

No. 94004-5

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' REPLY BRIEF

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I. INTRODUCTION

The trial court erred because it failed to interpret and apply several critical statutes to the review of Ecology's Dungeness rule-making, particularly several sections of the Water Code that apply to all appropriations of water. Allowing Ecology to avoid its statutory duties when creating instream flow water rights will have enormous consequences on the future availability of the public's water. Respondents argue that other statutes excuse instream flows rules from complying with the Water Code and from properly balancing the public's interest in water for the other purposes. This is the first case before the Court presenting this issue, therefore it is critical that the Court determine the Legislature's intent from the entire statutory scheme, not just a few rule-making authorizations selected by Ecology. The Dungeness Rule (DR) is an appropriation of the public's water, done in a manner that evaded public interest evaluation. Ecology exceeded its statutory authority, and will no doubt continue doing so in other basins if the trial court's decision is not reversed.

II. REPLY TO COUNTERSTATEMENT OF ISSUES

Ecology's counterstatement of issues improperly categorizes and attempts to minimize several legal issues of first impression relating to the

appropriation of water for instream flows. Appellants' Issues 1-5 stand alone as significant issues of first impression involving a statutory scheme that crosses multiple chapters of the RCW.¹ These issues cannot be answered in isolation by examining only Ecology's rulemaking authority under the APA. In addition, the following sub-issues listed by Ecology are irrelevant or subsumed within other issues stated by Appellants.

Ecology's Issue 1.a is irrelevant because Appellants haven't challenged the flow levels as such, they have challenged Ecology's lack of procedural and substantive compliance with other statutes limiting Ecology's authority to appropriate water for minimum flows. Ecology's Issue 1.d is subsumed within Appellants' Issue 3. Ecology's Issue 1.e is negatively stated, which is confusing, and mistakes the Court's statutory interpretation under different circumstances in *Postema* as a legislative enactment. The stream closure authority issue is more complicated than a mere subset of Ecology's general rulemaking authority and is better stated in Appellants' Issue 4. Ecology's Issue 1.f is subsumed within Appellants' Issue 5, which is more broadly and fairly stated. Thus, Appellants'

¹ This Court has consistently held that statutes relating to the allocation of water to minimum instream flows (MIFs) and other uses have a common overlapping purpose, a "statutory scheme" which the Court interprets together to determine the plain meaning of the statutes and the legislature's intent. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013).

propose that Issues 1 through 5 remain as stated in their Opening Brief.

Appellants do not object to Ecology's counterstatement of Issues 6 and 7 (Ecology's 2 and 3), with the following revision underlined:

Issue 6. Whether Appellants have satisfied their burden of demonstrating that Ecology adopted the Dungeness Rule without compliance with statutory rule-making procedures.

a. Whether the economic analyses were clearly erroneous; or

b. Whether the Dungeness Rule's mitigation element results in a reasonable and achievable means to secure future domestic water needs.

III. REPLY TO COUNTERSTATEMENTS OF THE CASE

Both Ecology's and CELP's responses accuse Appellants of using legal argument instead of a fair statement of the facts, then proceed to do just that themselves.² It is not argument to state essential facts in the case that support Appellants' legal arguments, facts which were seemingly ignored by the trial court. The following brief and fair corrections are provided to Respondents' biased and incomplete counter-statements.³

² Ecology Response at p. 17; CELP Response at p. 6.

³ Ecology's counterstatement of the case is a self-serving narrative of cherry-picked references to the administrative record, neither responsive to the legal issues nor a fair account of facts relating to the challenged economic analyses. CELP's counterstatement of the case references post-rule facts that were excluded by the trial court from the record. *See Clerk's Papers, No. 11, "Order on Motions to Supplement Record, dated December 2, 2016."*

A. Dungeness River Flows Were Restored through Negotiation and Purchase and Far Exceed Projected Groundwater Withdrawals from Permit-Exempt Wells.

After the 1924 adjudication, but before the adoption of the DR, instream flows of the Dungeness River were largely restored through negotiation of conditions on existing rights and the purchase and retirement of senior water rights. Reviews of Dungeness River water use efficiency programs and agreements with irrigators concluded that diversions from the Dungeness River were reduced from the pre-1979 average of 150 cubic feet per second (cfs), to 109 cfs before 1990, and down to 56 cfs in 2001. *ECY062224-26; ECY062249-51; ECY 1838-39*. Approximately 25 cfs of senior surface water rights were also acquired for the Trust Water Program for instream flows through negotiation with Dungeness irrigators. *ECY003438 at 003460*. By comparison, Ecology's hydrogeologist calculated the quantity of all projected new groundwater withdrawals in the basin as only a small fraction of the flow restorations achieved pre-rule. *ECY62255-56; ECY62225-26*. As an alternative to closing the groundwater in the basin and requiring mitigation, Ecology could achieve a total offset to the surface water effects of all projected new groundwater withdrawals by purchasing 0.3 cfs of water rights over a twenty-year period. *ECY018885*.

