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STATE OF WASHINGTON

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NO. 42710-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 2

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.

SQUAXIN ISLAND TRIBE'S RESPONSE BRIEF

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I. INTRODUCTION

The Squaxin Island Tribe (“Tribe”) seeks an rule that stops further dewatering of Johns Creek, for which Ecology established a water right with a 1984 priority date. This water right includes statutory guarantees against impairment by post-1984 (junior) water appropriations. Yet this instream flow water right is increasingly unmet. Johns Creek is drying up.

The Legislature in the 1971 Water Resources Act provided Ecology with a custom-fit, proactive tool for this situation, RCW 90.54.050(2). This statute allows Ecology to stop new appropriations in a water body during the period of time that it is missing the information needed for sound decision-making. While this statute affords Ecology discretion, discretion has its limits. The Court should resist allowing Ecology and Mason County to continue making unsound decisions about water use in the Johns Creek Basin into the foreseeable future. Ecology should not be able to walk away and let a fish-bearing stream in the heart of the Tribe’s usual and accustomed fishing area dry up. The record does not support Ecology’s assertions about costs and priorities, particularly when the Tribe’s proposed rule revisions are narrowly tailored, and the “priority” is to create brand new

rules for streams without instream flows while allowing existing instream flow rules to fail.

As described in the Argument section below, the Court should affirm the superior court's holdings that: (1) Ecology's petition denial did not meet its mandatory duty to address the Tribe's concerns (Section III.A); and (2) Ecology arbitrarily and capriciously refused to issue a rule under RCW 90.54.050(2) (Section III.B). This brief then explains that Ecology arbitrarily and capriciously denied the Tribe's additional proposed rule revisions, and that four existing rule provisions are invalid (Section III.C).

II. STATEMENT OF THE CASE

A court's analysis of whether an agency acted arbitrarily and capriciously hinges upon specific facts and circumstances. See generally, *Rios v. Washington Dept. of Labor & Indus.*, 145 Wash. 2d 483, 493, 39 P.3d 961 (2002). As Ecology's Statement of the Case is incomplete, the Tribe presents additional relevant facts and whenever possible adopts Ecology's facts.

A. Fishing is Central to Tribe's Culture and Economy.

For centuries before executing the 1854 Treaty of Medicine Creek, 10 Stat. 1132 ("Treaty"), the Tribe lived, hunted, fished and gathered around South Puget Sound. *United States v.*

Washington, 384 F.Supp. 312, 377-378 (W.D. Wash. 1974). In the Treaty, the Tribe gave up vast quantities of land in return for a homeland and reserved right to take fish off-Reservation at its usual and accustomed fishing areas (“U&A”). *Id.* Then and now, anadromous fish, and particularly salmon, remain central to the Tribe's subsistence, economy, culture, spiritual life and day-to-day existence. *Id.*, CP 8, 3 at ¶ 10.

Johns Creek is in the western portion of the Tribe's U&A. It “once supported a highly productive fishery” and was “an important producer of coho and chum,” as well as steelhead and cutthroat trout. ARP-000219, -000226, -000035. As described below, its fishery has substantially deteriorated due to decreased water flows. There are now far fewer fish available for the Tribe to harvest. Moreover, the Tribe has a fixed number of fish-bearing waters within its U&A. Once a stream is dewatered, the Tribe cannot seek better fishing areas elsewhere.

B. Ecology Studied Johns Creek's Fish and Flows, and then Adopted an Instream Flow Rule to Protect Them.

In the early 1980's, Ecology found that late spring and early summer flows in various streams in “Water Resources Inventory Area 14” (“WRIA 14”) were falling quite low. ARP-000011.

Diminished flows were hurting fish production because water of sufficient quantity and quality is a prerequisite for fish migration to spawning areas, spawning, egg incubation, emergence of fry, juvenile growth, and migration of smolts. See *id.* Ecology compiled and analyzed historic and current information about Johns Creek and its fish flow needs. WRF-000004-000035.

Accordingly, in 1984 Ecology adopted WAC Chapter 174-514 (“Rule”) to protect anadromous fish runs in Johns Creek (and other streams). The Rule established minimum “instream flows” of 7 cubic feet per second (“cfs”) during the critical time for salmon production of August 1 to October 15, and between 9 - 45 cfs for the remaining months.¹ WAC 173-514-030. These flows thereby became a surface water right with a priority date of January 23, 1984, the date of Rule adoption. RCW 90.03.345. As discussed herein, this priority date makes Johns Creek’s instream flow right senior to all subsequent surface and groundwater rights.

The Rule’s second protective measure was to close Johns Creek to all consumptive uses between October 1 and November

¹ Ecology correctly asserts that the Tribe lacks adjudicated water rights in Johns Creek, and originally opposed the instream flow amounts. Open. Br. at pp. 5 n. 5, 42 n. 35. While the Tribe opposed these flows in 1983 as not optimum, it is using the state’s water rights (i.e., instream flows with a 1984 priority date) to stop more de-watering of Johns Creek.

15. WAC 173-514-030. Stream closures recognize that surface flows are insufficient to meet existing rights and provide adequate base flows. See Postema v. Pollution Control Hearings Bd., 142 Wash. 2d 68, 94, 11 P.3d 726 (2000). Johns Creek's seasonal closure meant that its surface water was unavailable for appropriation during that period, whether by surface diversions or withdrawals of groundwater in "hydraulic continuity." WRF-000006, -000022. Ecology understood when it adopted the Rule that wells pumping groundwater in hydraulic continuity with streams subject to closures and instream flows could intercept groundwater that was otherwise bound for those streams. ARP-000022. Washington's Groundwater Code, then and now, specifically prohibits such impairment by junior wells. See, e.g., RCW 90.44.030.

The Washington Fish and Game departments separately urged year-round closures for the WRIA 14 streams, voicing concern "about the practicality of [Ecology's] enforcing seasonal closures." WRF-000025, WRF-000100. Ecology's "enforcement" of the Rule, the Department of Game said, "is essential to its effectiveness" in protecting the fisheries. WRF-000100. Ecology, however, rejected this request and opted for seasonal closures, asserting that a

“seasonal closure was not impractical to enforce, that it would monitor flows and water rights, and enforce the regulations to the best of its ability.” WRF-000206.

C. Johns Creek Base Flows are Unmet and Deteriorating.

Johns Creek’s flows and fisheries have noticeably diminished. Ecology observed, “Despite these protections, [Johns Creek] flows have continued to decline so that adopted instream flow levels are rarely met mid-February through September.”² ARP-000219, *see also* ARP-000224. Moreover, in recent years Johns Creek flows have fallen below instream flows for a “much greater portion of the year.”³ ARP-000224; CP 12, 201 at ¶ 26 (admitted).

Johns Creek’s reduced flows and higher temperatures have had “direct and adverse impacts on its anadromous fish habitat.” *Id.* at ¶ 30 (admitted). The Creek is now “home to a small and fragile population of summer chum that is being harmed by increasingly low water levels.” ARP-000224. Temperatures,

² Instead of the Rule’s 7 cfs base flows during late summer months, the Creek experienced the following flows: 4.0 cfs in 2008, 3.7 cfs in 2007, 4.4 cfs in 2006, 4.1 cfs in 2005 and 5.5 cfs in 2004. ARP-000139.

