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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,
v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,
Respondent,

and

CENTER FOR ENVIRONMENTAL LAW & POLICY,
Intervener/Respondent.

APPELLANTS' OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

> "The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise. ..." RCW 90.03.010.

This statute is the foundation and guiding principle of the Water Code adopted in 1917. It provides the clearest limit on the State's authority to regulate, allocate or appropriate the waters of the state, which the Legislature declared belong to "the public," not to state government. Its plain meaning requires the State to follow all the requirements of the Water Code before creating water rights by rule for reservations or minimum flows. Nothing in the later-adopted statutes relating to the protection of instream flows,[1] alters this guiding principle and limit on the State's executive and legislative authority to create rights in the public's water.

In 1971, the Legislature implicitly recognized the importance of this guiding principle in RCW 90.54.020(2). "Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state." Eight years later, in the

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[1] Instream Flows and Levels Act, ch. 90.22 RCW; Water Resources Act, ch. 90.54 RCW; and Watershed Planning Act, ch. 90.82 RCW.

same bill that gave minimum instream flows the status of water rights with priority dates (RCW 90.03.345), the Legislature highlighted the connection between the public's ownership of water and new protections for instream flows by incorporating the "maximum net benefits" mandate at the beginning of the Water Code, at RCW 90.03.005. Appellants ask the Court to interpret these statutes as part of the common legislative scheme that directs Respondent Department of Ecology ("Ecology") to carefully consider the public interest and future water needs before adopting a minimum flow rule that impacts the availability of water for other uses.

The Supreme Court's prior decisions relating to instream flow protection rules have not explored the full meaning and effect of RCW 90.03.005 - .010 in the context of the State's creation of minimum instream flow ("MIF") water rights.[2] The three most-recent decisions were published after Ecology adopted the instream flow protection rule for the Dungeness River basin, chapter 173-518 WAC ("Dungeness Rule") and require its invalidation.

Appellants seek review of the Order on Petition for Declaratory Judgment Regarding the Validity of a Rule, entered in Thurston County

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[2] *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77-83, 11 P.3d 726 (2000); *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013); *Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015); and *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn.2d 648, 381 P.3d 1 (2016) ("*Hirst*").

Superior Court on December 2, 2016. *Clerk's Papers ("CP") 12.* The Petition for Declaratory Judgment ("Petition") is a challenge under the Administrative Procedure Act ("APA") to the validity of the Dungeness Rule. *CP 2.* The superior court denied the Petition, without findings or conclusions, on the basis that Appellants had not met their burden of demonstrating under RCW 34.05.570(2) that: (1) the Dungeness Rule exceeds the Respondent's statutory authority; (2) the Dungeness Rule was adopted without compliance with certain statutory rule-making procedures; and (3) the Dungeness Rule is arbitrary and capricious.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in ruling that the Dungeness Rule did not exceed Ecology's statutory authority.

2. The superior court erred in ruling that the Dungeness Rule was adopted in compliance with statutory rule-making procedures.

3. The superior court erred in ruling that the Dungeness Rule was not arbitrary and capricious.

The following issues pertain to these assignments of error:

Issue 1. Did Ecology exceed its statutory authority by failing to make findings determining the "maximum net benefits" before appropriating water for minimum instream flows in the Dungeness Rule?

Issue 2. Did Ecology exceed its statutory authority by failing to make findings under RCW 90.03.290(3) before creating minimum flow water rights in the Dungeness Rule?

Issue 3. Did Ecology exceed its statutory authority by adopting reservations in the Dungeness Rule using the OCPI exception?

Issue 4. Did Ecology exceed its statutory authority by adopting surface water closures in the Dungeness Rule for the purpose of protecting MIFs and without complying with RCW 90.54.050?

Issue 5. Did Ecology exceed its statutory authority by regulating inchoate permit-exempt groundwater uses and ignoring relation-back priority dates?

Issue 6. For purposes of the APA cost-benefit and least burdensome alternatives analyses, did Ecology err: (a) by determining that future users of permit-exempt wells would not be cost-impacted because they had no rights affected by the Dungeness Rule; or (b) by incorrectly assuming that out-of-kind mitigation would be adequate to secure future domestic water needs?

Issue 7. Is the Dungeness Rule arbitrary and capricious?

III. STATEMENT OF THE CASE

In adopting the Dungeness Rule, Ecology appropriated virtually all the available water of the basin for instream flow water rights and closed

streams and the basin's groundwater without preserving adequate supplies of water to satisfy human domestic needs, and without determining the maximum net benefits for the people. MIFs adopted by rule are water rights with priority dates and have enormous consequences, forever limiting the future availability of water for out-of-stream uses in the same basin. Access to adequate supplies of potable water is a prerequisite to the development of land. It is vitally important that before the State appropriates all available water in a basin for MIF water rights, the public interest must be thoroughly vetted and adequately determined under the entire statutory scheme. Without the required public interest evaluations, MIF rules are a house of cards built on an inadequate foundation, unnecessarily causing a cascade of legal water availability issues that will vex county government, land owners and developers, lending institutions, and rural area residents. It is simply unacceptable that the public's water can be appropriated and the public's access to water for new uses blocked by the State through rule-makings that avoid legislatively-mandated public interest evaluation.

A concise statement of facts is challenging in this case because Ecology filed a rule-making record in the trial court of over 72,000 pages,

CP 3.[3] The facts relevant to Appellants' claims are set out in Plaintiff's Opening Brief, CP 5, at pp. 3-16, and in Plaintiffs' Reply Brief, CP 9, at pp. 8-15. Review of these facts and evidence in the rule-making record is essential, because the trial court made no findings and the Supreme Court's review is *de novo*. What follows is a fair and brief summary of those facts.

A. The CBA Includes False Assumptions and Legal Analyses

The cost benefit analysis (CBA) for the Dungeness Rule includes challenged assumptions about its economic benefits and costs.[4] For instance, there is no evidence in the record of any previous litigation challenging permit-exempt water availability where MIF rules are absent or of any credible threat of litigation in the Dungeness Basin against future permit-exempt wells for domestic uses. The CBA also relies on two challenged legal theories in order to produce cost/benefit numbers that supported adoption of the rule. In previous rulemakings, Ecology admitted

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[3] The Dungeness rule-making record is Bates-numbered and was transmitted electronically to the Supreme Court as CP 3. All citations to the record begin with ECY and end with the Bates numbers of the cited pages.

