arbitrary and capricious’ review.” *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (quoting *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987)).<sup>26</sup> “[W]here the proposed rule pertains to a matter of policy within the agency’s expertise and discretion, the scope of review should ‘perforce be a narrow one, limited to ensuring that the [agency] has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.’” *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir.

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turn, can be used punitively against an agency because they do not specifically *redress* a petitioner’s concerns, as occurred here, then an agency has little reason to offer alternatives in responding to a rulemaking petition.

<sup>26</sup> Given the dearth of state cases reviewing rulemaking petition denials, a review of federal cases analyzing rulemaking petition denials is appropriate. RCW 34.05.001 (the Legislature intended that “courts interpret provisions of the [Act] consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts.”).

1981) (*quoting Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979)).

Here, the record demonstrates that Ecology's denial of the Tribe's petition was reasonable and gave appropriate consideration to the attendant facts and circumstances. Upon receiving the Tribe's petition, Ecology immediately commenced consideration of that petition at the highest levels of the agency. ARP-162-163. The record is replete with documentation that shows Ecology's concerns about diverting limited agency resources away from higher priority work and the lack of necessary technical data that would support regulatory choices in the Johns Creek Basin. The record demonstrates that the agency was facing potential budget and staffing cuts to its instream flow work (ARP-162, 177), and that resources to do a rule amendment would have displaced work *already underway* in other higher priority basins. ARP-172, 175, 180, 181.

In concluding that Ecology's denial of the Tribe's petition was arbitrary and capricious, the Superior Court improperly concluded that the APA requires that a rulemaking petition denial record must include a certain volume or type of detail.<sup>27</sup> The Superior Court's approach is not

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<sup>27</sup> See CP 351: "[t]he agency record does not indicate how staff intensive or expensive it would be to engage in rulemaking to further limit withdrawals from the Johns Creek Basin as requested in the petition."

supported by the statute, is not workable in the 60-day period that an agency has to respond to a petition, and is at odds with case law interpreting the arbitrary and capricious standard. RCW 34.05.330(1) does not specify any record requirements, in sharp contrast to the detailed requirements specified for a formal rulemaking file. *See* RCW 34.05.370. Here, during the 60-day timeframe for considering the petition, the agency record demonstrates thoughtful consideration of the Tribe's petition, including weighing of the "pros and cons" of several options, discussion of staffing and budget concerns, discussion of the fact that the agency was already committed to rulemaking in higher priority basins, much of which was ongoing and consuming substantial agency resources, that rulemaking in Johns Creek would displace those activities in which the agency had already invested resources and time, and that technical data regarding the basin was lacking. *See, e.g.*, ARP-172, 173, 175, 177, 179–181, 220, 239. It is perfectly rational for an agency to deny a petition that would upend agency work already underway in other areas of the state and when technical data necessary to inform rulemaking is not presently available.

Further evidence that Ecology's denial of the Tribe's petition was rational and reasoned comes from the fact that the agency offered reasonable alternatives to address some of the Tribe's concerns. ARP-239. Under RCW 34.05.330(1), an agency is not required to offer

alternatives, but had discretion to do so where appropriate. Here, despite its limited resources, Ecology directed alternative means towards addressing some of the Tribe's concerns. The Superior Court improperly held these alternatives *against* the agency.

Collectively, these actions and alternatives further demonstrate reasoned decision-making. Where there is room for two opinions the Court should not find that an action was arbitrary and capricious, even though the Court, if it was the initial decision-maker, might reach a different conclusion. *Port of Seattle*, 151 Wn.2d at 589 (citing *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)).

The Tribe cannot make a clear showing of abuse that warrants setting aside Ecology's discretionary decision not to re-engage in rulemaking in the Johns Creek Basin when the agency had committed its resources to other higher statewide priorities, such as rulemaking in the fish-critical Dungeness and Kittitas Basins, and where sufficient technical information to support meaningful amendments was lacking. ARP-162, 180–181.