³ Every November to April period from November 2003 to April 2008 (except for January 2006), Johns Creek has experienced at least one and often many days when flows fell below the Rule’s 45 cfs base flows. ARP-000139. Of the 762 days between November 15 and April 15 from 2003 to 2008, flows fell below 45 cfs on 444 days (i.e., 58% of the time). *Id.*

Ecology notes, “really are a problem” for Johns Creek coho. ARP-000069-70. Johns Creek is formally designated as temperature-impaired. ARP-000035. Its fragile Puget Sound coho is a species of concern and its Puget Sound steelhead is threatened under the federal Endangered Species Act.⁴

Ecology acknowledges the “correlation between decreased streamflow and decreased fish populations.” ARP-000225. Ecology found it “logical to conclude that water management to maintain higher flows will preserve or improve salmon habitat conditions.” *Id.* If summer flows return to instream flow levels, roughly 20% more spawning habitat would be available for summer chum. *Id.*

D. Junior Wells Capture Water that is Otherwise Destined for Johns Creek and Needed to Meet Senior Instream Flows.

In the years after Ecology adopted the Rule, the Basin experienced considerable development. Since 1984, at least 208 permit-exempt wells were drilled for residential and other uses. ARP-000225 (Ecology estimates 278, ARP-000205). When the Tribe petitioned Ecology to rulemake, many applications in the Basin for commercial and industrial development with water needs were pending before Mason County. GOV-000011.

⁴ 72 Fed. Reg. 26722 (May 11, 2007); <http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Coho/Index.cfm> (accessed Dec. 20, 2010).

“Permit-exempt wells” are wells exempt from the Groundwater Code’s permitting requirement. RCW 90.44.050. While wells withdrawing less than 5,000 gallons per day for domestic or industrial uses need no permits, they are subject to all other limitations of Washington water law. *See id.* Two relevant ones are: (1) the first in time, first in right rule that gives priority to senior rights, and (2) surface water rights are superior to and cannot be impaired by junior groundwater withdrawals that are in hydraulic continuity therewith. RCW 90.44.030.

Ecology knows that wells are intercepting groundwater that is otherwise bound for Johns Creek. It funded studies showing that the Basin presented the “highest potential for hydraulic continuity” in the growing Shelton region, and that groundwater contributed the cold water that is critical for the Creek’s salmon habitat. ARP-000024; CP 13, 103 at ¶ 32 (admitted). Ecology understands how “unique this flow system is with respect to its dependence on groundwater.” ARP-00079.

Accordingly, Ecology recognizes, “We do believe Johns Creek is being impacted by exempt wells.” ARP-000083. And, “The corresponding drop in stream flows in Johns Creek and increased ground water use suggests a likely correlation.” ARP-

000225. Ecology acknowledges, “preliminarily there are several indications that exempt well use has, in fact, impaired a senior water right in the form of the [minimum instream flow] established for Johns Creek.” ARP-000081. “[I]t is looking like this may end up being a good example of a case where exempt well use has impacted senior water rights. . .” *Id.*

E. **Science-Based Decisions About Basin Water Use are not Being Made.**

Ecology, just before denying the Tribe’s second petition, prepared a “Study of Johns Creek Hydrogeology and Water Management Strategies” that also requested \$290,840 from the Environmental Protection Agency (“EPA”) to fund a study and three-dimensional numerical groundwater model. ARP-000219 to -000233. The model was “the needed tool” that would allow Ecology and Mason County to take “informed actions to protect” and manage Basin waters and their use. *Id.* The model would provide the “technical foundation” to understand which existing and proposed groundwater withdrawals in the Basin impaired or would impair Johns Creek’s flows. *Id.*; CP 13-14, 103 at ¶ 33.

Ecology recognized, “State and local officials presently lack the information needed to determine whether groundwater is

available in the Basin without affecting or impairing senior surface rights in Johns Creek.” *Id.* at ¶ 34 (admitted). Once funded, it would take at least two years to create a useable model for State and local decision-makers. *Id.* at ¶ 36 (admitted); ARP-000222. EPA did not award the funding. ARP-000219-233. Funding the study and model has proved elusive. Ecology had twice denied funding requests from the Tribe and City of Shelton, in 2006 and again in 2007. ARP 000044-51, 62; GOV-000040.

F. Ecology Opposed a Revision to RCW 90.54.050(2) That Would Have Removed its Proactive Language.

The Tribe’s petition sought an emergency⁵ or regular rule under RCW 90.54.050(2), which allows Ecology by rule, and when needed, to stop new water appropriations until the information needed for sound decisions becomes available. *See id.* Ecology, shortly before denying the Tribe’s petition, testified against a proposed amendment to RCW 90.54.050(2) that, if enacted, would have required Ecology to ensure that “sufficient information and data are available to allow for the making of sound decisions” before stopping new appropriations. ARP-000166-167. Ecology opposed the amendment because it would “completely abandon the precautionary principle” in RCW 90.54.050(2)

⁵ An emergency rule dispenses with statutory notice and comment procedures if good cause exists for immediate adoption, and the rule is necessary for public health, safety or welfare. RCW 34.05.350. It is followed by a regular rule. *Id.*

needed to prevent impairment of senior water rights. ARP-000169.

And, “The hurdles it would establish would make it virtually certain that withdrawing water would not be possible.” *Id.*

G. Ecology Neither Enforces nor Regulates in the Basin to Protect Johns Creek Instream Flows and Fisheries.

In the 1990’s, the Legislature amended the Growth Management Act (“GMA”) to require that building permit and subdivision applicants needing potable water “shall provide evidence of an adequate water supply for the intended use of the building.” RCW 19.27.097, RCW 58.17.150. As such, Mason County requires applicants’ “assurance that the water source will not interfere with existing water rights.” MCC § 6.68.040(c)(2)(C). Mason County, however, undertakes little to no inquiry as to whether these assurances are accurate, and has apparently not denied a building permit or subdivision application based on water unavailability in the Basin. ARP-000117-128, GOV-000041.

Moreover, there is a lack of communication and coordination between Ecology and Mason County as to whether proposed wells may impair senior instream flows. See CP 15-16, 103-104 at ¶ 43. In 1993, Ecology issued guidance to local governments on water availability determinations (“Guidance”).

ARP-000001-9. The Guidance stated that Ecology:

will notify local permitting authorities about areas where water is no longer available for appropriation or areas where Ecology is investigating problems concerning water availability. The local permitting authority must consider this information [before issuing building permits].

ARP-000005. Ecology does not follow this Guidance in the Basin.

CP 15, 103 at ¶ 41 (admitted), ARP-000005.

Additionally, in July of 2008 Ecology said it would clarify Mason County's and Ecology's respective roles when making water availability determinations for permit-exempt wells associated with building permits and subdivisions. ARP-000148. Ecology did not follow through.

Finally, Ecology has not monitored or enforced the Rule's seasonal closure to junior consumptive uses from October 1 through November 15. CP 12, 103 at ¶ 24 (admitted); GOV-000041. Since the Tribe is unaware of any exclusively seasonal use in the Basin, it is highly likely that many of the approximately 208 wells that are junior to Johns Creek's instream flows illegally use water year-round. *Id.* Ecology typically does not evaluate permit-exempt well proposals in the Johns Creek Basin, or monitor or collect data from them, or provide technical advice to help the County make water availability findings. CP 15-16, 103-104 at ¶ 43 (admitted); ARP-000129.

H. Ecology Denied the Tribe's First Petition, but Fashioned a Seven-Prong Alternative Path.

The Tribe has filed two rulemaking petitions with Ecology. The first, filed in April 2008, asked Ecology to withdraw Basin groundwater from new appropriations under RCW 90.54.050(2) until the information needed for sound decision-making was available. ARP-000052-61. Ecology denied it, and instead established a seven-part "alternative path" in which it promised:

1. To try to find funding for the model. ARP-000090-91.
2. To sign an agreement with Mason County ensuring that water conservation standards were in place by the end of 2008. ARP-000090-91. No MOU was signed and the County did not adopt code changes. ARP-000137-138.
3. To clarify by July 15, 2008, the County and State's respective roles vis-à-vis water availability determinations for building permits and subdivisions. ARP-000090-91. Ecology did not do this and continued acquiescing to County determinations that water was available in the Basin. ARP-000138, ARP-000115-116.
4. To clarify by July 15, 2008, how the Rule affected the Groundwater Code's permit exemptions and applied to water uses

in the Basin. ARP-000090-91. Ecology completed this task.

ARP-000100-101.