B. The 1924 Adjudication Did Not Include Groundwater, and the Watershed Plans Did Not Recommend Closing Groundwater or Requiring Mitigation for Permit-Exempt Groundwater Uses

The 1924 adjudication did not include groundwater. *ECY 1838*.

Respondents did not cite to any evidence that permit-exempt water rights were interruptible due to senior water rights prior to adoption of the DR.

The 1994 Dungeness-Quilcene Plan did not recommend closing groundwater to permit exempt wells or otherwise. *ECY68519-23*. The 2005 Elwha-Dungeness Watershed Plan (2005 Plan) also failed to recommend closure of the groundwater in the basin or a requirement that new users of permit-exempt wells prove legal availability or obtain mitigation as a condition of obtaining building permits. Instead, the 2005 Plan recommended limiting exempt wells where public water service can be feasibly provided. *ECY070401*.

C. The Economic Analyses Were Used to Sell the Rule to the Public, But Were Not Objectively Reasonable

The economic analyses prepared by Ecology were an integral part of the public process for “selling” the DR to the public. *ECY002355-65*.

Among the benefits calculated by Ecology in the cost-benefit analysis (CBA), were “increased certainty of development” for which it assigned a benefit value of \$19.8 million to \$62 million, and “litigation avoidance” for which it assigned a benefit value of \$2.4 to \$4.7 million. *ECY002395-*

99. These values were based upon a legal assumption generated by the Attorney General's Office that, even prior to adoption of the DR, prospective users of an exempt well had no right to withdraw water, only an "expectation" that holds no value. *ECY056693*. Ecology's economist Tryg Hoff strongly disagreed with these assumptions and communicated to Ecology staff and the AG's office that they were not based on proper economic principles. *See ECY056693; ECY023346; ECY032065-66*.

Prior to adoption of the DR, there was no minimum flow regulation or general stream closure, no groundwater withdrawal regulation, or other condition preventing Clallam County from issuing building permits based on permit-exempt groundwater supplies. *ECY062241; ECY062298-308*. Ecology's subsequent removal of Mr. Hoff from the Dungeness Rule economic analysis was not based upon his personal feelings. In his own words, Mr. Hoff was removed by Ecology because he refused to participate in a "cooked" economic analysis. *ECY003323; ECY003329-30*. Numerous public comments on the draft rule complained about Ecology's rejection of Mr. Hoff's analysis and Ecology's subsequent use of flawed baseline assumptions that skewed the economics in the final CBA.⁴

⁴ *See* multiple citations to Clerk's Papers in Plaintiffs' Opening Brief, CP 5, at p. 7, fn. 5.

IV. ARGUMENT

A. Standard of Review for APA Economic Analyses

Ecology argues that the standard of review for a substantive challenge to its economic analyses is the “arbitrary and capricious” standard, citing only RCW 34.05.570(2)(c) and no case authority. *Ecology Response at 37, fn 29*. Ecology implies that any economic analysis, no matter how outlandish, will satisfy the procedural requirement of RCW 34.05.228,⁵ and can only be substantively challenged under the much more lenient arbitrary and capricious standard. This cynical argument is contrary to the plain meaning of the judicial review statute, which provides,

[T]he 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. (Emphasis added.)

RCW 35.04.570(2)(c). The third basis for rule invalidation, “adopted without compliance with rule-making procedures,” is not a subset of the

⁵ RCW 34.05.328(1) states: “Before adopting a rule described in subsection (5) of this section, an agency must: ... (d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented; (e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection.”

arbitrary and capricious basis, it is a stand-alone basis for invalidation, as indicated by the word “or” in the list. The standard of review is whether Ecology complied or did not comply with the intent of RCW 34.05.328(c)(iii), *i.e.*, whether the economic analyses in the Dungeness Rule meet the intent of the statute.

