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STATE OF WASHINGTON

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**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.

STATE'S REPLY BRIEF

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I. INTRODUCTION

The discretionary nature of instream flow rulemaking is not in dispute. This case is about whether Ecology complied with the statutory requirements of RCW 34.05.330(1) of the Administrative Procedure Act (APA) in denying the Squaxin Island Tribe's (Tribe) rulemaking petition and offering certain alternatives, and whether Ecology's denial of that petition was the result of reasoned decision-making. The answer to both of these questions is "yes."

The Tribe's rulemaking petition sought many things from Ecology, from withdrawing the Johns Creek Basin from appropriation, to the re-writing of several sections of the existing rule, to taking enforcement action against junior permit exempt well users in the basin. ARP-142-160. The record shows that Ecology engaged in a rational decision-making process and its decision was based on reasonable grounds: that initiating rulemaking in the Johns Creek Basin would upend the agency's rulemaking efforts already underway in higher priority basins and that additional technical information was necessary to determine the appropriate regulatory approach in the basin. The Tribe thus has not satisfied its burden of demonstrating that Ecology's denial of its petition was arbitrary and capricious.

RCW 34.05.330(1) requires an agency to respond to a petition for rulemaking, but it does not require an agency to adopt the rules or remedies proposed by the petitioner. The Superior Court erroneously concluded that the statute imposes a *mandate* on Ecology to effectively

remedy a petitioner's concerns. The Court should reject the Superior Court's interpretation of RCW 34.05.330(1) and affirm Ecology's petition denial as consistent with this statute.

The Court also should reject the Tribe's argument that certain sections of WAC 173-514 are invalid. The Tribe conflates its rule petition claims with its rule challenge claims, and then makes no effort to demonstrate that the challenged sections were adopted in excess of Ecology's statutory authority. The Tribe instead argues for unprecedented relief in a rule challenge case—asking the Court to direct Ecology to rewrite its rule with the Tribe's suggested language. Under the APA, a court does not reach the question of relief unless and until it finds the challenged agency action invalid. Because the Tribe has not proved the 1984 rule invalid under the applicable APA standard, this court need not reach the Tribe's arguments regarding relief.

II. ARGUMENT

A. **The Tribe Has Failed To Demonstrate That Ecology's Petition Denial Was Arbitrary And Capricious**

1. **The Tribe Misreads RCW 34.05.330(1) As Imposing A Mandatory Duty On Ecology To *Remedy* The Tribe's Concerns**

Under RCW 34.05.330(1), an agency may deny a petition for rulemaking by (1) issuing a written decision (2) within 60 days of receiving the petition (3) that states the reasons for the denial and (4) specifically addresses the concerns raised by the petition. Here,

Ecology complied with RCW 34.05.330(1). Ecology timely issued a written decision denying the Tribe's petition that spoke to each of the Tribe's listed concerns. That decision stated the reasons for denial, and offered alternative actions addressing the Tribe's concerns. ARP-238–239.¹

Both the Superior Court and the Tribe misread the fourth requirement when denying a petition under RCW 34.05.330(1), reading it to mean that an agency must *resolve* a petitioner's concerns.² To illustrate, the Superior Court concluded, "[t]he record is undisputed that current requirements for instream flow levels in the Johns Creek Basis [sic] are not being met. . . . [t]he denial does not deny the problem *nor address how this problem will be addressed* while the study is pending." CP 268 (emphasis added). The Superior Court plainly believed Ecology's petition denial and the alternatives the agency offered needed to *remedy* the Tribe's concerns regarding unmet flows.

¹ An explanation of how Ecology is citing to the record is found in Ecology's Opening Brief at 5 n.3.

² As pointed out in Ecology's opening brief, this 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). In this sense, whether the Superior Court erroneously interpreted RCW 34.05.330(1) is irrelevant to the Court's inquiries in this case. However, because the Superior Court's interpretation of RCW 34.05.330(1) formed the basis of its ruling that Ecology's petition denial was arbitrary and capricious under the APA, Ecology has assigned error to that ruling and briefed it. Moreover, as demonstrated in this reply, the Tribe's reasoning is the same as that of the Superior Court.