5. To confirm the Port of Shelton's pledge to comply with an agreement allowing the Port to pump Basin groundwater in excess of its actual water rights and then identify an alternative water source. ARP-000090-91, -000217. Ecology did not act until the Governor later told it to. GOV-000040.

6. Ecology promised, when a regional water supply was extended to the Basin, to work with local partners on a Johns Creek flow augmentation plan. ARP-000090-91. The Tribe is unaware of such a plan. GOV-000041.

7. To confer with the Tribe about the Basin's southern boundary. ARP-000090-91. Ecology did this. ARP-000140.

The Tribe remained unconvinced that the alternate path, even if Ecology had implemented it, would have achieved nearly the same results as withdrawing the Basin from appropriations under RCW 90.54.050(2). ARP-000020. Still, after over 18 months of Ecology's inaction, the Tribe asked for a meaningful commitment to the promised alternative path and advised that it would file a renewed petition if Ecology did not respond within 30 days. ARP-000131-133. Ecology did not respond.

I. **Ecology Denied the Tribe's Second Petition, From Which the Tribe Appealed.**

The Tribe filed a second rulemaking petition in December 2009, this time seeking broader relief. ARP-000142-160. Besides seeking the Basin withdrawal under RCW 90.54.050(2), the petition asserted that four Rule provisions were invalid and proposed revisions (to both the invalid provisions and others) to bring it into statutory compliance and/or for other reasons. *Id.*

Ecology, after weighing the “pros” and “cons” of various options, elected to deny the petition and keep searching for study funding. Open. Br. at pp. 11-12. Ecology also understood that denying the petition could “increase[] well drilling and development based on concerns of limitations in the future.” ARP-000181. And, Ecology considered issuing an order to Mason County, recognizing that relying on the County’s “voluntary action” had not worked, and that a “stronger” regulatory tool was warranted with “specific actions with consequences for inaction.” ARP-000172. Ecology, however, rejected this option on the basis of “Potential for negative wave of misinformation.” ARP-000173.

On February 19, 2010, Ecology denied the Tribe’s second petition because it: (1) was already limited in doing state-wide

comprehensive instream flow work; (2) was unwilling to devote “a large commitment of Ecology staff time” needed for the “comprehensive rule amendment” sought by the Tribe, whether by emergency or regular rule; and (3) needed more information about basin hydrology / hydrogeology before it could undertake the “comprehensive rule amendment” requested. ARP-000239. Ecology also said it would keep trying to secure funding for the study because “the information provided by this study is essential to evaluate the rule amendments proposed in this petition.” *Id.*

Finally, Ecology promised to issue Mason County “a directive” to limit new residences to indoor use, reasoning that this would “result[] in approximately the same outcomes as a withdrawal of water by rule.” *Id.* Ecology understood that Mason County had “not been permitting new residences on exempt wells in Johns Creek,” and instead faced numerous pending applications for commercial and industrial building permits. ARP-000129.

On June 3, 2010, the Tribe appealed the petition denial to superior court.⁶ Several weeks later, Ecology by letter “recommended” that Mason County limit new buildings to indoor use if their water was

⁶ On March 22, 2010, the Tribe opted to appeal Ecology’s denial to the Governor under RCW 34.05.330. GOV-000002-38. The Governor’s denial directed certain actions, albeit without deadlines. GOV-000053a-c; see Open. Br. at pp. 14-15.

from permit-exempt wells hydraulically connected to Johns Creek.
GOV-000054.

The Tribe's lawsuit had four counts: (1) Ecology's denial violated the APA's mandatory duty to specifically address the Tribe's concerns; (2) Ecology arbitrarily and capriciously refused to issue a rule for an interim basin withdrawal under RCW 90.54.050(2); (3) Ecology arbitrarily and capriciously refused to revise portions of the Rule; and (4) a declaration that parts of the Rule were invalid.

As to Count 1, the superior court held that Ecology's denial violated the APA's mandatory duty to specifically address the Tribe's concerns because Ecology's explanations and proposed alternatives failed to address the underlying "undisputed" problem. CP 268. The court also held that Ecology's generalized statements of scarce resources were "not sufficient explanation," nor was its failure to do explain why it could not undertake some or all aspects of the Tribe's request pending the model's completion. *Id.* As to Count 2, the superior court found that its denial was "arbitrary and capricious," and subsequently ordered Ecology to "engage in rulemaking as requested in the Tribe's 2009 petition." *Id.*; CP 352. The superior court did not rule on Counts 3 and 4.

III. ARGUMENT

A. **Ecology Conflates Counts 1 and 2. As to Count 1, Ecology Breached the APA's Mandatory Duty to "Specifically Address" the Tribe's Concerns When Denying its Rulemaking Petition.**

Count 1 alleged that Ecology's letter denying the rulemaking petition did not meet the APA's *mandatory* duty in RCW 34.05.330(1) that an agency's denial "specifically address[]" a petitioner's concerns. In contrast, Count 2 alleged that Ecology arbitrarily and capriciously refused to undertake the *discretionary act* of issuing a rule that closed the basin for an interim period under the 1971 Water Resources Act, RCW 90.54.050(2). These are two distinct claims. Ecology, however, conflates them, arguing that the superior court by ordering rulemaking improperly required Ecology to "redress" rather than "address" the Tribe's concerns. Open. Br. at pp. 20-21, 25-28.

The superior court did not do this. Rather, by ordering that Ecology "engage in rulemaking," the superior court effectively ruled on Count 2 that Ecology had arbitrarily and capriciously refused to rulemake – a *discretionary act*. CP 353. This analysis is addressed in Section III.B below.

As to Count 1, the APA directs that an agency “shall” either grant or deny a petition for rulemaking and, if the latter, “shall” “stat[e] its reasons for the denial, specifically addressing the concerns raised by the petitioner, . . .” RCW 34.05.330(1). The superior court determined that this law imposed a “mandatory” duty “[b]y its terms and its context within the [APA].” CP 268. Ecology does not dispute this finding.

The court went on to query whether Ecology’s denial letter had specifically addressed the Tribe’s key (and undisputed) concerns, which were: (1) increasingly unmet senior instream flows caused by proliferating junior wells; and (2) continued unsound decision-making in an informational vacuum, which caused the harm described in (1). ARP 000152-000159. Ample evidence supported the conclusion that Ecology had breached a mandatory duty, starting with the frank admission in its Answer that its denial letter “failed to respond to the Tribe’s concerns.” CP 18, 104 at ¶ 53.

Moreover, the court found that the substance of Ecology’s denial did not meet the statutory mandate. To “address” means, per Ecology’s definition, to “demonstrate due consideration of,” “speak to” or “give reasons” “that acknowledge and respond to” the

Tribe's concerns. Open. Br. at 26. For the following reasons, Ecology did not "address" the Tribe's concerns by pleading budget woes, seeking more hydrogeologic information, promising to seek funding for the model, or promising to issue a directive to Mason County about residential water use.

Budget constraints, while perhaps limiting available options, are not in and of themselves responsive to the fact that the Creek is drying up and new wells are proliferating. *Contrast WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 812 (D.C. Cir. 1981) (FCC in denying rulemaking petition directly spoke to petitioner TV stations' concerns by explaining on the merits why a rule would not be helpful, and how the existing rules were working).

Nor are the Tribe's concerns addressed by Ecology's search for the elusive funding. Even when fully funded, a working model is still two years away and wells continue to abound. Section II.E. A funding search in no way "speaks to" the unabated, ever-increasing harm and its cause. See Open. Br. at p. 26. For the same reasons, Ecology's gathering more information about Basin hydrogeology fails to "address" these concerns, particularly since the statutory basis for the Tribe's petition is a "proactive" statute (as Ecology acknowledged, Section II.F) that says just the opposite:

i.e., when the information needed for sound decision-making is missing, issue a rule that stops a water problem until the information becomes available. RCW 90.54.050(2).