**3. The *Hillis* case supports Ecology's decision to prioritize its activities.**

The State Supreme Court has affirmed Ecology's authority to prioritize its activities when the agency's resources are strained. In *Hillis*

*v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), Ecology sought review of a trial court order requiring the agency to immediately process the plaintiffs' water right applications when the agency had directed its limited resources and priorities to other activities. *Id.* at 377. At the time, Ecology was facing significant reductions in its budget. The agency responded to the budget cuts by "setting priorities for the applications it would process first." *Id.* at 387. Reversing a superior court order that found Ecology's approach arbitrary and capricious, the Supreme Court held:

Given the severely reduced budget, the large number of applications pending, and the complex investigation required to determine the availability of water and the rights of senior water right holders, we cannot conclude that Ecology's inaction on the Hillis applications was arbitrary or capricious.

*Id.* at 394.

Here, Ecology's decision to allocate its existing limited rulemaking resources to agency rulemaking that was already underway rather than redirecting them to Johns Creek per the Tribe's request is no different than Ecology's decision in *Hillis* to set priorities for the order in which water right applications would be processed. Instream flow rulemaking and basin withdrawal rules are complex and time-intensive discretionary

activities.<sup>28</sup> Ecology's reasoned decision to allocate its resources to other basins, like its course of action in *Hillis*, does not support a conclusion that Ecology's petition denial was arbitrary and capricious.

**4. This case does not present the "extraordinary circumstances" that were present in the *Rios* case.**

While *Hillis* fully supports Ecology's ability to allocate its resources as it deems appropriate when engaging in discretionary activities, there is one state case wherein the Supreme Court found an agency's denial of a rulemaking petition to be arbitrary and capricious. *Rios*, 145 Wn.2d at 507. *Rios*, however, is readily distinguishable from the current case, in particular because there the Supreme Court noted extraordinary circumstances that are not present here.

In *Rios*, the Supreme Court reviewed challenges to a 1993 Department of Labor and Industries (L & I) rule and to a 1997 denial of a petition requesting rulemaking to change that rule. *Rios*, 145 Wn.2d at 487-489. At issue in *Rios* was a statute that required L & I to protect workers from exposure to toxic materials "to the extent feasible," which

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<sup>28</sup> As mentioned above, at the time Ecology was considering the Tribe's petition, it was engaged in drafting a withdrawal rule in Kittitas County in Central Washington. This effort required a major effort by agency staff. See ARP-212. That commitment of resources limited Ecology's ability to take actions requested by the Tribe. The Director's denial letter notes that the agency considered a withdrawal but "[l]ike the rule amendments requested by the Tribe, this approach would require a large commitment of Ecology staff time." ARP-239.

the Supreme Court interpreted to mean economically and technologically possible. *Id.* at 502.

Pursuant to this authority, in 1993, L & I adopted a rule that identified a package of measures aimed at preventing farm worker exposure to a particular chemical (cholinesterase) found in pesticides. The measures included protective clothing, respiratory equipment, and voluntary medical testing. *Id.* The record for the 1993 rule included EPA draft pesticide worker protection standards. Like L & I's 1993 rule, EPA's draft standards did not make medical monitoring mandatory because of "too many implementation difficulties remain[ing]." *Id.* at 503. Also in L & I's 1993 rule record was evidence from a mandatory monitoring program used in California. *Id.* at 503–504. In *Rios*, the Supreme Court concluded that L & I's 1993 rule was rational, in light of the evidence in the rulemaking record, even with the evidence of California's mandatory monitoring program (although the Court noted that California did not include a package of protection measures like those in Washington's 1993 rule). *Id.* at 504–505 (including n.14). The Court noted that the presence of contradictory evidence in a rulemaking record does not render an agency's decision automatically arbitrary and capricious, particularly when there is rational explanation for the agency's approach. *Id.* Thus, the Court found L & I's 1993 rule valid. *Id.*

After completing its 1993 rulemaking effort, L & I convened a Technical Advisory Group which released a report in 1995. *Id.* at 505. The report reviewed post-1993 research, documented the success of California's mandatory testing program, recognized that EPA now required mandatory testing, and identified medical monitoring as the most well-developed and feasible method for monitoring exposure. *Id.* L & I did not dispute this new information or suggest that mandatory testing was not technologically or economically feasible, but it denied a 1997 petition for rulemaking requesting mandatory monitoring, citing limited agency resources. *Id.* at 506.