The Tribe's response brief also misinterprets the statute. For example, the Tribe argues that the agency's alternative to issue a directive to Mason County to restrict new residences to indoor water use is insufficient because "Ecology had not inquired into whether such a directive *would actually benefit flows.*" Squaxin Island Tribe's Response Brief (Tribe's Response) at 21 (emphasis added). The Tribe too misinterprets RCW 34.05.330(1) to require that an agency *remedy* a petitioner's concerns, instead of providing a reasoned analysis and decision explaining its response to a rulemaking request, as Ecology did here.

RCW 34.05.330(1) is a tool the Legislature provided to allow interested persons to request agencies to adopt, amend, or repeal agency rules. It is not a tool that grants interested persons the power to determine the timing of rulemaking and mandate the content of rules simply by filing a rulemaking petition. The Court should reject the Tribe's and Superior Court's erroneous interpretation of RCW 34.05.330(1).

2. Ecology's Petition Denial Is Well Reasoned and Supported by the Record

The record demonstrates that Ecology weighed the pros and cons of initiating rulemaking for the Johns Creek Basin. Ecology considered the effect initiating such rulemaking would have on other agency

priorities, including its rulemaking efforts in other higher priority basins wherein the agency had already invested substantial resources. The agency also considered its budget, and the record reflects that the agency was in fact facing the possibility of a reduced budget for instream flow rulemaking. *See, e.g.*, ARP-162; 177; 180; 239; GOV-53b. Finally, the agency considered the technical information it had, the technical information it lacked, and the prospects for obtaining additional technical information. Based on all of these considerations, Ecology decided to deny the Tribe's request for rulemaking. ARP-238–239.

The Tribe bases much of its argument that Ecology's petition denial was arbitrary and capricious on a strained reading of the Supreme Court's decision in *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002). However, the statute under which the Department of Labor and Industries (L & I) was acting in the *Rios* case and the statutes Ecology implements are distinct. Significantly, the authorities governing Ecology rulemaking are discretionary. RCW 90.54.040(2); RCW 90.54.050(2). Likewise, the record, the decision-making process, and the reasons for Ecology's agency decision in this case stand in sharp contrast to the "extraordinary circumstances" identified by the Court in *Rios*.

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a. Ecology's discretionary rulemaking authorities are distinct from the statute at issue in *Rios*.

In *Rios* the Supreme Court reviewed challenges to a 1993 L & I rule and to a 1997 denial of a petition requesting rulemaking to amend that rule. *Rios*, 145 Wn.2d at 487–489. The petitioners there sought to make testing for farm worker exposure to the chemical cholinesterase mandatory, where such testing was not mandatory under the existing rule. *Id.* at 502. The Supreme Court ultimately concluded that L & I's petition denial was arbitrary and capricious based on what it found to be the “extraordinary circumstances” presented by the case. *Id.* at 507–508.

The Tribe attempts to construct an “extraordinary circumstances test” from three aspects of the L & I record and decision referred to in *Rios*: (1) that the petitioners were not seeking a new enterprise; (2) that testing for exposure to the cholinesterase remained an agency priority; and (3) that L & I's technical advisory group found that monitoring was necessary and feasible. Tribe's Response at 26. The *Rios* decision does not support such a test.³ A number of additional factors were important to the Court in *Rios*, not the least of which was the Court's conclusion that

³ Even if these three factors formed a “test,” the record does not support the Tribe's arguments that these factors are present in this case, as explained in Section II.A.2.b., *infra*.

the L & I statute imposed a mandatory duty on the agency to protect workers when economically and technologically feasible.⁴ *Id.* at 502.

Here, the discretionary nature of Ecology's rulemaking authorities is distinct from the statute at issue in *Rios*. Where in *Rios* the Supreme Court found a mandatory duty on L & I to protect worker health, here the Legislature has recognized that Ecology may have competing demands regarding the management and regulation of water resources around the state, which is why the Legislature has directed Ecology to modify existing rules "when needed and possible." RCW 90.54.040(2). The withdrawal statute itself is also permissive. RCW 90.54.050(2).