Nor were the Tribe's concerns "specifically addressed" by Ecology's promise to issue, at some undetermined date, a directive that Mason County restrict new residences to indoor water use. The Tribe has shown, and Ecology did not dispute, that a directive, whenever issued, would be utterly ineffective without enforcement; that most of the new wells were for industrial and commercial buildings, and not residences; and that Ecology had not inquired into whether such a directive would actually benefit flows. Sections II.G and I. At any rate, Ecology only issued a "recommendation" to Mason County, not a directive. GOV-000054.

Accordingly, the Court should reject Ecology's argument that the superior court erroneously interpreted the APA so as to require "redressing" as opposed to "addressing" the Tribe's concerns. The superior court correctly interpreted the APA's mandatory duty in RCW 34.05.330(1), and concluded that Ecology failed to meet it. As in *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 7 (D.C. Cir. 1987), the agency director failed to present a "reasonable explanation" of his failure to grant the rulemaking petition seeking

stronger horse protection rules in the face of known problems and inadequate existing rules. Moreover, “what he has said strongly suggests that he has been blind to the nature of his mandate from Congress.” *Id.* Here, Ecology’s explanation is not reasoned and, as further explained below, demonstrates a blindness to its statutory mandates.

To conclude, the superior court could have stopped there, remanded as to Count 1, and directed Ecology to make another run at a denial letter that specifically addressed the Tribe’s concerns. Instead, it also ruled on Count 2 and ordered rulemaking.

B. Ecology Lacks Unfettered Discretion to Decide Whether to Rulemake Under RCW 90.54.050(2).

1. The Issue is Not Whether Ecology’s Authority to Rulemake is Discretionary, but Whether it Arbitrarily and Capriciously Refused to Rulemake Under a Specific Statute and These Circumstances.

Ecology generally asserts that its rulemaking authority is discretionary. Open. Br. at pp. 22-24. This, however, is not at issue. The relevant question is whether Ecology arbitrarily and capriciously refused to exercise rulemaking authority under RCW 90.54.050(2) in the 1971 Water Resources Act, which provides:

In conjunction with the programs provided for in RCW 90.54.040(1), whenever 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: . . .
(2) When sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are available.

To summarize, the Legislature provided a proactive tool to protect public waters by allowing Ecology, by rule, to withdraw groundwater from appropriation when it (1) appears necessary in carrying out the 1971 Act's policies, and (2) there is insufficient information to make sound decisions. *See id.* Ecology's withdrawal need last only until the information becomes available. *See id.* Once that happens, Ecology (and counties) will understand whether a proposed well will likely capture groundwater that is destined for a stream with unmet instream flows, and thus can make informed decisions about where water is and is not available.

Accordingly, the issue is not whether Ecology has discretion to establish or modify instream flows by rule. It does. The issue is whether Ecology acted arbitrarily and capriciously by refusing to issue a rule closing the Basin to new wells for an interim period under RCW 90.54.050(2), in the face of ever-increasing harm to Johns Creek's flows, Ecology's understanding of why that was happening, its failure to regulate and, among other things, an

acknowledged lack of the “information and data” needed for sound decision-making about water use. *See id.*

2. Ecology’s Analysis of its Discretionary Rulemaking Power is Legally Unsupported.

Ecology’s analysis of the scope of agency discretion is stunted and was previously rejected by the Washington Supreme Court in *Rios*, 145 Wash. 2d 483 (2000). Ecology argues that if the rulemaking statute uses the word “may” and Ecology asserts (1) general budgetary woes and (2) an unwillingness or inability to shift priorities, then it has unfettered discretion not to issue or modify a rule. Open. Br. pp. 22-24. As an initial matter, the Court should reject this “analysis” as nullifying the APA’s provision that allows rulemaking petitions, since an agency can always present this response.

In *Rios*, pesticide handlers threatened to challenge a Department (“L&I”) rule that omitted mandatory testing to monitor certain blood enzymes, which appeared to decrease through exposure to a pesticide chemical and harmed the nervous system. 145 Wash. 2d at 488. In response, L&I established an advisory committee that issued a report confirming the harm, the cause, and that blood testing was the appropriate method to monitor

exposure. *Id.* at 505. The handlers sought a revised rule that mandated blood testing, but L&I refused. *Id.* at 489. Among other things, they judicially challenged L&I's refusal to rulemake. *Id.* at 486-487.

To determine whether L&I had arbitrarily and capriciously⁷ refused to exercise discretion to rulemake, the Supreme Court's "threshold task" was to "define the nature of the agency's statutory duties." *Id.* at 493. It considered L&I's mandatory duties as a backdrop when examining the circumstances, the agency's knowledge, and its reasons for refusing to act. *Id.* at 505-508.

Like Ecology, L&I based its refusal to rulemake on its "limited resources" (especially in the division's "rulemaking section"), "budget constraints," "the importance of setting priorities for the allocation of scarce resources," the "displacement of other agency activities," and because rulemaking would be "controversial and contentious." *Id.* at 506-507. The court held that L&I arbitrarily and capriciously refused to rulemake. The pesticide handlers had not asked L&I to "embark on a new

⁷ Arbitrary and capricious is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Id.* at 505. Courts consider the record and ask whether the agency's decision was rational at the time it was made. *Id.* at 501-502. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. *Id.* at 501.

enterprise”; “they had not simply pulled from a hat the name of one dangerous workplace chemical among the hundreds.” *Id.* at 508. Rather, L&I had “already invested its resources” in studying the problem and solutions. *Id.* While the Court recognized L&I’s “wide discretion in choosing and scheduling its rulemaking efforts,” it concluded:

Ordinarily, an agency is accorded wide discretion in deciding to forgo rulemaking in an area, and fiscal constraints may reasonably determine whether an agency takes action (and, if so, how). **But an agency’s allusion to fiscal considerations and prioritizing cannot be regarded as an unbeatable trump in the agency’s hand**; on review, a plaintiff has the opportunity to show that the agency’s failure to act was “[a]rbitrary or capricious.”

Id. at 507 (emphasis added).

Ecology focuses on the *Rios* court’s observation that the case presented an “extraordinary circumstance” warranting an arbitrary and capricious holding. Open. Br. at 33-37. In *Rios*, the extraordinary circumstances were: (1) the petitioners had not asked for a “new enterprise”; (2) L&I had already made the enzyme a sufficient priority by drafting guidelines and convening a team of experts to explore a monitoring program; and (3) the team found that monitoring was necessary and feasible. *Id.* at 507-508.

While the APA does not define “arbitrary and capricious” to require “extraordinary circumstances,” they readily exist here. Paralleling the *Rios* circumstances, and as described in more detail below: (1) the Tribe did not seek a “new enterprise”; (2) Ecology had already made Johns Creek a sufficient priority by, among other things, adopting an instream flow rule for it; (3) Ecology admitted to the problem of unmet flows, the missing information needed for sound decisions, and the cause (junior wells); and (4) the record supports the need for and feasibility of granting some or all the Tribe’s request, and does not support claims that it was too expensive or work-displacing to do so.⁸

3. The Statutory Backdrop Indicates the Legislature’s Intent that Ecology Act to Protect Senior Instream Flows from Harmful Junior Wells.

The first step of the *Rios* analysis is identifying the statutory backdrop to Ecology’s discretionary decision whether to rulemake under RCW 90.54.050(2). *Rios*, 145 Wash. 2d at 493. These are: Ecology’s organic statute, the Water Code, the Groundwater Code and the 1971 Act. Each is addressed in order. Ecology’s organic statute charges the Director with the “supervision of public waters

⁸ In fact, the situation here is infinitely more compelling than *Rios*: a Basin closure rule is far from the procedurally complex one sought in *Rios* that commonly took 10-15 years from start to finish, and would proceed without “any comparable rule in the federal system or 48 of the other states.” *Id.* at 523-524.

within the state and their appropriation, diversion, and use.” RCW 43.21A.064(1). Most important, it directs that the Director “shall⁹ regulate and control the diversion of water in accordance with the rights thereto,” which “shall be liberally construed” in order to “plan, coordinate, restore and regulate the utilization of natural resources in a manner that will protect and preserve . . . [Washington’s] pure and abundant waters.” RCW 43.21A.010, .064(3).