[4] The CBA relied on significant economic benefits in terms of "preventing litigation" and increased "certainty." ECY002395-99. The "litigation prevention" values assigned to the Dungeness Rule lack credibility at face value because recent Ecology instream flow rules have created more litigation than they have prevented. *See, e.g., Fox v. Skagit County*, 193 Wn. App. 254 (2016), *Hirst*, and *Postema*. *See* ECY062240-42. Ecology's use of OCPI to adopt reservations at WAC 173-518-080 is also a magnate for litigation, rather than for certainty. *See, e.g., Swinomish* and *Foster*.

that until a basin was closed by rule the owner of vacant land could obtain a residential building permit relying on the groundwater permit exemption in RCW 90.44.050. *ECY062240-41.*

A draft CBA for the Dungeness Rule was consistent with prior rulemakings but resulted in costs that far outweighed the benefits of the rule. *Id.* Instead of abandoning the rule, Ecology relied on inconsistent and unsupported advice from the AG's Office that a prospective user of an exempt well has no right to withdraw water, only an "expectation" that holds no value. *ECY056693.* To the contrary, the loss of the ability to use a permit-exempt well caused by an Ecology regulation has significant economic impacts to rural property owners and county taxpayers, as evidenced by devaluation of properties in the Skagit basin after the *Swinomish* decision invalidated the amended Skagit rule. *ECY062240-41.* Ecology's economic analysis also relies on Ecology's contested legal theory that permit-exempt water rights do not have relation-back priority dates and hold no value during the development of property until they are actually put to beneficial use. *But see,* Argument Secs. IV.H & I, *infra.*

The economist Ecology originally assigned to the CBA, Tryg Hoff, calculated far greater costs than benefits from the Dungeness Rule. *ECY023952; ECY022605.* He found no significant benefit to new water users, that Ecology's litigation savings argument was not applicable to the

Dungeness basin, and that only a small fraction of the State's investment in habitat and flow restoration in the Dungeness River would be protected by the rule. *ECY023346.* He characterized the rule as "upside down by a massively negative cost benefit ratio." *ECY032065-66.* Ecology officials attempted to persuade Hoff to alter the draft CBA for the Dungeness Rule without a formal AG opinion on disputed legal questions, prompting Hoff to offer to be taken off the Dungeness CBA because he could not agree with a "cooked" economic analysis. *ECY003323; ECY003329-30.* Ecology replaced Hoff, and issued the proposed rule with a CBA that incorporated the challenged assumptions and legal theories, which materially altered the economic analysis of the rule. *ECY000027, 35-36, 62-66.* In doing so, Ecology rejected numerous negative public comments about replacing Hoff and its use of inappropriate assumptions in the CBA. *See, e.g.*, E*CY025673-75; ECY061534; ECY063385-91; ECY061239-40*; and *ECY62221 at 62227-30.*

B. Ecology failed to identify the least burdensome alternative

Ecology failed to identify the least burdensome alternative to accomplish the Dungeness Rule's primary objective: "meeting statutory obligations to manage waters for public use and for the protection of

instream flows."[5] The projected effect of new withdrawals from a total build-out of homes was only a small fraction of water savings already achieved prior to the rule.[6] Despite multiple public comments against Ecology's "close and mitigate" approach, (including from Clallam County, *ECY061534*) Ecology adopted a rule requiring mitigation for exempt wells despite their tiny impacts, and before the mitigation was acquired and available. *ECY 071278-91.* Less burdensome alternatives to the rule would have Ecology reserve enough water for future domestic uses without requiring mitigation (because the cumulative impact to flows was negligible), providing regional mitigation to flows in a more efficient and less complex manner (such as purchasing and relinquishing additional water rights, *ECY018885*), or adopting the rule after the water bank was established with legally adequate mitigation. *ECY001939-40; ECY001948-49.*

C. Ecology Failed to Conduct a "Maximum Net Benefits" Analysis

Ecology made a conscious decision not to determine the "maximum net benefits" (MNB) for the Dungeness Rule, despite appropriating more water for fish habitat than was available in the river,

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[5] Concise Explanatory Statement (CES), *ECY001830 at 1838-40ECY001839.*
[6] *See ECY062224-26; ECY062249-51; ECY62255-56; ECY062258-61.*

and before protecting adequate reserves for domestic use. *ECY019828. See ECY 022635-42.* This was despite their economist's plain meaning interpretation of the MNB statute that any combination of domestic use and fish protection is going have higher maximum net benefits than just fish protection alone. *ECY022560; see also ECY020992.* Ecology's decision to avoid MNB analysis is inconsistent with legislative intent derived from standard rules of interpretation, as demonstrated *infra.* The adopted MIFs also exceed the "priority minimum flows" as characterized in a 1986 informal opinion by Senior Assistant Attorney General Charles B. Roe (the "Roe Memo"), that Roe opined could escape MNB analysis under the WRA. *ECY064235-45.*

D. The Dungeness Rule's MIFs Fail to Meet the Requirements of the 4-Part Test for New Water Rights at RCW 90.03.290(3)

It is uncontested the Ecology did not make 4-part test findings under RCW 90.03.290(3) before creating the MIF water rights. The record demonstrates unequivocally that the MIFs at WAC 173-518-040 were set at levels that are simply not present in the river, *ECY001854,* and are not "minimum flows". *ECY062235, referring to Roe Memo.* Ecology protected <u>potential</u> habitat in the speculative possibility that such infrequent flows would be present in the future. Such a speculative

appropriation would appear to fail the water availability portion of the 4-part test in RCW 90.03.290.

Ecology's decision to protect instream flows that exceed water available in the river prompted its closing the Dungeness basin's groundwater to new uses without mitigation, WAC 173-518-070, which produced substantial hardship for the local community. *See ECY025673-75, ECY063385-92 (comments 1, 3, 7), ECY062221-22.* Despite such hardships, Ecology adopted MIF water rights without complying with the Water Code, including the "detriment to public welfare" prong of the 4-part test.

E. The Reservations in the Dungeness Rule Were Based on OCPI.

Instead of reserving adequate supplies of groundwater for domestic uses in rural areas, Ecology resorted to the "overriding considerations of public interest" (OCPI) exception and an unwieldy and expensive well-by-well "mitigation" apparatus for future domestic uses. WAC 173-518-070, -075, -080, -090, -110. In doing so, Ecology fell into a habit that this Court rejected in *Swinomish* and *Foster*. By adopting MIFs before protecting adequate domestic water supplies, and without MNB or 4-part test findings, Ecology artificially created a need for the OCPI exception to authorize any new domestic water uses.

The rule-making record demonstrates that Ecology used the OCPI exception as the basis for the domestic water reservations at WAC 173-518-080. *ECY001885*. Ecology's Concise Explanatory Statement ("CES") also underscores the direct linkage between those OCPI-based reservations and the rule's MIFs and closures. *ECY001912*. Each reserve is limited to no more than a 1 percent impact and mitigation is required to replenish the reserves over time. If and where mitigation does not replenish a reserve and it is fully allocated, the rule clearly prohibits new water use of any kind until additional mitigation is in place. *ECY001963; ECY001965; ECY001967; ECY002254.*[7]

F. The Dungeness Rule is arbitrary and capricious.

The Dungeness Rule's groundwater closures, mitigation program, OCPI-based reservations, and maximum depletion amounts are so complicated and uncertain that they fail to deliver a "yes or no" answer whether water is legally available for future domestic and agricultural uses in the rural area, especially after the *Hirst* decision. The Dungeness Mitigation Plan ("Mitigation Plan") at *ECY 071278-91*, was approved by

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[7] With or without the reservations, mitigation isn't available year-round and the Dungeness Mitigation Plan can't assure water availability in rural areas sufficient to obtain building permits under this Court's *Foster* mitigation standard. (See Argument IV.J, infra). Thus, even if the reservations are rescued by RCW 90.54.210, (see Argument IV.F.2, infra) they are inadequate to supply future domestic needs.