Notwithstanding the discretionary nature of Ecology's specific rulemaking authorities, the Tribe argues that a number of *broader* authorities containing the word "shall" should compel the Court to conclude that a mandate exists here too. Tribe's Response at 27–30. Although the word "shall" is presumptively mandatory, see, e.g., *Singleton v. Frost*, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987), its meaning "is not gleaned from [use of] that word alone because our purpose is to ascertain legislative intent of the statute as a whole." *State v. Krall*, 125 Wn.2d 146,

⁴ RCW 49.17.050(4) directed L & I to "set a standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health" *Rios*, 145 Wn.2d at 494 (emphasis added). The Court interpreted the language "to the extent feasible" to mean "to the extent the standard is capable of being economically and technologically accomplished." *Id.* at 498–499.

148, 881 P.2d 1040 (1994). Our Supreme Court recognized long ago that “[t]he words ‘may’ and ‘shall’ [are] used according to the context and intent found in the statute, and are frequently construed interchangeably.” *Clancy v. McElroy*, 30 Wash. 567, 568-69, 70 P. 1095 (1902). The critical flaw in the Tribe’s arguments is that the Tribe presents the cited statutes out of context.

The first two statutes the Tribe cites, RCW 43.21A.064(1) and (3), outline Ecology’s *general responsibilities* to regulate and manage *all* the State’s water resources. The second two statutes, RCW 90.03.010 and RCW 90.03.345, are from the Water Code that, in context, merely confirm our State’s prior appropriation system and that surface water flows constitute “appropriations” under the law. The fifth and sixth cited statutes, RCW 90.44.020 and RCW 90.44.030, are groundwater statutes that, in context, confirm the supplemental nature of the groundwater code and the superiority of surface water rights to subsequent groundwater appropriations.⁵ None of these statutes, when read in the context of the

⁵ The Tribe argues in its response that Ecology is not enforcing against junior groundwater users in the basin in favor of senior instream flows. *See* Tribe’s Response at 11. Enforcement, like rulemaking, is discretionary. *See, e.g.,* RCW 43.27A.190(7) (“the department *may* cause a written regulatory order to be served . . .”) (emphasis added). To the extent the Tribe’s arguments can be interpreted as a request that the Court order Ecology to take enforcement action in the basin, the Tribe is improperly inviting the Court to exercise Ecology’s enforcement discretion. *See* RCW 34.05.574(1).

Acts where they are found, impose a mandatory duty on Ecology to adopt a specific watershed management rule.

The remaining statutory provisions cited by the Tribe⁶ are all selected from subsections of the 1971 Water Resources Act, and are not helpful to the Tribe's arguments. Tribe's Response at 29–30. In context, the broader purpose of that Act is:

[T]o set forth fundamentals of water resource policy for the state to insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington and, in relation thereto, to provide direction to the department of ecology, other state agencies and officials, and local government in carrying out water and related resources programs. . . .

RCW 90.54.010(2). Ecology best satisfies the broader purpose of that Act to ensure that waters of the state are protected and fully utilized for the greatest benefit to the people by reasonably exercising its *discretionary authority* to determine when and where to adopt and modify regulations (RCW 90.54.040(2)) and when and where to statutorily withdraw water from further appropriation by rule (RCW 90.54.050(2)).

Moreover, the Tribe fails to mention one subsection of the 1971 Act, RCW 90.54.040(1), which directs Ecology to develop a comprehensive state water resources program, expressly providing the agency with discretion to “develop the program in segments so that

⁶ RCW 90.54.010(1)(a), .010(2), .020(3)(a), .020(9), .090.

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).

Reading these statutes in context, and including the sections from the 1971 Water Resources Act omitted by the Tribe, it is plain that the Legislature intended that Act to afford Ecology wide discretion to best determine how and where to deploy its expertise and resources to manage the State’s water resources. Selecting a few statutes with the word “shall” and presenting them out of context does not alter the discretionary nature of Ecology’s instream flow rulemaking authorities under the 1971 Act.

In summary, unlike *Rios*, where the Court concluded that L & I had a mandate to protect worker safety when it is economically and technologically feasible, here the Legislature has expressly recognized that Ecology may have competing demands regarding managing and regulating water resources around the state, and has granted Ecology discretion to modify existing rules “when needed and possible.” RCW 90.54.040(2).

b. *Rios* is factually distinct.