Under the Water Code, all waters within the State belong to the public, subject to existing rights. *Id.* As between water appropriations, the first in time “shall” be the first in right. RCW 90.03.010. Instream flows established by rule “shall constitute appropriations,” and are thus surface water rights with priority dates as of the rule’s adoption. RCW 90.03.345.

The Groundwater Code “shall be supplemental” to the Water Code. RCW 90.44.020. Surface water rights “shall not be affected or impaired” by any provisions of the Groundwater Code. RCW 90.44.030. Also, surface water rights “shall be superior” to “any subsequent” groundwater right to the extent that “any underground water is part of or tributary to the source” of a surface stream, or if withdrawing groundwater may affect the flow of a

⁹ Emphasis is added to the words “shall” and “must” throughout this Section.

surface water body. *Id.* The Washington Supreme Court has held that the Water and Groundwater Codes together dictate that “*minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows.” *Postema*, 142 Wash. 2d at 82 (emphasis in original).

Finally, the Legislature in the 1971 Water Resources Act directed that “instream resources and values must be preserved and protected” for future generations. RCW 90.54.010(1)(a). The Legislature, to “provide direction to” Ecology and any other governmental officials that implement water programs, established “fundamentals of water resource policy” under RCW 90.54.010(2) that include:

The quality of the natural environment shall be protected and, where possible, enhanced as follows: . . . streams . . . shall be retained with base flows necessary to provide for preservation [of fish]. (RCW 90.54.020(3)(a))

“Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters.” (RCW 90.54.020(9))

Withdrawals of water which would conflict [with established “base flows”] shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. (RCW 90.54.020(3)(a))

Finally, Ecology “shall,” whenever possible, carry out its vested powers in a manner that is “consistent with the 1971 Water Resources Act.” RCW 90.54.090.

Accordingly, once Ecology promulgated a rule establishing Johns Creek’s instream flows, those flows became a state water right with a priority date of 1984. These flows are senior to and must be preserved and protected as against subsequent (junior) wells that intercept water needed to meet those flows. The Legislature has not authorized a different treatment for Johns Creek’s water right.

4. Ecology’s Refusal to Issue an Interim Basin Closure Rule was Arbitrary and Capricious.

After establishing the statutory backdrop, the next step in the *Rios* analysis is determining whether the agency’s refusal to exercise its rulemaking discretion was arbitrary and capricious. The court examines the circumstances, including what the agency knew at the time. *Rios*, 145 Wash. 2d at 505-508. For the following reasons, Ecology’s refusal to engage in rulemaking under RCW 90.54.050(2) was willful, unreasoning and taken without regard to the attending facts and circumstances.

a) Ecology's Knowledge of the Problem and the Circumstances Make its Refusal to Act Willful and Unreasoning.

Given what Ecology knew when it denied the Tribe's second petition, its refusal to withdraw the Basin under RCW 90.54.050(2) was decidedly not reached through a process of reason. Ecology had known for years Johns Creek received only a fraction of its base flows during critical summer months, and was now falling below base flows by ever-increasing amounts and for longer periods of time. Section II.C. Ecology knew that, because of the Basin's geology, hundreds of existing junior wells in the Basin were likely intercepting water needed for Johns Creek's senior base flows. Section II.D. Ecology also knew about the Basin's development pressures, i.e., the many pending applications for commercial and industrial development. *Id.*

Moreover, Ecology knew that insufficient evidence existed to determine that a proposed junior withdrawal would not impair the Creek's senior instream flows. Section II.E. Ecology knew that sound decisions about water use were not being made in the Basin, and that it had statutory authority to close the Basin until it had the information needed for informed decisions. *Id.* And, Ecology understood the discrete nature of the missing information,

that it had twice denied the necessary funding, and that the funding and completed groundwater model were nowhere in sight. *Id*; see RCW 90.54.050(2) (when “information and data” are needed for sound decisionmaking).

Ecology also knew that the model, once completed, would show that new withdrawals in many locations within the Basin would impair Johns Creek’s senior base flows. Sections II.D and E. Ecology understood that denying the petition could actual spur more well-drilling in the Basin. Section II.I. Ecology knew that it would be extremely difficult, if not impossible, to stop or reverse withdrawals after buildings and wells were constructed, so that any new water consumption begun while the scientific information was still lacking would irreversibly impair the Creek’s instream flows. See *id*. Ecology knew that the Rule failed to expressly subject groundwater withdrawals to instream flows, which would impede any after-the-fact enforcement efforts. See further discussion in Sections III.C.7 below. In fact, Ecology had no scientific basis for concluding that the situation in the Basin would not worsen if it failed to act.

Additionally, Ecology knew it lacked any viable alternate plan to stop new wells from intercepting groundwater headed for

Johns Creek. Section II.G. Ecology, even after recognizing Mason County's disinterest in voluntary cooperation, issued only a weak, unenforceable "recommendation" to Mason County. Section II.I. Finally, Ecology had no plan or strategy to enforce the Creek's seasonal closure, to actively prohibit outdoor water use, or to take any other action in the Basin to stop junior permit-exempt wells from intercepting the water needed to meet Johns Creek's senior instream flows. Section II.G.

Accordingly, Ecology's refusal to withdraw the Basin from appropriations was in complete disregard of the facts and circumstances, and this is arbitrary and capricious.¹⁰

b) Ecology had Invested Resources in Johns Creek. The Tribe did not Ask for a "New Enterprise."

Like L&I in the *Rios* case, Ecology was not asked to "embark on a new enterprise." See *id.* at 507. Instead, Ecology for years

¹⁰ The Court may also find that Ecology's acted outside its statutory authority. RCW 34.05.570(4). Ecology has a mandatory duty to "superv[ise]" the "appropriation, diversion, and use" of public waters, and the duty to "regulate and control the diversions of water in accordance with the rights thereto." RCW 43.21A.064(2). The "rights" appurtenant to Johns Creek's base flows require: (1) retaining them to preserve fish; (2) ensuring that they are "first in time" and "superior" in right to subsequent groundwater withdrawal rights; (3) not being affected or impaired by junior withdrawals; and (4) allowing diminishment only "in those situations when it is clear that overriding considerations of the public interest will be served." RCW 90.03.010, .345; RCW 90.44.030, RCW 90.54.020(3)(a). Ecology exceeded its authority by refusing to supervise, regulate or control junior withdrawals and senior surface flows in a Basin in accordance with the mandatory legal framework established by laws that it is charged with administering.

had made Johns Creek's instream flows "enough of a priority" and "already invested its resources" in them. See *id.*; Section II.B. For example, Ecology had studied the Creek's fisheries and flows and determined that they were sufficiently damaged to warrant an instream flow rule – an action reserved for only some streams. *Id.* And, Ecology knew that once it established these instream flows, senior priority rights and mandatory statutory protections would attach.

Moreover, Ecology promised to devote (but failed to deliver) resources by assuring its enforcement of the Rule's seasonal closure. Section II.B. It funded studies that found exceptionally high hydraulic continuity between Johns Creek and Basin groundwater. Section II.D. It devoted resources to a highly-detailed EPA funding request. Section II.E. It promised to devote (but failed to deliver) resources to the complex, seven-prong "alternative path" that it devised as grounds for denying the Tribe's first petition. Section II.H.

Most important, Ecology had not been asked to invest in a brand new activity like creating instream flow rules where none existed. This is an infinitely more costly and resource-intensive

effort, and truly “comprehensive,” than the narrowly-tailored interim rule that the Tribe sought under RCW 90.54.050(2).¹¹

c) Ecology’s Explanation that it Needed More Information about Basin Hydrology was Unreasonable under the Circumstances.