Ecology a mere sixteen days after its submittal, with no specific water rights identified as having been acquired as mitigation, and fails to comply with this Court's standards for mitigation of impacts to MIF water rights.[8]

Ecology could and should have addressed impacts from exempt wells on instream flows in a way that does not involve complex and overly costly regulatory impacts on landowners and local government, especially for such small uses of water. These complicated regulatory provisions create a presumption against legal water availability that is inappropriately placed on individual property owners, contrary to Chief Justice Madsen's admonition in *Hirst*:

> When the counties and Ecology combine their planning and water resources authority, the technical resources and planning solutions offer a wide range of tools to ensure water availability. ... Although the legislature has placed a burden on individual applicants to provide evidence of water, RCW 19.27.097(1), there are steps that the State and the counties must take under their statutory duties to protect water resources, ensure water availability, and engage in a comprehensive planning process. <u>The burden on permit applicants under RCW 19.27.097(1) assumes that the State and the counties have already complied with their</u>

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[8] The Mitigation Strategy document cited by Ecology, *ECY002785-2829*, which is the basis for the Mitigation Plan, demonstrates a substantial disconnect with the later *Foster* decision. "The Dungeness Rule also provides for the possibility of out-of-kind mitigation- i.e. mitigation actions that address potential water right/instream flow impairment through means other than mitigation water." *ECY002793*. "[I]n-kind mitigation will be used to offset impacts during the critical period for new withdrawals. However, during the non-critical period, mitigation will be achieved partially through out-of-kind habitat mitigation in the small streams." *ECY071289* (emphasis added). Thus, the Mitigation Plan is focused on partial year mitigation during a fish-critical period, rather than the year-round avoidance of "legal injury" to stream flow that is the law of the land after *Foster*.

> statutory duties to ensure the availability of water. Thus, the burden to provide evidence of water falls on individual applicants only where the State and the counties have first fulfilled their statutory duties of ensuring that water is available. 186 Wn.2d at 699, *Madsen, C.J., concurring*. (Emphasis added.)

This interpretation of GMA implicitly recognizes Ecology's duty to protect water availability for permit applicants in addition to or even prior to protecting instream flows by rule. Ecology could have achieved its goals for the Dungeness basin using a MNB finding and reservations of water that are not junior in priority to MIFs and closed streams. Instead, it created a mitigation program that provides no water to significant portions of the watershed and cannot reliably be replenished under existing legal standards for mitigation of impacts to MIF water rights. Regulations that so fail to accomplish their objective of making domestic water supply "more certain" by "avoiding litigation," but in fact have the opposite effect, are willful and unreasoning and taken without regard to the attending facts or circumstances.

IV. ARGUMENT

A. Review of Administrative Rules under APA

The Administrative Procedure Act, at RCW 34.05.570(2), provides for judicial review of administrative rules. In reviewing an agency rule-making action, the Supreme Court sits in the same position as the superior court. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n,* 149

Wn.2d 17, 24, 65 P.3d 319 (2003). A court shall declare the rule invalid only if it finds that: the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious. RCW 34.05.570(2)(c).

An administrative rule cannot amend or change a legislative enactment, and a rule that is inconsistent with the statutes it implements is invalid. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002); *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998). Administrative "[r]ules must be written within the framework and policy of the applicable statutes." *Swinomish* at 580 (emphasis added); quoting *Dep't of Labor & Indus. v. Gongyin*, 154 Wn.2d 38, 50, 109 P.3d 816 (2005). A court must declare an administrative rule invalid if it finds that "the rule exceeds the statutory authority of the agency." *Id.*; RCW 34.05.570(2)(c). An agency exceeds its rule-making authority to the extent it modifies or amends precise requirements of statute. *Baker v. Morris*, 84 Wn.2d 804, 809-10, 529 P.2d 1091 (1974).

In *Swinomish* and *Wash. State Hosp. Ass'n v. Dep't of Health*, 183 Wn.2d 590, 353 P.3d 1285 (2015), the Supreme Court carefully

interpreted the meaning of statutory terms used by administrative agencies in the promulgation of rules, and invalidated both challenged rules because the agencies gave the terms a broader meaning than intended in the authorizing statutes. In *Swinomish*, the Supreme Court rejected Ecology's interpretation of "overriding considerations of public interest" because it gave Ecology too much discretion and authority to issue reservations of water and was inconsistent with the interrelated statutory scheme of water rights, water allocation, and instream flow protection.

B. General Rules for Statutory Construction

When construing a statute, the court's goal is to determine and effectuate legislative intent. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010); *Campbell & Gwinn*, 146 Wn.2d at 9-10. Where possible, courts must give effect to the plain meaning of the language used as the embodiment of legislative intent. *TracFone*, 170 Wn.2d at 281; *Campbell & Gwinn*, 146 Wn.2d at 9-10. "We determine plain meaning 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *TracFone*, 170 Wn.2d at 281 (quoting *Campbell & Gwinn*, 146 Wn.2d at 11). The statutes relating to the allocation of water to MIFs and other uses have a common overlapping purpose and have been described by the Supreme Court as a "statutory scheme" which

it interprets together to determine the plain meaning of the statutes and the legislature's intent. *Swinomish* at 582. Those parts of chapters 90.22 and 90.54 RCW relating to instream flow protection and competing water resource policies can and must be harmonized with the Administrative Procedure Act (chapter 34.05) and the Water Code (chapter 90.03) in order to determine the minimal procedural requirements for creating new instream flow water rights.

In *Hirst*, the Supreme Court reaffirmed several canons of statutory interpretation that are applicable to the MNB mandate and 4-part test in this case.

> "Statutes must be interpreted and construed so that all the language is given effect, with no portion rendered meaningless or superfluous." *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010)*(other citations omitted); see also Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) ("To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.") The GMA provisions would be superfluous if the County's only obligation was to defer to Ecology's water regulations.

186 Wn.2d at 682.

Proper use of the canons of interpretation are especially important here, at the intersection of instream flow protection, water policy, water rights, and the legal availability of water from permit-exempt wells for building permits and subdivisions. "[R]esolving the meaning of a statutory

provision concerning water rights almost always requires consideration of numerous related statutes in the water code. *Swinomish* at 582, citing *Campbell & Gwinn*, 146 Wn.2d at 12-17, and *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77-83, 11 P.3d 726 (2000).