After acknowledging the general rule that agencies typically enjoy wide discretion in choosing and scheduling rulemaking efforts, the Court nonetheless found L & I's decision in this instance arbitrary and capricious based on "extraordinary circumstances" present in the *Rios* record—including that the agency had already made the topic of medical monitoring for cholinesterase an agency priority and that the report of L & I's own panel showed that medical monitoring was both necessary and doable. *Id.* at 507–508.

No such extraordinary circumstances are present in this case. Foremost, the statutes that direct Ecology to engage in instream flow rulemaking are discretionary and markedly different from the statute at

issue in *Rios* that the Court found imposed a “mandatory duty” upon the agency to protect workers when economically and technologically feasible. *Id.* at 502. When it comes to water resource management and instream flow rulemaking, the Legislature has recognized that Ecology may have competing demands regarding managing and regulating water resources around the state. This is precisely why the Legislature has told Ecology to modify existing rules “when needed and possible.” RCW 90.54.040(2).

Moreover, in sharp contrast to the *Rios* record where the agency’s defense of limited agency resources was undermined by undisputed technical conclusions supporting the necessity and feasibility of mandatory testing and L & I having already made cholinesterase regulation an agency priority, here the record shows a lack of necessary technical information to move forward now and confirms that Ecology’s rulemaking priorities are, in fact, in other basins in the state.

In considering the Tribe’s petition, Ecology noted many obstacles that would have to be overcome in order to grant the Tribe’s petition. *See, e.g.,* ARP-180–181. One such obstacle stemmed from the fact that Ecology is charged with the allocation and management of water in each of the State’s 62 WRIAs, and not just WRIA 14 containing Johns Creek. When the petition was filed, Ecology was engaged in rulemaking in other

fish critical basins that did not yet have *any* instream rules. *See* n.11, 12, *supra*. Indeed, part of the motivation for Ecology's efforts in one of these other basins (Upper Kittitas) was the fact that surface water rights with priority dates of 1905 had been curtailed in recent low water years due in part to the lack of regulation.<sup>29</sup> In order to pursue rulemaking in Johns Creek, Ecology would have had to slow down, or discontinue altogether, its work in these other higher priority basins. Ecology's decision not to do so was rational.

In sum, *Rios* is inapposite to the current case and it does not help the Tribe satisfy its burden of demonstrating that Ecology's petition denial in this case was arbitrary and capricious.

### **C. The Challenged Portions Of The Rule Are Valid**

After concluding that Ecology's rulemaking petition denial was arbitrary and capricious, the Superior Court did not expressly reach the Tribe's second category of claim, presumably because the judge thought reaching those claims was unnecessary given the relief she had ordered (remand to agency for rulemaking) on the first claims. Because the Court of Appeals sits in the same position as did the Superior Court in an APA review, and because the full administrative record is before this Court, this

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<sup>29</sup> Concise Explanatory Statement for WAC 173-539A, available at <https://fortress.wa.gov/ecy/publications/publications/1011029.pdf>. Last visited July 16, 2012.

Court may review the Tribe's challenges to the 1984 rule. Should the Court reach the rule challenge claims, they should be rejected.

Counts 4 and 5 of the Tribe's lawsuit seek a declaration that WAC 173-514-030(4), WAC 173-514-030(6), WAC 173-514-060(2), WAC 173-514-070,<sup>30</sup> and WAC 173-514-010 are invalid.<sup>31</sup> Under both the APA and the Uniform Declaratory Judgment Act, the Tribe cannot meet its burden of demonstrating based upon the agency record that the challenged provisions of the Rule are invalid.

As explained at pages 19–20, above, the standard of review in effect in 1984 when Ecology adopted the Rule was former RCW 34.04.070(2). Under this rigorous standard, rules are presumptively valid and the Court may set aside a rule only if the Court concludes that it was adopted in excess of the agency's authority. This is not the case with any of the challenged provisions of the Rule.