Ecology refused to withdraw the Basin under RCW 90.54.050(2) because it wanted information about Basin hydrology and hydrogeology. ARP-000238-239; Open. Br. pp. 30, 31. This is arbitrary and capricious for the following reasons. First, its justification conflicts with the statute’s plain, proactive language that envisions preventing more damage until the necessary information becomes available and sound decisions can be made. Ecology was now doing what it had testified against when opposing the bill. Section II.F. Second, the information that Ecology desires is the very same study for which it had twice denied funding. Section II.E.

Finally, Ecology’s approach nullifies RCW 90.54.050(2).

Once it has a model, it will know where wells can safely be drilled.

¹¹ Comprehensive instream flow rulemaking typically includes: (1) investigating and setting numerical stream flow levels needed to protect fish; (2) investigating and setting time periods for closing basins to new consumptive uses; (3) establishing water mitigation credit systems; (4) establishing criteria for mitigation plans; (5) investigating and setting aside groundwater reserves for future uses (domestic, agricultural, municipal, etc.); (6) investigating and setting maximum depletion amounts from mitigation plans; and (7) establishing criteria for water storage projects. See, e.g., WAC Ch. 173-503 (Skagit River instream flow rule).

Sound decision-making will occur. RCW 90.54.050(2) will not apply. The information that Ecology seeks as a precondition to a Basin-wide withdrawal is the very same information needed for sound decision-making. Ecology's illogic lets it do nothing (other than vainly seek funding) while a stream de-waters, and despite the availability of a specific statutory remedy. This is illogical and unreasonable, and therefore arbitrary and capricious.

d) Ecology's Asserted Budget Limitations do not Overcome the Arbitrary and Capricious Nature of its Decision.

Ecology's denial stated that "staff reductions and potential new cuts" limited its ability to do the "comprehensive rule amendment" sought by the Tribe, and that either an emergency or regular rule "would require a large commitment of Ecology staff time." ARP-000239; Open. Br. pp. 9-10, 15, 21. While the Tribe understands that Ecology like other agencies faces budget limitations, these statements are unreasonable here. Ecology's "allusion to fiscal considerations and prioritizing" are not "an unbeatable trump" for refusing to rulemake. See *Rios*, 145 Wn.2d at 507.

First, the Tribe in no way sought "comprehensive" rulemaking. The record does not show that the Tribe's tailored

rule revision warranted investigations and substantial resources.

Second, Ecology's assertions are directly contradicted by its counsel's in-court statements: "Your honor, this is not a case about the agency pleading poverty to avoid administrative rulemaking" and "So again, this is not a case where, as in *Rios*, the agency is alluding to financial issues as a trump card to deny the tribe's position." RP 9, lines 17-18; Rp 14, lines 1-6 (Feb. 4, 2010 transcript).

Third, Ecology points to no evidence showing that it estimated the cost of an emergency and/or regular rule (or portions thereof). Most likely, any such analysis would not have helped its case. Fourth, Ecology never weighed against so-called "costs" the benefits of making the Rule: (1) compliant with state water laws; (2) enforceable against permit-exempt wells; (3) coordinate with the County's process for determining water availability; and (4) reflect actual changes in Basin water use that had occurred over 28 years since Rule issuance. *See id.*

Ironically, the modified Rule will likely decrease financial burdens on Ecology and Mason County. It will bring certainty to a water availability process that is in disarray, with no regulation of permit-exempt wells. *Id.* The State and County can then make sound

decisions that do not dewater Johns Creek, like encouraging connections to piped water from the City of Shelton's system, adopting enforceable water conservation measures, storing water, and/or using reclaimed water. An interim Basin rule will relieve the County's burden of defending against the Tribe's challenges to unsupported water availability findings for building permits in the Basin.¹² And, Ecology can redeploy its staff and resources away from this litigation.

e) Ecology's Claim that Issuing an Interim Rule Would Displace Higher Priority Work is Illogical and Unsupported.

Neither logic nor the record supports Ecology's affording a higher priority to developing brand new instream flow rules over stopping the de-watering of a fish-bearing stream with existing, unmet instream flows. See, e.g., Open. Br. at pp. 1-2, 30. Any such priority would likely conflict with Ecology's statutory mandates and the rights and protections that the Legislature attached to established instream flows. Section III.B 3. And, nothing in the record supports Ecology's assertions that other basins without established instream flows had "more pressing needs" than Johns Creek, or that granting all or part of the petition would actually "upend" Ecology's work on other streams. Open. Br. at p. 30.

¹² For example, in 2009 the Tribe challenged the County's water availability finding for a proposed industrial water use in the Basin. ARP-000125-128.

f) Ecology's Alternative of Issuing a Directive to the County Prohibiting Outdoor Water Use for Building Permits was Unreasonable under the Circumstances.

Ecology also denied the petition because would "issue the County a directive limiting new residential development in Johns Creek Basin to in-house use only." ARP-000239. Ecology asserted that this would "result[] in approximately the same outcomes as a withdrawal of water by rule." *Id.* This is arbitrary and capricious. First, the record is devoid of any analysis showing that prohibiting new residential outdoor use approximated an interim closure to new Basin groundwater appropriations. Second, Ecology knew that prospects for new residential development were virtually nonexistent and that, instead, the pending requests were for commercial and industrial buildings. Section II.D. Finally, nothing in the record shows how Ecology would enforce such a ban. Instead, it shows admitted, non-existent enforcement in the Basin.¹³ Section II.G.

¹³ In the end, Ecology issued no "directive," but instead a recommendation. Section II.I. This was unreasonable because Ecology knew it needed something stronger than asking for Mason County's "voluntary compliance." *Id.* This had not worked in the past. *Id.*

5. The *Hillis* Decision Highlights Ecology's Arbitrary and Capricious Decision Here.

The Court should reject Ecology's assertion that its petition denial is supported by *Hillis v. State, Dept. of Ecology*, 131 Wash. 2d 373, 932 P.2d 139 (1997). Open. Br. at pp. 31-33. In *Hillis*, the court upheld Ecology's discretion not to immediately process Mr. Hillis's nine water rights applications while facing over 5,000 other pending ones. *Id.* at 389. For the following reasons, *Hillis* only underscores Ecology's arbitrary and capricious decision here. First, in *Hillis* Ecology had established a rational priority system that started with applications posing public health risks. *Id.* at 387, 391. Here, Ecology's "priorities" never reach Johns Creek; it keeps creating new rules while allowing existing ones to fail. Moreover, Ecology in *Hillis* was actually engaged in the task complained of: i.e., processing the applications. Mr. Hillis just disagreed with Ecology's slow pace. *Id.* at 378. Here, as stated, Ecology is not actually engaging in the task complained of.

Third, in *Hillis* there really were over 5,000 pending applications. *Id.* at 389. Here, the record does not indicate pending rulemaking petitions in the pipeline. Fourth, while Mr. Hillis was likely financially harmed by Ecology's slow pace, eliminating

such harm was not Ecology's statutory mandate. Here, preventing further harm to Johns Creek's instream flows and fisheries falls squarely under Ecology's statutory mandates. Section II.B.3. Ecology lacks a statutory basis for standing by while a public resource – a fish-bearing stream – disappears to private interests.

Fifth, the record in *Hillis* was replete with detailed information about Ecology's fiscal inability to speed up the permitting process. *Id.* at 386-388. No such evidence exists here. Section III.B.4(d), above. Finally, in *Hillis* the court was careful to point out that Ecology's approach to processing applications did not impair senior users. 131 Wash. 2d at 392. Here, Ecology's denial only guarantees more impairment of a senior instream flow by junior wells.

C. Ecology Arbitrarily and Capriciously Refused to Modify Certain Rules, Some of Which are Invalid.

1. Standards of Review

The petition sought nine revisions to seven Rule sections and a finding of invalidity for four of these sections. The respective standards are: (1) whether Ecology arbitrarily and capriciously refused to make the nine revisions; and (2) whether the four existing provisions are invalid as exceeding Ecology's statutory

authority.¹⁴ RCW 34.05.570(2)(b)(i), (4)(c)(iii). As to Rule invalidity, the same statutory provisions that invalidate the Rule also existed at Rule adoption in 1984; the Court should reject Ecology's implications otherwise. Open. Br. at pp. 40, 42 n. 35.