C. Deference to Agency Interpretations is not Warranted Here

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

D. Ecology Exceeded its Statutory Authority by Failing to Make Maximum Net Benefit Findings (Issue 1)

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

Instream flow protection serves important state interests by protecting the health of natural watersheds, including preservation of fish

production, water quality, recreation, navigation, power production, and scenic and aesthetic values. In 1969 the Legislature authorized Ecology to establish MIFs and lake levels throughout the state. RCW 90.22.010. The 1969 law, however, did not mandate the creation of MIFs, and did not provide a set of legislative directives for the allocation of water to MIFs or other water uses. In 1971, the WRA established fundamental state policy for the utilization and management of the waters of the state including the retention of "base flows" in perennial rivers and streams and the preservation of water for domestic and other out of stream uses. The purpose of establishing these policies was to insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state. RCW 90.54.010(2). Among other fundamental policy directives enumerated in Act, the Legislature declared:

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

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

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

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

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

"Maximum net benefits" refers to both diversionary uses and also to instream uses. *Swinomish* at 600. This demonstrates that the Legislature did not intend for Ecology to ignore out-of-stream water needs when appropriating water for MIF water rights.

The Legislature's use of the word "shall" in the WRA is significant. The word "shall" creates a mandatory duty for Ecology when allocating water, unlike the word "may." *Akrie v. Grant*, 178 Wn. App. 506, 512, 315 P.3d 567 (2013), *rev'd on other gds.*, 183 Wn.2d 665, 355 P.3d 1087 (2015). RCW 90.54.020 is silent with respect to the relative priority of the various fundamentals listed there, but provides a method for resolving conflicts among the competing fundamental policies. By

creating potentially conflicting duties as to the allocation of water, the Legislature also created the need for a balancing test to comply with those duties. MNB is that balancing test. The Legislature required Ecology to provide for fundamental water needs that compete with each other, required Ecology to allocate water among those needs by using a balancing test, and then defined that test. It is self-evident that Ecology cannot thereafter allocate waters to only one of the fundamental water needs to the detriment of the other without using the balancing test required by the Legislature. To hold otherwise would ignore the canon of interpretation that all language be given effect, with no portion rendered meaningless or superfluous. *Hirst, supra*; *Broughton Lumber Co. v. BNSF Ry.*, 174 Wn.2d 619, 634, 278 P.3d 173 (2012); *Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001).

It would also be absurd to conclude that the Legislature intended for Ecology to allocate all available water in a river basin to instream flows as a matter of priority, thereby precluding the allocation of uninterruptible water to serve fundamental domestic water needs, at least not without a meaningful MNB analysis. General rules of statutory construction require avoidance of such absurd or strained results. *State ex rel. Evergreen v. WEA*, 140 Wn.2d 615, 632, 999 P.2d 602 (2000).

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

It is unknown whether the Dungeness Rule would pass the MNB test because Ecology hasn't done one. The critical role and mandate of the MNB directive is that Ecology must publicly weigh the option of reserving water for future domestic and other uses and decide on water allocations according to the maximum benefits for the people of the state. This is only timely if done before allocating most or all of the remaining water in a basin to instream flows. To hold otherwise would be to grant Ecology authority to protect all stream flows first without a balancing test, and then to weigh the maximum net benefits of allocating what is left over -- essentially an empty pot. That would be a meaningless exercise that violates both the spirit and intent of the Legislature's MNB directive, tantamount to authorizing Ecology to shoot first and ask questions later.

The MNB directives at RCW 90.54.020(2) and 90.03.005 have no meaning if interpreted to apply only after all available water in a basin is allocated to MIFs, because all subsequent permits and uses of water will be conditioned upon and cannot impair those MIFs.[9] As a result of the

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[9] Once MIFs have been established, "no statute [has] been brought to our attention that requires any further weighing of interests ... and none requiring that economic considerations influence permitting decisions once minimum flows are set." *Swinomish*, 178 Wn.2d at 585 (citing Postema, 142 Wn.2d at 82-83). In other words, if Ecology does

Supreme Court's strict impairment standards relating to MIFs in *Postema*, its prohibition in *Swinomish* on creating reservations that impair MIFs, its prohibition on the use of OCPI for out-of-kind or out-of-time mitigation in *Foster*, and its determination in *Hirst* that counties have a duty to protect MIFs under GMA, MIFs are significant and can prevent other uses of water, therefore Ecology must perform the MNB analysis before allocating water to MIFs. It is the only time that a MNB analysis makes any sense, because doing so after the fact is simply too late to accomplish a meaningful result that balances the public interest between instream and out-of-stream uses of water.

E. Ecology Exceeded its Statutory Authority by Failing to Make Findings under RCW 90.03.290(3) Before Adopting the Dungeness Rule (Issue 2)

Long-established and incontrovertible legislative policy at RCW 90.03.010, quoted at the beginning of this brief provides:

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

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not make a MNB finding when establishing a MIF, it will be too late, and the MNB directive cannot thereafter be satisfied.

This statute establishes three foundations principles applicable to the 4-part test issue. First, the waters of the Dungeness Basin belong to the public and the State's power to regulate those waters must be exercised consistent with the Water Code. Second, Ecology can only appropriate waters for instream flows in the manner provided in the Water Code, which includes the 4-part test at RCW 90.03.290(3).[10] Third, the phrases "in this chapter" and "in the manner provided" also incorporate the MNB requirement of RCW 90.03.005 discussed *supra*, which is an additional legislative policy mandate that must be carried out by Ecology in the exercise of its functions in the Water Code. The MNB requirement can be harmonized with the public interest prong of the 4-part test, but neither procedural requirement can be ignored by Ecology when creating instream flow water rights with priority dates.

By creating a MIF water right with a particular numerical flow level and a priority date, Ecology is forever appropriating the waters of a river up to that level for instream flow purposes. That appropriation of water is permanent, and, as decided in the *Postema* and *Foster* cases, forever excludes other future uses of the same water by establishing a

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[10] Alternatively, Ecology can protect stream flows in other ways that do not amount to an "appropriation" without the 4-part test, *e.g.*, by using government or private funds to purchase and retire water rights or change their purpose to instream flow preservation, as it has done in the Yakima and Columbia River basins, among others.

senior water right that must be protected from impairment, even from *de minimus* effects. Because it is a permanent appropriation for instream flow purposes, and creates a water right with a priority date, the 4-part test of RCW 90.03.290 is necessary to comply with the full range of public policy directives and procedures in RCW 90.54.020, RCW 90.03.005 and RCW 90.03.290, including the MNB test.

The statutes authorizing MIFs do not exempt the appropriation of water for MIFs from the 4-part test of RCW 90.03.290, which predated chapter 90.54 RCW. The Legislature is presumed to be aware of existing law requiring the 4-part test for new water rights. If it intended to exempt MIF water rights from that test, the Legislature could and should have stated that exemption expressly in the statutes when they gave MIFs the status of water rights with priority dates. It did not.