The facts of *Rios* demonstrate that when L & I first adopted the cholinesterase rule in 1993, there was a conflicting body of evidence in the record regarding the feasibility and effectiveness of mandatory testing. *Rios* 145 Wn.2d at 503–504. Because the evidence was conflicting, the

Court concluded it was rational for the agency not to require mandatory testing in 1993. *Id.* However, between 1993 and 1997, L & I continued to study the issue; by 1997, the agency's technical advisory group had concluded that mandatory testing for cholinesterase had become economically and technologically feasible, and the record supported that conclusion. *Id.* at 508. Accordingly, when the agency asserted budget constraints and different agency priorities as its rationale for denying the rulemaking petition in 1997, the Court was not convinced and concluded that L & I's petition denial was arbitrary and capricious.

In contrast to *Rios*, the record here demonstrates that Ecology adopted the Johns Creek rule in 1984 and then moved on to other basins in the state wherein stream flows had not yet been set.⁷ The Tribe is thus incorrect in asserting that this case is similar to *Rios*, where rulemaking in 1997 was not a "new enterprise" because the topic of cholinesterase testing had remained a priority for L & I. *See* Tribe's Response at 27, 33. Here, approximately twenty-five years passed between Ecology's enactment of the rule and the Tribe's petition. The record does not reflect that Johns Creek was an ongoing Ecology priority during that time.

⁷ The Tribe rhetorically argues that Ecology's claim that rulemaking in Johns Creek would displace higher priority work is "illogical and unsupported." Tribe's Response at 38. This argument is directly contradicted by the record, which makes clear that "resources to do rule amendment *would displace work underway* in other priority WRIs (18, 16, lower Columbia)." ARP-180-181.

Rios is factually distinct, and the “extraordinary circumstances” that were present there do not exist here.

- c. **The record supports a conclusion that Ecology’s decision not to initiate rulemaking was rational and none of the arguments advanced by the Tribe shows otherwise.**

In *Rios*, the Court believed that L & I was citing budget concerns and different priorities as an excuse not to adopt rules mandated by statute. Here, in contrast, Ecology has discretion to determine when and whether particular instream flow rules are “needed and possible.” The record reflects a process of careful deliberation by Ecology on the Tribe’s petition, a weighing of the pros and cons of initiating rulemaking in the Johns Creek Basin, a discussion of the agency’s priorities and budget limitations, and an acknowledgment that technical information was lacking at that time. *See, e.g.*, ARP-162; 172; 175; 177; 180–181; 212; 238–239; GOV-52–53; GOV-53a–53c. The record supports Ecology’s stated reasons for denying the Tribe’s petition.

- (1) **Ecology’s knowledge of flow conditions in the Johns Creek Basin supports Ecology’s decision not to initiate rulemaking at this time.**

Nevertheless, the Tribe argues that it was *unreasonable* for Ecology to deny the Tribe’s petition because “Ecology had known for years Johns Creek received only a fraction of its base flows during critical

summer months [and] Ecology knew that, because of Basin's geology, hundreds of existing junior wells in the Basin were likely intercepting water needed for Johns Creek's senior base flows." Tribe's Response at 31.

It was not unreasonable. When Ecology set flows for Johns Creek, Ecology used a 50 percent exceedance level (a flow that is available on the average of 1 out of 2 years on a given day of the year, meaning that on any particular day, there was a 50 percent chance of the creek having that flow level (or not)). WRF-207. This decision reflects the common-sense recognition *that instream flows would not always be met*. The Tribe does not describe this aspect of flow-setting because the Tribe would prefer to leave the Court with the mistaken impression that "unmet flows" automatically means stream conditions are poor.⁸ Moreover, the fact that there are "unmet flows" does not necessarily mean that "impairment to the streams" is being caused by area groundwater use. *Postema v. Pollution Control Hearings Bd.*, 142 Wn. 2d. 68, 93, 11 P. 3d 726 (2000) (rejecting that specific premise). Site-specific hydrogeologic study is required to