As to the requested revisions, the 1971 Act "direct[s]" Ecology "to modify existing regulations and adopt new regulations, when needed and possible, to insure that existing regulatory programs are in accord" with the Act.¹⁵ RCW 90.54.040(2). Narrowly tailored Rule revisions are undeniably "needed" and "possible" as described in the subsections below. Ecology is basically not implementing a instream flow program in the Basin. By allowing junior withdrawals to directly conflict with instream flows, its instream flow program is certainly not "in accord" with the 1971 Act's mandates of "preserv[ing] and protect[ing]" "instream resources and values" for "future generations," and "fundamentals" of (1) "retain[ing] those "base flows necessary" to preserve fish and

¹⁴ For the four rules that the Tribe asserts are invalid, the Court may also find that Ecology's failure to either reject or grant their revisions exceeded its statutory authority under RCW 34.05.570(4)(c)(ii). Additionally, the Court may find that the Ecology's failure to address either request in its denial was arbitrary and capricious under RCW 34.05.570(4)(c)(iii).

¹⁵ See *also* RCW 18.104.040 (Ecology's rules may include "limitations on well construction in areas" that Ecology identifies "as requiring intensive control of withdrawals in the interests of sound management of the groundwater resource."). And, the Rule itself states that Ecology "shall initiate a review" of the Rule "whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions." WAC 173-514-090.

(2) giving “[f]ull recognition” “to the natural interrelationships of surface and groundwaters.” RCW 90.54.010(1)(a); RCW 90.54.020(3)(a), (9). And, revisions are consistent with the Legislature’s mandate that Ecology “shall,” whenever possible, carry out its vested powers in a manner that is “consistent with the 1971 Water Resources Act.” RCW 90.54.090.

Each subsection below addresses: (1) whether Ecology arbitrarily and capriciously refused a proposed Rule revision; and (2) if relevant, why the existing Rule is invalid. The revisions call for no new, expensive study. They will protect against impairing senior rights, encourage wise planning, be enforceable, and repair statutory conflicts.

2. Ecology Arbitrarily and Capriciously Refused to Revise WAC 173-514-010.

The Tribe requested the following revision:

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 90.03 (Water Code), chapter 90.54 RCW (Water Resources Act of 1971), chapter 90.44 RCW (Groundwater Code), 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).

Ecology now incorrectly states that the Tribe sought invalidity of this provision when it sought only revision. Open. Br.

At pp. 38, 44, 46. Refusing to include the Water and Groundwater codes as authorizing statutes is arbitrary and capricious because they prescribe the rights and protections afforded to established instream flows – i.e., as appropriations that are “superior” to and not to be impaired by later groundwater withdrawals.¹⁶

3. Ecology Arbitrarily and Capriciously Refused to Revise the Seasonal Closure in WAC 173-514-030(2).

Johns Creek is seasonally closed to new consumptive uses (Oct. 1 – Nov. 15). Refusing to extend the closure to year-round is arbitrary and capricious given the year-round unmet instream flows, an increasingly de-watered Creek, and Ecology’s failure to fulfill its 1984 promise to enforce a seasonal closure. Section II.G. This is “new information” and “changing circumstances” that warrants Rule revision. See WAC 173-514-090.

4. Ecology Arbitrarily and Capriciously Refused to Issue an Interim Closure Rule by Revising WAC 173-514-030(2) or Issuing an Emergency Rule.

The proposed revision authorizes withdrawing the Basin under RCW 90.54.050(2):

¹⁶ RCW 90.03.010, .345; RCW 90.44.020, .030; *Rettkowski v. Dep’t of Ecology*, 122 Wash. 2d 219, 227 n.1, 858 P.2d 232 (1993), (Legislature intended “that groundwater rights be considered a part of the overall water appropriation scheme, subject to the paramount rule of ‘first in time, first in right.’”).

() Pursuant to RCW 90.54.050, the department withdraws from appropriation all waters of the state in the vicinity of Johns Creek, as defined by the map in Appendix 1 during the pendency of a groundwater study. This withdrawal and year-round closure period apply to surface diversions and withdrawals from wells in the vicinity of Johns Creek, regardless of whether the groundwater withdrawal requires a permit under RCW 90.44.050.

Appendix 1: Map of Johns Creek vicinity boundaries.

Ecology's refusal to revise the Rule by withdrawing the Basin is arbitrary and capricious as described in Section II.B.

5. WAC 174-514-030(4) is Invalid, and Ecology Arbitrarily and Capriciously Refused to Revise it.

This provision describes which appropriations are subject to instream flows. It is silent as to groundwater withdrawals. The Tribe requested these revisions:

Future consumptive water right permits issued hereafter for ~~d~~Diversions of surface waters in the Kennedy-Goldsborough WRIA and perennial tributaries, and withdrawals of groundwater in hydraulic connection thereto, that are junior to shall be expressly subject to instream flows established in WAC 173-514-030 (1) through (3) shall be expressly subject to those instream flows as measured at the appropriate gage as defined in WAC 173-514-030(1), preferably the nearest one downstream, except from those exempted uses described in WAC 173-514-060(1) through (3). Ecology shall curtail existing junior diversions and withdrawals as necessary to obtain compliance with senior instream flows established in this Chapter.

First sentence. The first sentence is invalid because it expressly subjects only future *surface water* appropriations to senior instream flows, thereby allowing impairment by junior wells.

Open. Br. at pp. 38-42. Under rules of statutory construction that apply to administrative rules, the express mention of one thing (surface diversions) implies exclusion of the other (groundwater diversions).¹⁷ Accordingly, the Rule illegally sanctions impairment of senior instream flows by junior wells, which is exactly how Ecology “applies” it. No other Rule provision fills this gap, contrary to Ecology’s assertion as to WAC 173-514-030(6). (Section II.C.6 addresses this.) The Tribe’s revision subjects all new appropriations to senior rights, according to the governing statutes.

And, rejecting this revision was arbitrary and capricious given Ecology’s knowledge of why instream flows are unmet. The Court should reject Ecology’s assertion that the existing Rule does not “limit any remedies available to a senior right holder with standing who claims impairment.” Open. Br. at p. 41. The owners of junior permit-exempt wells that will intercept water needed for Johns Creek’s instream flows or another senior right can readily defend against any attempt to enforce compliance with this Rule – there is virtually nothing in it to enforce.

¹⁷ *Multicare Med. Ctr. v. State, Dept. of Soc. & Health Services*, 114 Wash. 2d 572, 591, 790 P.2d 124 (1990) (statutory canons apply to rules); *Kreidler v. Eikenberry*, 111 Wash. 2d 828, 835, 766 P.2d 438 (1989) (express prohibition of one implies allowance of the other).

Ecology also defends the existing Rule provision and WAC 173-514-030(6) (see Section III. C.6), which addresses when Ecology can issue permits to divert surface waters subject to instream flows, by presenting an argument that the Tribe has not made. Open. Br. at pp. 41-42, see also pp. 5 n. 5, 45-46. To reiterate, the proposed revisions: (1) subject junior surface and groundwater appropriations to instream flows; and (2) allow new appropriations when they do not interfere with instream flows. The law clearly requires this. Ecology asserts that the Tribe seeks an automatic presumption of impairment, and thus permit denial, when there are unmet instream flows and hydraulic continuity between wells and the stream. *Id.* The Washington Supreme Court in *Postema* rejected this argument, and the proposed revisions would not effectuate it. 142 Wn.2d at 93. Rather, instream flow rights may or may not be impaired when there is hydraulic continuity depending on a host of factors, including the source aquifer, seasonal fluctuations, the time of withdrawal, and so forth. *Id.*

The last phrase, which the Tribe seeks deleted, exempts the uses described in WAC 173-514-060(2) from instream flows. Section II.C 7 explains why these exemptions are invalid.