1. MIFs in the Dungeness Rule Are Appropriations with Priority Dates, Therefore They Must Meet the 4-Part Test of RCW 90.03.290

Under the Water Code and according to this Court's decisions, minimum flows and levels established by administrative rules such as the Dungeness Rule are appropriations of water. *Postema,* 142 Wn.2d at 81. Water necessary to meet established minimum flows and levels is not available for appropriation to other uses. *Swinomish* at 578; RCW 90.03.345. Applications for water permits relating to the Dungeness River

basin must now be conditioned to protect the MIFs. RCW 90.03.247; WAC 173-518-040(3).[11]

> "[Minimum] flows are not a limited water right; they function in most respects as any other water appropriation. As such, they are generally subject to our State's long-established "prior appropriation" and "first in time, first in right" approach to water law, which does not permit any impairment, even a de minimus impairment, of a senior water right." *Foster* at 471.
>
> "A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired." *Foster* at 472, citing *Postema*, 142 Wn.2d at 82.

Without question, under the statutory scheme interpreted by the Supreme Court, the Dungeness Rule MIFs are appropriations that limit or foreclose future appropriations of water for other uses. Under the Water Code, any later appropriation cannot impair a MIF water right or reservation with an earlier priority date. RCW 90.03.290(3).

MIFs are called out in the Water Code as appropriations that must comply with Water Code procedures. RCW 90.03.345 provides:

> <u>The establishment of reservations of water</u> for agriculture, hydroelectric energy, municipal, industrial, and other beneficial uses under RCW 90.54.050(1) <u>or minimum flows or levels under RCW 90.22.010 or 90.54.040</u> shall constitute appropriations

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[11] The effect of creating MIFs as water rights is admitted and overt in the Dungeness Rule at WAC 173-518-040(3), which provides: "Instream flows established in this rule are water rights and will be protected from impairment by any new water rights commenced after the effective date of this chapter and by future water right changes and transfers."

> within the meaning of this chapter with priority dates as of the effective dates of their establishment. ... (Emphasis added).

In *Swinomish*, this Court interpreted RCW 90.03.345 as requiring the 4-part test before adopting reservations of water.

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

Swinomish at 588-89 (emphasis added); citing *Postema*, 142 Wn.2d at 79 and RCW 90.03.290(3).

RCW 90.03.345 treats MIFs and reservations identically, giving both the status of appropriations with priority dates. Logically, if reservations must satisfy the 4-part test because of RCW 90.03.345, as already interpreted by this Court, MIF water rights must also satisfy the 4-part test. Thus, the statutory scheme interpreted by this Court in *Postema* and *Swinomish* requires that before Ecology creates MIFs as water rights with priority dates, Ecology must make the same findings as required for any other water right under the Water Code. Ecology adopted the Dungeness Rule before the *Swinomish* decision, but that does not exempt the Dungeness Rule from the same statutory mandates and limitations that

led this Court to invalidate the amended Skagit Basin rule in *Swinomish*, including RCW 90.03.345.

F. Ecology Exceeded its Statutory Authority by Adopting Reservations in the Dungeness Rule Using the OCPI Exception, Rather than the 4-Part Test (Issue 3)

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

Ecology's approach in the Dungeness Rule to creating OCPI-based reservations that conflict with MIF water rights and stream closures has already been soundly rejected by this Court in *Swinomish* and *Foster*. Indeed, the entire foundation for mitigating new water uses in the Dungeness Rule collapsed after *Swinomish* and *Foster*, and RCW 90.54.210 can't put Humpty Dumpty back together again.

The Supreme Court determined in *Swinomish* that Ecology lacks statutory authority to adopt reservations using OCPI, reiterating its earlier interpretation of the OCPI clause in *Postema* as a "narrow exception." 178 Wn.2d at 584. The Court further interpreted the "public interest" qualifier in OCPI as different from "beneficial use" and stated that "exempt wells for domestic use on a non-interruptible basis [is] a private use, generally speaking, not a public use." 178 Wn.2d at 587. Then in *Foster*, this Court held that OPCI could <u>only</u> be used to authorize temporary uses of water and only for a public purpose, which did not include authorizing domestic uses of the permit-exemption. 184 Wn.2d at 475.

The reservations in the Dungeness Rule at WAC 173-518-080 clearly exceed Ecology's statutory authority as already interpreted by the Court, because they purport to authorize water for permanent domestic uses, which reserves "shall be debited when mitigation water is unavailable." The Dungeness Rule also provides that use of the reserves for future domestic supply would have the potential for negative impacts on instream resources. WAC 173-518-080(1). Therefore, as a matter of law, the reservations are invalid because they attempt to accomplish what this Court has expressly ruled cannot be accomplished with OCPI. As a consequence, the "close and mitigate" approach to domestic water supply that the reservations are inextricably linked to is also invalid because it exceeds Ecology's authority.

The Dungeness Rule preceded the *Swinomish* decision, but in it Ecology interpreted and applied OCPI in the same way as the amended Skagit Rule that was rejected by this Court. In *Swinomish*, the Court concluded that Ecology's interpretation of the OCPI exception "is inconsistent with the entire statutory scheme" including the prior appropriation doctrine. *Swinomish* at 586-89. The Court's analysis concluded that Ecology must adopt reservations using the 4-part test for water rights at RCW 90.03.290(3), and could not do so using the OCPI

exception. *Swinomish* at 588-89, citing *Postema*, 142 Wn.2d at 79 and RCW 90.03.290(3). The Court went on to state:

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

Swinomish at 590. This, and the Court's interpretation of OCPI in *Foster* as authorizing only temporary uses of water and rejecting mitigation plans based on out-of-kind or out-of-time mitigation, are very clear statutory interpretations by this Court. In order to sustain the reservations at WAC 173-518-080 and the "close and mitigate" approach to future groundwater uses in the Dungeness Rule, Ecology must convince this Court to reverse these interpretations

The reservations in the Dungeness Rule should have been adopted using the 4-part test of RCW 90.03.290(3). If they had, they might be valid and sufficient to accomplish Ecology's objective to allow limited use of the permit exemption for domestic uses.

2. RCW 90.54.210 Doesn't Cure the Dungeness Reservations

The 2016 Legislature adopted Chapter 117, Laws of 2016), codified at RCW 90.54.210, to address OCPI-based reservations in the Wenatchee Instream Flow Rule (WAC 173-545-090) and the Dungeness

Rule, but it does not cure the legal defects described above or rescue the Dungeness Rule from invalidation. First, it is important to note that RCW 90.54.210 only addresses the reservation section of the Dungeness Rule and makes no attempt to "validate" or otherwise approve any other section of the rule, including those adopting MIFs and closing streams to further appropriation. It is telling that the Legislature was aware of the impact of the *Swinomish* case on reservations in the Dungeness Rule and was presumably aware of this pending challenge to the rule as well, but did nothing to preserve or validate anything else in the rule relating to the protection of instream flows.