⁸ At the outset of its Statement of the Case, the Tribe mentions that fishing is central to the Tribe's economy and culture. Tribe's Response at 2. By stipulation of the parties below, the Tribe does not assert any action or claim arising from the Tribe's claimed federal rights. Any allegation of harm to Treaty rights based on low flows has been excluded from this case. See CP at 374-376.

determine whether area groundwater pumping is having an impact on stream flows and, if so, how much of an impact exists. *Id.*

With this background context, Ecology's decision not to initiate rulemaking before obtaining additional site-specific hydrogeologic information (especially because rulemaking would have required diversion of agency resources away from other higher priority basins) is reasonable, and the agency made the rational decision to seek additional technical information about the basin as an alternative to immediate rulemaking in the Johns Creek Basin. ARP-238–239.

(2) Ecology's decision was in response to a petition that asked for multiple forms of relief.

As it did in the Superior Court, the Tribe asks this Court to review Ecology's decision not to adopt a specific rule, one that would withdraw the Johns Creek Basin from further appropriation. This request ignores the scope of the petition the Tribe filed with Ecology, which sought multiple forms of relief from Ecology, ranging from withdrawing the Johns Creek Basin from further appropriation, to the re-writing of several sections of the existing rule, to taking enforcement action against junior permit exempt well users in the basin. ARP-142–160. Faced with limited resources for rulemaking that were already focused on higher priority basins and aware that it lacked enough technical information to know

which, if any, of the Tribe's proposed rules would be the most effective way to regulate in the Johns Creek Basin, Ecology denied the Tribe's petition. That decision was not arbitrary and capricious.

Even if the Court were to allow the Tribe to artificially parse its petition on appeal, the Tribe is still not able to show that Ecology's decision not to initiate rulemaking to withdraw the basin from new appropriations of water was arbitrary and capricious. The Tribe argues that it was unreasonable for Ecology to seek funding for a study of the Johns Creek Basin rather than withdraw the basin under RCW 90.54.050(2). Tribe's Response at 35. To the contrary, the record reflects the reasonableness of Ecology's decision to seek additional technical information about the basin here rather than withdrawing the basin:

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).

RCW 90.54.050(2) permissively allows Ecology to withdraw a basin by rule so that the agency can gather additional information and data for the making of sound decisions. The withdrawal tool is one of many in

Ecology's water resources management belt, and as explained throughout this reply, it is discretionary.⁹ Yet it is not a tool the agency can or must deploy every time a basin has unmet flows.

The Tribe suggests "withdrawals" are a more simple form of rulemaking than other management options. This is not true. RCW 90.54.050(2) requires compliance with the formal rulemaking requirements of the APA. ("[W]henver it appears necessary to the director in carrying out the policy of this chapter, the department may by rule adopted pursuant to chapter 34.05 RCW . . . withdraw various waters of the state from additional appropriations[.]") RCW 90.54.050(2). Rulemaking requirements under the APA include multiple public notices according to specified timelines, RCW 34.05.310; .320; .335, and substantial public participation, RCW 34.05.325. RCW 34.05.328(1)(d) may require the preparation of a cost-benefit analysis.¹⁰ RCW 90.54.050(2) imposes the additional requirement that Ecology

⁹ The Tribe cites the testimony of Ecology's former water resource program manager in opposition to a failed bill that would have removed the withdrawal tool from Ecology's belt. Tribe's Response at 10–11. An agency manager's testimony regarding that bill is not probative of the Tribe's allegation that Ecology's decision not to withdraw Johns Creek was arbitrary and capricious. If anything, that testimony demonstrates that Ecology believes that withdrawals of water are a good tool that the agency needs to maintain in order to most effectively manage the State's highest priority basins.

¹⁰ The Tribe argues that the record is devoid of a cost-benefit analysis. Tribe's Response at 36. A cost-benefit analysis is a requirement of formal administrative rulemaking. RCW 34.05.330(1) contains no similar requirement.

consult with the standing committees of the House and Senate that have jurisdiction over water resource management issues.¹¹

In light of the *entire petition* that was before Ecology, the record demonstrates that Ecology made a perfectly rational decision that rather than upending its investment of rulemaking resources elsewhere, the agency would instead seek funding for a study of the basin so that it could, in the future, be more informed about what regulatory approach is appropriate for Johns Creek. That decision was not arbitrary and capricious.