**1. WAC 173-514-030(4) and WAC 173-514-030(6) are valid.**

The Tribe first challenges two subsections of WAC 173-514-030, which establishes instream flows for WRIA 14. The challenged subsections are (4) and (6).

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<sup>30</sup> The Tribe's Petition for Judicial Review challenges the section of the rule titled "Future Rights," which is WAC 173-514-070. The Tribe mistakenly refers to this section of the Rule in its Petition for Judicial Review as WAC 173-514-060.

<sup>31</sup> Ecology addresses the sections of the rule challenged by the Tribe in the order presented by the Tribe in its complaint. CP 19–22

WAC 173-514-030(4) states:

Future consumptive water right permits issued hereafter for diversion of surface water in the Kennedy-Goldsborough WRIA and perennial tributaries shall be expressly subject to instream flows established in [the rule]... except from those exempted uses described in WAC 173-514-060 (1) through (3).

WAC 173-514-030(6) provides for the future use of groundwater in the basin:

If department investigations determine that withdrawal of groundwater from the source aquifers would not interfere significantly with stream flow during the period of stream closure or with maintenance of minimum flows, then applications to appropriate public groundwaters may be approved and permits or certificates issued.

WAC 173-514-030(4) provides that future surface water uses will be subject to the established minimum instream flows, while WAC 173-514-030(6) ensures that future permitted groundwater uses also protect the integrity of the established flows. The Tribe states that both sections implicitly allow for the construction and operation of new permit-exempt wells that impair surface water rights established by the rule. CP 19–20. With respect to the second section, the Tribe takes issue with the standard set forth for future appropriations of groundwater (the “interfere significantly” standard). *Id.*

The question before the Court in assessing the Tribe’s challenge to these two sections of the Rule is whether the challenged sections of the

Rule—enacted by Ecology in 1984—exceeded Ecology’s statutory authority.<sup>32</sup> They did not. Ecology adopted WAC 173-514 under the authorities of chapter 90.54 RCW (Water Resources Act of 1971), chapter 90.22 RCW (minimum water flows and levels), and chapter 75.20 RCW (State Fisheries Code). *See* WAC 173-514-010. In adopting WAC 173-514-030(4), Ecology took an approach consistent with its authorities to adopt a rule that sets instream flows and regulates future surface water diversions that might interfere with those flows. Similarly, in adopting WAC 173-514-030(6), the agency outlined a standard for future permitted groundwater use in the basin that preserves the integrity of the adopted flows by ensuring that future groundwater uses *not be permitted* if they will interfere significantly with adopted flows.

A water management rule cannot abrogate water law or the doctrine that regulatory instream flows constitute appropriations (water rights) that cannot be impaired by junior users. *See, e.g.,* RCW 90.03.010; RCW 90.03.345.<sup>33</sup> WAC 173-514-030(4) is expressly consistent with this doctrine, as future diversions are expressly made subject to the flows, while WAC 173-514-030(6) ensures that future permitted groundwater

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<sup>32</sup> The Tribe has not maintained that the provisions are unconstitutional or that they were adopted without compliance with statutory rulemaking procedures. *See* former RCW 34.04.070(4).

<sup>33</sup> Under RCW 90.03.345, regulatory instream flows are considered appropriations, or “water rights” with a priority date as of the date of the adoption of the flows.

uses are also protective of flows. Even permit-exempt groundwater uses under RCW 90.44.050 are still “appropriations” within the meaning of the water code, and exempt only from permitting.<sup>34</sup> To the extent the Tribe maintains that the Rule allows for junior groundwater rights, permit-exempt or not, to abrogate adopted flows in WRIA 14, the Rule does nothing that would limit any remedies available to a senior right holder with standing who claims impairment.