It is very important to note what RCW 90.54.210 provides and what it doesn't:

> (1) The department shall act on all water rights applications that rely on the reservations of water established in WAC 173-518-080 or 173-545-090, as those provisions existed on March 31, 2016. The legislature declares that the reservations of water established in WAC 173-518-080 and 173-545-090, as those provisions existed on March 31, 2016, are consistent with legislative intent and are specifically authorized to be maintained and implemented by the department. (Emphasis added.)

The words "water rights applications" refer to applications filed for specific allocations of a reservation pursuant to RCW 90.03.345, not to future permit-exempt water uses or building permit applications. If the Legislature intended to direct the processing or approval of building

permit applications relying on the reservations in the Dungeness Rule, it could have said so, but did not. Second, by stating that the Dungeness reservations are "consistent with legislative intent" and are "authorized to be maintained and implemented," the Legislature is at odds with the Supreme Court's clear rejection of similar reservations in *Swinomish* as exceeding Ecology's statutory authority. Legislative intent is only relevant when a statute is ambiguous, not when it is clear and its plain language has been interpreted by the Supreme Court as providing no authority for Ecology to adopt reservations.

It is notable that the Legislature did not amend the OCPI statute and did not mention the *Swinomish* or *Foster* decisions or make any effort to interpret OCPI in a manner different than the Supreme Court. This means that the Supreme Court's interpretations of OCPI are unaffected by RCW 90.54.210. As a result, the Court can and should apply RCW 90.54.210, but only narrowly so that it does not counter the Court's statutory interpretations of OCPI in previous cases. Thus, the Dungeness reservations at WAC 173-518-080 cannot be interpreted as authorizing any permanent water uses or private uses of water, although Ecology is authorized to act on any "water right application" that relies on the Dungeness reservations. As a result, the Dungeness reservations do not accomplish their purpose of authorizing future domestic uses of water on a

permanent basis from permit-exempt wells, and this must be taken into account in analyzing whether the rule accomplishes Ecology's objectives, meets APA standards, and is consistent with Ecology's limited statutory authority.

G. Ecology Exceeded its Statutory Authority by Adopting Surface Water Closures in the Dungeness Rule (Issue 4)

The basis of Ecology's statutory authority for closing numerous streams in the Dungeness Rule is murky at best. However, to the extent the closures were intended to protect MIFs for which Ecology failed to conduct MNB analysis or make 4-part test findings, or to comply with recommendations from the state Department of Fish & Wildlife (WDFW), the closures exceed Ecology's statutory authority and evaded APA rule-making requirements discussed elsewhere in this brief.

In *Postema*, this Court decided numerous legal issues relating to the denial of groundwater applications in basins with MIFs and stream closures adopted by rule. Language in the *Postema* decision appears to condone Ecology's practice of closing streams in rules based on Ecology determinations that water is no longer available in a stream for further appropriation. The arguments which follow, however, were not made by the appellants in *Postema*, and should be considered by the Court in the context of the Dungeness Rule, including Ecology's inadequate procedure

for adopting MIFs. This case is brought under the APA as a challenge to the validity of a rule, unlike the *Postema* appeals which did not challenge the validity of rules but only their interpretation and application to specific groundwater permit application decisions. The Dungeness rule-making context differs substantially from the context and arguments in *Postema*, and the Court should consider the following arguments as a matter of first impression because they have not previously been decided by an appellate court.

In *Postema*, the Court stated:

> Ecology is required to protect surface waters in order to preserve the natural environment, in particular "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." *RCW 90.54.020(3)(a)*. Ecology also has authority to close streams to further appropriation. *See RCW 43.21A.064(9)* (authorizing promulgation of rules governing administration of Chapter 90.03 RCW); *RCW 43.27A.090(7), (11)* (authority to promulgate rules respecting future water use); *RCW 90.54.040* (authority to adopt rules related to future allocation decisions to implement intent of Water Resources Act of 1971); *RCW 90.03.247* (Ecology with authority to set minimum flows, levels, or restrictions). Pursuant to this authority, Ecology has adopted rules closing certain streams following a determination that water is unavailable from the surface water source. *E.g., WAC 173-507-030(2)* (Snohomish WRIA closure).
> Stream closures by rule embody Ecology's determination that water is not available for further appropriations.

142 Wn.2d at 94-95. This recitation of authority includes no analysis of the specific rulemaking requirements for closing streams by rule, or the

statutory authority for adopting individual stream closures by rule. Significantly, *Postema* did not provide that Ecology could evade rule-making requirements when closing streams. Here, the stream closures are part of Ecology's overall scheme for the Dungeness basin, along with MIFs, reservations, maximum depletion amounts, and Ecology's "close and mitigate" approach to all groundwater in the basin. Appellants contend, at a minimum, that the effect of stream closures in the rule on the overall allocation of water within the basin must be considered as part of the MNB analysis and the economic analyses required by the APA.

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

> [T]he department may by rule adopted pursuant to chapter 34.05 RCW:
>
> ...
>
> (2) 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. Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department shall consult with the standing committees of the house of representatives and the senate having jurisdiction over water resource management issues. (Emphasis added.)

In the CES, Ecology explains that the Dungeness closures are based upon a finding that water is not available,[12] not that information is lacking. The CES expands upon this justification as follows: "An 'administrative closure' is a term used to describe a finding that water is not available for new diversions from a specific surface water body based on a recommendation from the [WDFW] made pursuant to RCW 77.57.020." *ECY001915.* However, RCW 77.57.020 does not authorize a closure by rule. RCW 77.57.020 relates only to a case-by-case evaluation of permit applications.[13] Nothing in RCW 77.57.020 overrides Ecology's duty to investigate each permit application under RCW 90.03.290, or suggests that Ecology may by rule circumvent its duty to investigate each permit application in order to satisfy the objectives of WDFW.

The CES also attempts to justify Ecology's historical practice of closing streams in other instream flow rules by calling it a "term of art." *ECY001874.* "Closure" may be a "term of art" to Ecology, but it is not

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

[13] RCW 77.57.020 provides: "The director of ecology shall give the director notice of each application for a permit to divert or store water. The director has thirty days after receiving the notice to state his or her objections to the application. The permit shall not be issued until the thirty-day period has elapsed. The director of ecology may refuse to issue a permit if, in the opinion of the director of ecology, issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream. The provisions of this section shall in no way affect existing water rights."

derived from the Water Code. Ecology's historical practice is simply not an acceptable substitute for statutory authority. *See Theodoratus*, 135 Wn.2d 582. Ecology also used the same "OCPI" approach to support water reservations in several other water management rules, but that did not stop this Court in *Swinomish* from invalidating Ecology's use of OCPI in the Skagit basin rule. Ecology's "terms of art" are especially suspect when they are inconsistent with statutory language.

The rule-making record discloses that the stream closures in the Dungeness Rule are predicated upon Ecology's authority to protect MIFs. "Ecology has closed (or seasonally closed) surface water bodies that chapters 90.22 and 90.54 RCW direct us to protect." *ECY001947*. RCW chapters 90.22 and 90.54 authorize Ecology to establish minimum instream flows or base flows. But those statutes do not (except in circumstances involving insufficient data or information, which Ecology admits does not exist here) authorize closure of a stream by rule for the purpose of protecting senior water rights, including MIFs. Ecology simply lacks statutory authority to establish by rule a "closure" intended to protect a new MIF in the same rule.