New second sentence: The proposed revision expressly recognizes Ecology's authority to curtail existing junior diversions and withdrawals when necessary to meet senior instream flows. Even if Ecology issued an interim Basin closure rule, that would not begin restoring waters to the instream flow levels. Accordingly, Ecology arbitrarily and capriciously refused to even consider this revision given all that it knew. Section II above.

6. WAC 173-514-030(6) is Invalid, and Ecology Arbitrarily and Capriciously Refused to Revise it.

This provision establishes a standard for determining when Ecology can approve appropriations that may harm instream flows. The Tribe proposed the following revisions:

If department investigations determine that withdrawal of ground water that could be in hydraulic continuity with surface water subject to instream flows from the source aquifers would not impair or threaten to impair ~~interfere significantly with~~ stream flow during the period of stream closure or with maintenance of minimum flows, then either applications to appropriate public ground waters may be approved and permits or certificates issued, or state or local government approvals related to groundwater withdrawals that do not require a permit may be issued. State and local governments shall consider both individual and cumulative effects on instream flows when making their respective decisions.

First sentence: The "interfere significantly" standard is invalid because it is more permissive than allowed by statute. RCW 90.44.030 directs that surface water rights "shall not be

affected or impaired” by subsequent groundwater withdrawals, and declares surface water rights as superior to later groundwater rights if such withdrawals “may affect” streamflow.”¹⁸ In fact, the Court in *Postema* rejected the groundwater users’ attempt to modify the test with the word “significant” as inconsistent with the Legislature’s intent. 142 Wash. 2d at 92. Ecology thus arbitrarily and capriciously refused to modify the Rule as requested.

Second sentence: Ecology arbitrarily and capriciously refused to add new requirement that State and local decision-makers consider individual and cumulative effects on instream flows. This change recognizes and implements GMA water adequacy requirements for local governments that the Rule does not and should reflect. Section II.G. Since the GMA provisions were enacted post-Rule, there has been a “statutory change” warranting Rule revision. See WAC 173-514-090.

7. WAC 173-514-060(2) is Invalid, and Ecology Arbitrarily and Capriciously Refused to Revise it.

This provision carves out certain groundwater uses as entirely exempt from instream flow requirements. The Tribe proposed deleting it in its entirety:

¹⁸ *Rettkowski*, 122 Wash. 2d at 226 (an administrative agency cannot modify a statute through its own regulations).

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

Ecology wrongly asserts that “it does not authorize impairment of established instream flows.” Open. Br. at p. 43. It does. The rule lets junior domestic groundwater users freely withdraw and impair senior instream flows, until they reach a level where the “cumulative” impacts of numerous single family homes “significantly” affect instream flows. Then they may keep using water indoors but not outdoors. And, junior users of groundwater for stockwatering (other than feedlots) may freely withdraw groundwater even when it impairs senior instream flows.

This provision is plainly invalid and Ecology arbitrarily and capriciously refused to remove it. The Groundwater Act creates no exemptions from statutory instream flow rights and protections, only from the requirement to get a permit. RCW 90.44.050. And, allowing junior domestic wells to impair instream flows until they “significantly affect” them conflicts with RCW 90.44.030, at

minimum.¹⁹ Section III.B.3. Ecology absurdly asserts that this provision “is designed expressly to maintain the integrity of instream flows,” while it does exactly the opposite as demonstrated by the now-degraded Johns Creek. See Open. Br. at p. 43.

Moreover, Ecology’s allowing the Rule’s cumulative impacts standard to stand is arbitrary and capricious in light of reality. First, no regulator, including Ecology, is determining whether single domestic wells in the Johns Creek Basin are cumulatively interfering with instream flows. Section II.G. As the *Postema* Court recognized, “an instream flow right subject to piecemeal impairment would not preserve flows necessary to protect fish, wildlife and other environmental resources.” 142 Wash. 2d at 89.

Second, the Rule improperly allows homes to be built and harm determined later on, only after there is mounting stream impairment. “[A]fter-the-fact remedies will not serve legislative purposes as effectively as review before appropriation occurs.”²⁰ Finally, Ecology wrongly asserts that this provision “preserves” its or a senior user’s enforcement authority”; rather, the Rule

¹⁹ Ecology’s finding mention of “measurable” impacts in the 1984 record is irrelevant since this is not what the Rule says. See Open. Br. at p. 43.

²⁰ *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 17, 43 P.3d 4 (2002) (rejected developer’s arguments for expansive reading of groundwater permit exemption in RCW 90.44.050).

expressly subjects only surface water users to instream flows and implies exclusion of groundwater withdrawals.²¹ See Section III.C.5.

8. WAC 173-514-070 is Invalid, and Ecology's Refusal to Revise the Provision as Requested is Arbitrary and Capricious.

This provision prevents Ecology from granting future surface water rights that conflict with the Rule. The Tribe proposed:

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

The current Rule without the Tribe's revision implicitly allows impairment of senior instream flows by future wells.²² Ecology incorrectly asserts otherwise. Open. Br. at pp. 45-46. A regulation's express mention of one thing implies the exclusion of another. Section III.C.5, citing *Kreidler*, 111 Wash. 2d at 835. By omitting groundwater, the Rule implicitly allows junior wells to

²¹ Ecology suggests that the Tribe finds inconsistencies between the Rule's exemptions and the Groundwater Code's permit exemption. Open. Br. at pp. 43-44. The Tribe does not make this argument. To reiterate, the Groundwater Code does not allow junior users to impair instream flows; it only exempts them from the permit requirement. RCW 90.44.050.

²² As described in Section III.C.5, the Court should disregard Ecology's argument that the Tribe argues for an automatic presumption of impairment if there exists unmet instream flows and a hydraulically connected aquifer. Open. Br. at pp. 45-46.

interfere with senior instream flows. The statutes require otherwise. Section III.B.3. And, the Court should reject Ecology's revision of the Tribe's argument as to presumptions and *Postema* for the reasons explained in Section III.C.5.

D. Ecology had Sufficient Time to Develop the Record.

Ecology complains that the superior court required development of a longer or more detailed record than possible within 60 days. Open. Br. pp. 29-30. This is a red herring. The record exceeds 500 pages. Ecology had, alternatively, 761 days to develop it (starting with the Tribe's 2008 petition filing and ending with the Governor's May 5, 2010 decision on the 2009 petition) or 140 days from the Tribe's 2009 petition until the Governor's decision. More important, the superior court recognized Ecology's failure to address the Tribe's concerns, which did not require a voluminous, detailed record to fix. See Section II.I., above.

IV. CONCLUSION

The Tribe urges the Court to affirm the superior court's decision that: (1) Ecology's petition denial did not meet the APA's mandatory duty to specifically address the Tribe's concerns, and; (2) Ecology arbitrarily and capriciously refused to issue a rule that stops more dewatering of Johns Creek, and must engage in rulemaking as

requested in the Tribe's petition. If the Court elects to decide the two counts that Ecology and the superior court have not addressed, the Court should find that: (1) Ecology arbitrarily and capriciously refused to make the Tribe's additional proposed Rule revisions; and (2) the aforementioned four Rule provisions are invalid as inconsistent with the governing statutes.

DATED this 29th day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2012, I filed the foregoing Squaxin Island Tribe's Response Brief by mailing it to the Clerk of the Court at 950 Broadway, Suite 300, Tacoma, WA 98402 and by serving these same documents upon the following parties by depositing them into the United States mail on that same date:

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I hereby certify that on September 25, 2012, I filed the foregoing Respondent Squaxin Island Tribe's Response Brief – Errata and corrected pages of the Response Brief with the Court by mailing it to the Clerk of the Court at 950 Broadway, Suite 300, Tacoma, WA 98402 and by serving these same documents upon the following parties by depositing them into the United States mail on that same date:

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