(3) Any ongoing development in the basin does not make Ecology's decision arbitrary and capricious.

The Tribe also points to development of new groundwater uses under the authority of the statutory exemption from permitting and/or under the authority of county land use approvals and appears to suggest that Ecology has a mandatory duty to initiate rulemaking to respond to such development. Tribe's Response at 7-9, 11-12.

By way of background, through RCW 90.44.050, the Legislature exempted certain small groundwater uses, including single and group

¹¹ Even emergency rules, which allow the agency to dispense with many of the requirements of formal rulemaking under the APA, expire after 120 days. *See* RCW 34.05.350(2). The agency cannot keep promulgating emergency rules unless the agency is pursuing a permanent rule. *Id.*

domestic uses, from the permit requirement applicable to all other new uses of groundwater. Exempted uses can be established without Ecology's approval or oversight, a policy decision that the *Legislature* has made. The Tribe's complaint about Ecology's failure to take action to prevent the establishment of such new water uses conveys the misimpression that Ecology has a role in "authorizing" these new uses. Ecology does not. The Tribe similarly points to the role of the county in providing land use approvals that rely on the authority of the permit exemption for their water supplies. Tribe's Response at 11–12. As with the permit exemption, Ecology does not control local county land use decisions.¹²

Of course, as the State's water resources manager, when Ecology evaluates the water resource conditions in a basin, water use authorized under the authority of the permit exemption and county land use approvals is part of the overall basin picture. However, the fact that development of new water use has occurred under these separate authorities does not create a mandate for Ecology to immediately initiate rulemaking.

¹² The Supreme Court recently verified in *Kittitas Cy. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011), that county land use decisions must consider legal availability of water and that Ecology can provide informal technical support for counties in their land use permitting regarding water availability, but that Ecology does not make a county's land use decisions.

In *Natural Resources Defense Council, Inc. v. Securities & Exchange Comm'n*, 606 F.2d 1031 (D.C. Cir. 1979), that court articulated well why judicial review of an agency's decision to decline to rule make should be extremely limited:

An agency's discretionary decision not to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution e.g., internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework. Further, even if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived.

Id. at 1046 (citations omitted).

Here, while unmet flows in Johns Creek may be “worthy” of Ecology’s consideration, the record demonstrates that Ecology reasonably concluded the time to revisit Johns Creek has “not yet arrived” (although it may arrive once a study is complete).¹³ The Court should conclude that Ecology’s denial of the Tribe’s petition was not arbitrary and capricious.

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¹³ See ARP-172-173 (“[i]f the study justifies closure of the basin, then rule amendment should be done.”).

B. The Tribe Has Failed To Demonstrate That Any Of The Challenged Sections of WAC 173-514 Were Adopted in Excess Of Ecology's Authority

1. The Tribe Improperly Conflates Its Rule Petition Claims With Its Rule Challenge Claims And Seeks Inappropriate Relief Under The APA

The Tribe's lawsuit involves two distinct sets of claims. "Counts" 1 through 3 claimed that Ecology violated the APA by denying the Tribe's request for rulemaking and for failing to revise certain sections of the rule that the Tribe maintained were invalid (rule petition claims). CP 23-28. "Counts" 4 and 5 specifically sought to invalidate certain sections of the rule (rule challenge claims).¹⁴ CP 28.

The Tribe's response demonstrates how the Tribe conflates these two sets of claims: "Ecology Arbitrarily and Capriciously Refused to Modify Certain Rules [rule *petition* claims 1-3], Some of Which are Invalid [rule *challenge* claims 4-5]." Tribe's Response at 41. Without satisfying its requisite burden of demonstrating rule invalidity, the Tribe asks that the Court direct Ecology to *rewrite the rule* to the Tribe's specifications. The Court should not reach the question of relief unless the Tribe satisfied its burden of demonstrating rule invalidity, which, as

¹⁴ The Tribe's briefing at 17 fails to mention "Count" 5, which is the same as "Count" 4, only it is brought pursuant to the Uniform Declaratory Judgment Act. The Tribe's rule challenge claims, stated in their Petition for Judicial Review, are actually "Counts" 4 and 5. CP 28.

explained below, it has not. Even if invalidity were demonstrated, relief is limited under the APA.