Ecology also lacks authority to prohibit inchoate permit-exempt groundwater withdrawals under RCW 77.57.020, quoted in footnote 13,

supra, which provides that "[t]he provisions of this section shall in no way affect existing water rights." *See also* Argument Sec. IV.H, *infra*.

Generally speaking, Ecology must evaluate the availability of water for new uses on a case by case basis for water right applications, as provided in the 4-part test.[14] Closing a source by rule eliminates the ability of applicants or exempt well users to demonstrate that water may be available for a particular use in a particular place and manner. The Legislature authorized Ecology to withdraw waters by rule when information is lacking, not to close streams by rule in order to protect MIF water rights created in the same rule. The stream closures at WAC 173-518-050 exceed Ecology's statutory authority and should be invalidated.

H. The Priority Date for Exempt Wells is Determined by the Relation-Back Doctrine (Issue 5)

The Dungeness Rule states that the priority date for exempt wells will be the date that water is put to beneficial use, unlike all other private water rights under the Water Code, which have a priority date that relates back to the date the <u>process</u> for putting water to beneficial use begins.

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[14] RCW 90.03.290 requires Ecology to investigate each application for a water right permit, "and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied." RCW 90.03.290(1); *see also* RCW 90.03.290(4) ("In determining whether or not a permit shall issue upon any application, it shall be the duty of the department to investigate all facts relevant and material to the application").

Pursuant to the Dungeness Rule, if a landowner drilled a well, applied for and obtained a building permit and construction loan, built a house and connected it to the well prior to the effective date of the rule, but didn't turn on and start using the water until after the rule went into effect, the landowner's water right would be junior to the rule and subject to the closure and mitigation requirement, thus interruptible and an inadequate water supply under GMA. *See Fox v. Skagit County,* 193 Wn. App. 254, 280, 372 P.3d 784 (2016). This feature of the Dungeness Rule ignores the relation-back of priority dates in the prior appropriation doctrine, and exceeds Ecology's statutory authority.

WAC 173-518-010(3) states:

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

The relation back doctrine was created under the principles of equity to allow an appropriator to receive, as a priority date, the date the appropriator first initiated the use of water and not later when the appropriation was completed. The ability to receive the early priority date depended on the appropriator's diligence in applying water to use. *An Introduction to Washington Water Law, Office of the Attorney General,*

January 2000, at 111:27 (CP5, Appendix 3), citing RCW 90.03.340 and *Hunter Land Co. v. Laugenour*, 140 Wn. 558, 565 (1926).

When water right permits are issued under the Water Code, it is with a priority date that relates back to the notice date – the date of application. RCW 90.03.340. This is the statutory version of the relation back doctrine. The groundwater permit exemption at RCW 90.44.050 is silent as to the priority date of permit-exempt water rights. Because there is no application for a permit-exempt groundwater right, common law relation back doctrine must apply to determine the priority date of an exempt well water right and the reasonable diligence required to preserve such priority date. The analogous point in time would be the notice of intent filed by a well driller, or the date of application for subdivision, which provides notice of intent to create lots with homes that will be supplied with groundwater. So long as the project is developed and completed with due diligence, the priority date of a permit-exempt water right relates back to the date of the notice or application.

Ecology is not a legislature and has no authority to change this provision of the prior appropriation doctrine by defining the priority date of permit-exempt wells in a rule. Revising a feature of state law is solely within the province of the legislature. Ecology cannot point to any legislative delegation of authority to change or define the priority date of

permit exempt water rights or the relation back doctrine, by rule or otherwise. It simply lacks this authority.

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

I. For Purposes of the CBA and LBA, Ecology Erred in Determining that Future Users of Exempt Wells Would Not Be Cost-Impacted Because They Had No Rights Affected by the Dungeness Rule (Issue 6.a)

RCW 34.05.328(c)(iii) requires that Ecology prepare cost-benefit and least-burdensome alternative analyses before adopting a "significant

legislative rule." Ecology prepared both a CBA and LBA for the Dungeness Rule, which are included in the rule-making record. *ECY002355-002439*. Appellants' trial briefs disclosed a number of fatal flaws with the CBA and LBA. *CP 5, CP 9.* This argument addresses Appellants' Issue No. 6, a legal issue at the core of Ecology's flawed economic analyses leading to the house of cards which is the Dungeness Rule.

The CBA and LBA treat future permit-exempt well users, such as builders, financiers, and purchasers of a home, as though they possessed no legal rights regardless of plans and efforts expended toward development. This flawed legal theory supports Ecology's false economic conclusions in the CBA and LBA that these future users of groundwater would lose no value by being denied free access to groundwater. Economist Tryg Hoff demonstrated that Ecology's error completely skewed the cost-benefit and least burdensome alternative analyses. *ECY023952, 022605, and 023346.*

The MIFs at WAC 173-518-040 significantly impact property rights and values by preventing unmitigated exempt well uses from qualifying as an "adequate water supply" for building permits. This Court knows very well after its *Hirst* decision in 2016 that the effect of adopting MIFs is to eliminate exempt wells in the same basin as a source of

"adequate water supply" under RCW 19.27.097. Under the Dungeness Rule, this subjects those properties to a requirement to pay for mitigation from a state-approved water bank, but as the next argument in this brief demonstrates, the Dungeness mitigation bank has incomplete geographic applicability and is unlikely to obtain more than seasonal mitigation for new uses, which is not enough to establish an adequate water supply for year-round domestic uses under RCW 19.27.097.

Under state law effective immediately prior to the Dungeness Rule, no water right permit was required for a use of 5,000 gallons per day or less of groundwater for domestic purposes, RCW 90.44.050. The groundwater exemption was adopted with the Groundwater Code in 1945 and has survived numerous legislative attempts to limit it. The Legislature struck a balance with the exemption, guaranteeing at least a minimal amount of water to make reasonable use of rural land that is exempt from the complications, delays and expense of water rights permitting. *Campbell & Gwinn,* 146 Wn. 2d at 16. Exempt wells can establish water rights like other permitted water rights under the prior appropriation doctrine and subject to the "first in time, first in right" principle. *Campbell & Gwinn*, at 17, n.8.

RCW 19.27.097, enforceable by counties, requires applicants for building permits to demonstrate they have an adequate water supply for

the proposed structure. *Hirst*, 186 Wn.2d at 684. In rural areas where there is no public water system, including large parts of the Dungeness Basin, permit applicants will drill a well and provide a well log and water quality test to satisfy this requirement. Absent a minimum flow rule, nothing else has been required to demonstrate water availability for a building permit unless Ecology withdraws the groundwater from further appropriation by rule under RCW 90.54.050, as it did in the Upper Kittitas watershed in 2011. *See* WAC 173-539A-010.