In challenging the validity of these sections of WAC 173-514-030, the Tribe seems to be suggesting that whenever a minimum instream flow in a basin is not met and area groundwater uses are in hydraulic continuity with the stream, then it can be presumed that groundwater uses are impairing the water right that is associated with the minimum flow. The Supreme Court rejected this argument in a 2000 case involving Ecology’s denial of several groundwater applications due to hydraulic continuity with regulated surface water bodies. *Postema v. Pollution Control Hearings Bd.*, 142 Wn. 2d. 68, 11 P. 3d 726 (2000). In *Postema*, the Supreme Court held that “hydraulic continuity between groundwater and a surface water source with unmet minimum flows or which is closed to further appropriation is not, in and of itself, a basis on which to deny an

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<sup>34</sup> A permit exempt use established under RCW 90.44.050 is considered a “right equal to that established by a permit issued under the provisions of th[e] chapter” to the extent it is used beneficially.

application . . . .” *Postema*, 142 Wn.2d at 73. However, the Court did hold that denial is required where withdrawal will *impair* regulated surface water rights, including minimum flows. *Id.* at 93. Here, WAC 173-514-030(4) and (6) are consistent with *Postema* in that both provisions are designed to protect the integrity of the instream flows in WRIA 14.

The Tribe wrongly assumes *any* subsequent groundwater use in the Johns Creek Basin amounts to an impairment of the creek. Again, this assumption is refuted by *Postema*. In *Postema*, the Court “reject[ed] the premise that the fact that a stream has unmet flows necessarily establishes impairment if there is an effect on the stream from groundwater withdrawals.” *Id.* at 93. The Tribe’s challenge to these sections of the rule fails.<sup>35</sup>

**2. WAC 173-514-060(2) is valid.**

The next section of the rule challenged by the Tribe is WAC 173-514-060(2), which establishes certain exemptions from the rule:

Single domestic and stockwatering use, except that related to feedlots, shall be exempt from the provisions established in this chapter. If the cumulative impacts of numerous single domestic diversions would significantly affect the quantity of water available for instream uses, then

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<sup>35</sup> To the extent the Tribe’s concerns relate to impacts in the basin from water uses that were started *after* the 1984 rule was enacted, the challenge is not appropriate to the 1984 rule, it is more appropriately considered either under the Tribe’s petition denial argument (above), or is an issue that can be addressed by a senior water right holder against a junior user. Here, the Tribe has no confirmed water rights in Johns Creek.

only single domestic in-house use shall be exempt if no alternative source is available.

The provision exempts certain small diversions, diversions the agency in the Rule record articulated would not have a “measurable” impact on instream flows. WRF-208. The Rule is thus consistent with agency authority and water law in that it does not authorize impairment of established instream flows.

The Tribe maintains this provision is invalid because it allows diversions that interfere with senior surface water rights. CP 20–21. However, this argument is directly contrary to the agency record just discussed and further undermined by the language in the Rule that preserves enforcement authority in Ecology should cumulative impacts of allowed exempt uses impact regulatory flows. In other words, consistent with agency authority, the Rule, again, is designed expressly to maintain the integrity of instream flows. The Court must consider whether this section of the Rule exceeded Ecology’s authority in 1984. Because this section is designed to protect established flows consistent with the agency’s authorities to adopt instream flows, *see* RCW 90.54 and RCW 90.22, it did not.

The Tribe also argues that the exemptions in the Rule are inconsistent with those established by RCW 90.44.050, the groundwater

permit exemption. However, the Tribe can point to no provision in the law in 1984 (or now) that required exemptions unique to an instream flow (here those small surface water uses that were found not to have a measurable impact on instream flows) to be the same as the exemptions from groundwater permitting established in RCW 90.44.050.

As discussed above, those exempt uses, even though not part of the Rule, are still part of the priority system and a senior user is not without remedies should that senior user maintain that junior permit exempt uses are causing impairment. The Tribe cannot satisfy its burden of demonstrating that this section of the rule was adopted in excess of Ecology's authority.

**3. WAC 173-514-070 and WAC 173-514-010 are valid.**

The Tribe's final rule challenges are to two standard provisions of the rule. WAC 173-514-070 is entitled "Future Rights":

No rights to divert or store public surface waters of the Kennedy-Goldsborough WRIA 14, shall hereafter be granted which shall conflict with the purpose of this chapter.