Under RCW 34.05.574(1), a reviewing court may:

(a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. . . . *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.* The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

(Emphasis added).

If the Court concludes that any provisions of the rule are invalid, the only available remedy would be to declare such provisions invalid (*i.e.*, “set aside agency action”) and remand for Ecology to exercise its discretion. RCW 34.05.574(1) does not authorize the Court to order Ecology to withdraw the basin by rule or to revise its rules to the Tribe’s specifications.

2. Each Challenged Section Of The Rule Was Adopted Consistent With Ecology Authority

The Court should reject the Tribe’s arguments that certain sections of WAC 173-514 are invalid. The sections challenged by the Tribe are

WAC 173-514-010;¹⁵ WAC 173-514-030(4); WAC 173-514-030(6); WAC 173-514-060(2); and WAC 173-514-070. Tribe's Response at 41–52. The Tribe's response fails to demonstrate how, under former RCW 34.04.070, any of these sections of the rule were adopted in excess of Ecology's authority in 1984.¹⁶ To the contrary, each is expressly consistent with the implementing legislation listed in WAC 173-514-010.

The Tribe's invalidity argument is this: (1) each rule is a surface water rule that should be more inclusive in how it addresses groundwater use in general and permit-exempt wells in particular, and (2) each rule therefore effectively allows for the impairment of instream flows by groundwater uses established after the date of the rule. For the reasons stated in Ecology's opening brief at pages 37 through 46, the Court should reject the Tribe's arguments outright.

The Tribe's arguments rest on the flawed assumption that any time groundwater is used in the basin, that use will impair senior instream flows. As explained in the opening brief, the Supreme Court rejected this

¹⁵ The Tribe argues that it's not seeking to invalidate WAC 173-514-010. Tribe's Response at 43. However, the Tribe's Petition for Judicial Review claims "[t]his provision is invalid because, . . . it omits Water and Groundwater Codes . . . from the list of authorizing statutes[.]" CP 21.

¹⁶ See *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 469, 832 P.2d 1310 (1992) (citations omitted) ("[Former RCW 34.04.070(2)] 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.").

argument in *Postema*. The Court made clear that any level of impact to a regulated surface water body does not amount to legal impairment. *Postema*, 142 Wn.2d at 73 (“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 application . . .”). *Postema* did not hold that there could be no impact to regulated streams; rather, it concluded only that denial is required where there will be *impairment*. *Id.* at 93.¹⁷

The Tribe has failed to demonstrate how any of the challenged sections contained in WAC 173-514 allow for *impairment* of senior flows. They do not. As indicated in Ecology’s opening brief, the rules contain protections for flows. For example, WAC 173-514-030(6) allows Ecology to approve groundwater permits in the basin *if* the agency concludes that those uses will not “interfere significantly,” i.e., *impair*, instream flows.

The challenged provisions of WAC 173-514 are expressly consistent with the implementing authorities listed in WAC 173-514-010, which do not require instream flow rules to address both surface and groundwater uses. The Tribe’s rule challenge claims fail.

¹⁷ The Tribe’s primary concern is with permit-exempt uses under RCW 90.44.050. In *Postema* the Court held that “legislative exemptions from the permitting system do not determine what ‘impairment’ means.” *Postema*, 142 Wn.2d at 90.

III. CONCLUSION

For the reasons stated herein and in Ecology's opening brief, Ecology respectfully requests the Court affirm Ecology's petition denial and declare each of the challenged sections of the rule valid.

RESPECTFULLY SUBMITTED this 28th day of September, 2012.

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NO. 42710-9

STATE OF WASHINGTON

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

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

Pursuant to RCW 9A.72.085, I certify that on the 28 day of
September 2012, I caused to be served a copy of the State's Reply Brief,
in the above-captioned matter upon the parties herein as indicated below:

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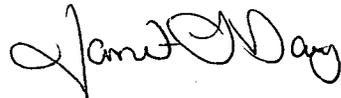
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 28 day of September 2012 in Olympia, Washington.



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