Permit-exempt wells that are junior to an instream flow rule can be interrupted if the instream flow level is not being met. Interruptible water sources do not meet the requirements for an adequate reliable supply of water needed to authorize issuance of a building permit under RCW 19.27.097. *Hirst*, at 686, *citing Fox,* at *280*. Thus, contrary to Ecology's reasoning that landowners only possessed an "expectation" but not a right to an uninterrupted supply of groundwater, landowners could obtain a building permit with an exempt well before the effective date of the rule, but not after, at least not without the mitigation that is addressed in the next argument relating to Issue 6.b.

To summarize, when the new MIF water rights were created at WAC 173-518-040, later established permit-exempt groundwater uses became junior to the minimum flows and interruptible when they are not

met. Interruptibility of a ground water right renders it inadequate as a water supply for a building permit under RCW 19.27.097. This represents a significant loss of property rights and values that Ecology wrongly overlooked in its economic analyses for the CBA and LBA in violation of the APA.

J. The Dungeness Mitigation Plan Fails To Protect Water Availability for Future Domestic Uses And Fails Multiple APA Requirements (Issue 6.b)

In *Foster,* this Court rejected a mitigation plan for a water right permit that had out-of-kind mitigation to cover the periods of time when water-for-water replacement mitigation was unavailable.

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

184 Wn.2d at 476-77. The senior water referred to in *Foster* was a minimum instream flow adopted by Ecology, akin to the MIFs in the Dungeness Rule. This Court's *Foster* ruling demonstrates that Ecology's cost-benefit calculus for the Dungeness Rule (which relies on allowing future domestic uses with mitigation) was inadequate and violates the

APA. While domestic uses are year-round, the only senior water rights available as mitigation are seasonal irrigation rights. Under Foster, a seasonal irrigation right cannot be used to mitigate the "legal injury" that occurs to a senior instream flow water right during the non-irrigation season when any new use has a hit on the river, no matter how *de minimus* that impact might be. This renders all future efforts in the basin to mitigate new groundwater uses legally uncertain, and may result in building permit moratoriums unless the Dungeness Rule is invalidated.

The *Foster* decision came two years after the Dungeness Rule went into effect, but the effect of the *Foster* decision on the availability of mitigation for new groundwater uses should have been anticipated by Ecology before adopting the rule. Ecology ignored public comments requesting that mitigation be in place prior to the adoption of the rule. Ecology's haste to adopt the rule and close groundwater in the basin was both arbitrary and capricious and a fatal flaw in its economic analyses of the rule.

K. The Dungeness Rule is Arbitrary and Capricious (Issue 7)

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

capricious manner, it is necessary to understand its responsibilities with regard to the public waters of the state. *Hillis*, at 383. As demonstrated above, Ecology is responsible for protecting minimum instream water resources or base flows for various environmental purposes, and for protecting adequate water supply for domestic uses. RCW 90.54.020 (3 and 5). To the obvious extent that these fundamental legislative purposes may be in conflict, Ecology is required to make its decisions according to the maximum net benefits for the people of the state. RCW 90.54.020(2); RCW 90.03.010. After all, it is the peoples' water, and the State, through Ecology, exercises a responsibility to act in the peoples' interest. RCW 90.03.010.

Not only did Ecology refuse to make MNB findings, or to consider public interests under the 4-part test, but Ecology appropriated more water for fish than exists naturally in the basin, creating MIF water rights with priority dates that foreclose future appropriations for domestic, agricultural or other uses. It also approved the Mitigation Plan, which it required for future domestic water availability, before mitigation was acquired and without year-round water sources to mitigate for future year-round domestic uses, which will inevitably lead to a failure of the Dungeness Rule's "close and mitigate" approach to groundwater for domestic uses. Finally, Ecology attempted to make new law regarding the

priority date of permit-exempt wells, without any delegation of authority from the Legislature, in order to subject more domestic uses to the Dungeness Basin stream closures and mitigation requirements by ignoring their relation-back priority dates.

Ecology's actions were taken with full knowledge that they were inconsistent with the law and/or that they failed to comply with APA rule-making standards. Comments in the rule-making record from Ecology economist Tryg Hoff and others cited in this brief and Appellants' trial briefs were warnings to Ecology that its draft rule exceeded its authority and would not accomplish its purposes. Ecology's failure to correct these problems in the final rule demonstrates its willful and unreasoning behavior, taken without regard for the consequences.

The multitude of legal and factual miscues in the adoption of the Dungeness Rule demonstrate a pattern of conduct by Ecology to ignore fundamental state water policy, economic impacts, and the rights of the public to access drinking water. Ecology developed a complicated rule requiring mitigation for all new water uses in the basin without a proven mitigation strategy, when it could have accomplished greater protection of instream flows by purchasing less than one cfs of water rights. By acting without appropriate consideration of the maximum net benefits for the people, and without full compliance with the Water Code, Ecology acted

in a willful and unreasoning manner without consideration of the true effects of its actions. This is a classic case of arbitrary and capricious action by a state agency.

V. CONCLUSION

As this Court decided in *Postema*, *Swinomish*, *Foster* and *Hirst*, MIF water rights have enormous consequences on the future availability of the public's water for other purposes, and can even force counties to deny building permits for exempt wells in rural areas where there may be no other feasible alternative water supply. The *Bassett* case examines the other end of MIF water rights – their foundational requirements for creation by rule, consistent with the entire statutory scheme for allocating/appropriating the peoples' water, including MNB, the 4-part test, APA requirements for honest economic analyses, and the avoidance of absurdities in the interpretation of statutes. Based on this Court's prior rulings concerning MIFs and limits on Ecology's authority, and upon the rules of statutory interpretation, Ecology must do more to protect the public interest and the peoples' right to access drinking water before appropriating all the available water in a basin for MIFs. Ecology exceeded its statutory authority, and the Dungeness Rule must be invalidated.

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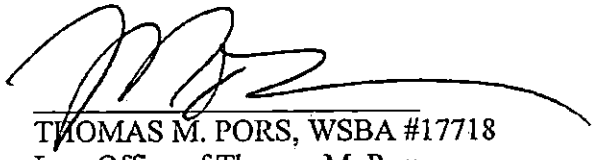
RESPECTFULLY SUBMITTED this 3rd day of April, 2017



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on April 3, 2017, I caused to be served the Appellants' Opening Brief in the above-captioned matter upon the parties herein as indicated below:

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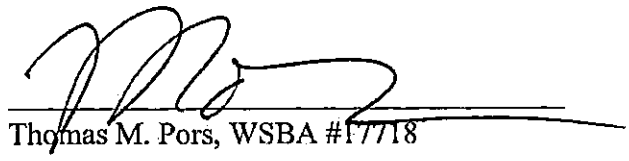

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Pursuant to RAP 10.2 and this Court's letter dated February 8, 2017, attached please find Appellants' Opening Brief in this matter, including certificate of service.

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