WAC 173-514-010 simply outlines the scope and authorities under which Ecology adopted WAC 173-514 in 1984:

These rules apply to waters within the Kennedy-Goldsborough water resource inventory area (WRIA 14), as defined in WAC 173-500-040. This chapter is promulgated pursuant to chapter 90.54 RCW (Water Resources Act of 1971),

chapter 90.22 RCW (minimum water flows and levels), chapter 75.20 RCW (State Fisheries Code) and in accordance with chapter 173-500 WAC (water resources management program).

As with other challenged provisions, the Court must determine whether Ecology adopted these provisions in 1984 in excess of the agency's authority. The answer, once again, is no.

WAC 173-514-070 simply provides that rights cannot issue that conflict with the purpose of the chapter, which is "to retain perennial rivers, streams, and lakes in the [watershed] with instream flows and levels necessary to provide protection for wildlife, fish, scenic, aesthetic, and environmental values, recreation, navigation, and water quality." WAC 173-514-020. The Tribe argues that the section "implicitly allows the construction and operation of both permit and permit exempt wells that affect or impair senior surface water rights." CP 21. This argument is without merit, as the section of the rule is simply a reaffirmation of the doctrine that instream flow rights are water rights that cannot be impaired. RCW 90.03.345. It in no way "implicitly" allows for impairment of those flows by future rights, as the Tribe speculates. Once again, the Tribe continues to pursue the false notion that whenever a minimum instream flow in a basin is not met and area groundwater uses are in hydraulic continuity with the stream, then it can be presumed that groundwater uses are impairing the water right that is associated with the minimum flow.

This argument has been rejected by the Supreme Court in *Postema, supra*. The Tribe's argument thus fails.

WAC 173-514-010 merely states the scope of the rule and lists authorities under which it was adopted. The Tribe argues that this provision is invalid because it omits groundwater, and more specifically the groundwater code, as a source of authority for the Rule. CP 21-22. Ecology adopted this rule consistent with its authority in 1984 because nothing in 1984 (or now) required instream flow rules to regulate both the use of surface and groundwater in a particular basin. The Tribe has made clear through its requested amendments to the Johns Creek Rule that it would prefer that the Rule more expressly regulate groundwater uses, including permit exempt uses, but that desire does not demonstrate that the Rule that was adopted in excess of Ecology's authority in 1984. The authorities listed in the Rule are sufficient to authorize the Rule. The Tribe's challenge to WAC 173-514-010 fails.

In summary, under the narrow standard of review of former RCW 34.04.070(2), the Tribe cannot demonstrate that any of the presumptively valid provisions of WAC 173-514 were adopted in excess of Ecology's authority in 1984. The Court should therefore uphold each of the challenged provisions of the Rule.

## VIII. CONCLUSION

For the foregoing reasons, Ecology respectfully requests the Court reverse the Superior Court's ruling that RCW 34.05.330(1) imposes a mandatory duty on Ecology and that Ecology's denial of the Tribe's petition was arbitrary and capricious. The Court should uphold Ecology's denial of the Tribe's petition and dismiss the Tribe's challenges to WAC 173-514.

RESPECTFULLY SUBMITTED this 23 day of July 2012.

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NO. 42710-9

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

SQUAXIN ISLAND TRIBE,

Respondent,

v.

WASHINGTON STATE  
DEPARTMENT OF ECOLOGY, a  
State agency; TED STURDEVANT,  
Director of the Washington Department  
of Ecology, in his official capacity;  
CHRISTINE GREGOIRE, Governor of  
the State of Washington, in her official  
capacity; and MASON COUNTY, a  
municipal corporation and political  
subdivision of the State of Washington,

Appellants.

CERTIFICATE OF  
SERVICE

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

Pursuant to RCW 9A.72.085, I certify that on the 23 day of July  
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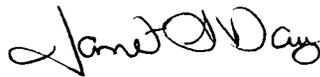
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 23 day of July 2012 in Olympia, Washington.



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