There appear to be no cases on point with respect to the specific review standard for the adequacy of APA economic analyses when challenged under RCW 34.05.570(2). To the extent it is a mixed question of fact and law, the “clearly erroneous” standard appears to be most applicable. Judicial review of an administrative decision under the clearly erroneous test is broader than a mere search for substantial evidence in support of the decision. *Willard v. Employment Sec. Dep't*, 10 Wn. App. 437, 517 P.2d 973 (1974). The findings of an administrative body may be found to be clearly erroneous by a reviewing court, even where there is evidence to support such findings, when the court can firmly conclude on the record that “a mistake has been committed.” *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 508 P.2d 166, (1973). This requires review of the entire record, not only references cherry-picked by Ecology.

B. The Water Code Applies to MIF Appropriations by Rule

Ecology relies upon a false premise that the Water Code doesn't apply when Ecology appropriates water for instream flows by rule-making. The plain meaning of RCW 90.03.010, .290 and .345, however, is that the Water Code applies to any "appropriation" of water. Instead of making an exception for minimum instream flows (MIFs) and reservations adopted by rule, these statutes specifically include such appropriations within the procedural and substantive ambit of the Water Code.

"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.

"Shall be exercised as hereinafter in this chapter provided" is a mandatory directive regarding the exercise of Ecology's delegated authority to "regulate" or "control" waters of the state, 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). Adopting MIFs by rule is undeniably an exercise of Ecology's authority to "regulate" or "control" water, and Ecology clearly intended to "appropriate" water for MIFs, creating instream flow water rights with priority dates in the Dungeness Rule. WAC 173-518-040(3).

“[I]n the manner provided and not otherwise” is a clear legislative directive that when “appropriating” water, Ecology must do so as provided in the Water Code (this chapter). All words in a statute must whenever possible be given effect and statutes must be read in their entirety and construed together. *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). Therefore, Ecology’s appropriations of water by rule, whether of MIFs or reservations, must meet all the requirements of the Water Code, not merely the requirements of RCW 90.22.010 and 90.54.020.

The trial court may have relied upon Ecology’s argument that rulemaking authorities at RCW 90.22.010 and 90.54.020 were adopted after RCW 90.03.010, without mentioning the need for Water Code procedures, but that interpretation is erroneous for at least two reasons. First, RCW 90.22.010 and 90.54.020(3)(a) do not presuppose that the only way Ecology can protect instream flows is by “appropriating water” and creating MIF water rights. In fact, the words “appropriate” and “water rights” do not appear in either statute’s authorizing language for the protection of instream flows by rule. It was RCW 90.03.345, adopted in 1979 within the Water Code, that identified MIFs established under RCW 90.22.010 or 90.54.020 as “appropriations within the meaning of this

chapter ...” This statute has already been interpreted by this Court as requiring the four-part test for reservations adopted by rule.

“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 v PCHB*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000) and RCW 90.03.290(3). Because RCW 90.03.345 treats MIFs and reservations identically, the plain meaning of RCW 90.03.345 is that MIF water rights must also satisfy the 4-part test.⁶

Similarly, maximum net benefits analyses under RCW 90.54.020 and 90.03.005 are not optional when Ecology appropriates water for MIFs. Protecting only one interest at the expense of others with no balancing test leads to unintended consequences not supported by the policy fundamentals of RCW 90.54.020. How can the public’s interest in adequate water for domestic purposes, *see* RCW 90.54.020(5), be

⁶ Ecology’s Response (p. 29) and CELP’s Response (p. 14) assert that there is a distinction between MIFs and reservations under RCW 90.03.345 because reservations serve people. There is not one shred of language in any of these statutes to support this distinction.

protected if Ecology always defaults to protecting MIFs without a proper balancing test? Simply put, the legislature's intent within this statutory scheme requires a public interest evaluation before such a lopsided and impactful appropriation, otherwise the multiple statutory references to public interest and public welfare would be meaningless.

The trial court missed this, and Respondents ignore this logic in their briefing. When the rule-making process includes appropriations for MIFs and reservations, it is more than just a rule. It invokes the Water Code and must be consistent with: (1) statutory water fundamentals at RCW 90.54.020, (2) Water Code procedures and substantive requirements; and (3) APA rulemaking requirements. At a minimum, there must be a meaningful evaluation of public interest, not merely accepting public comments.

Ecology cites to a misleading "fact" in order to justify not conducting a maximum net benefits (MNB) analysis or four-part test: the "over-appropriation of the Dungeness River." Ecology and CELP fail to acknowledge that instream flows were largely restored pre-rule, and that the groundwater was not adjudicated or otherwise found to be over-allocated. Ecology closed the groundwater despite contrary recommendations in the 2005 Plan and without balancing any interests between environmental protection and domestic water needs. The trial

court erred in concluding that Ecology complied with its statutory authority, because Ecology clearly failed to comply with Water Code requirements to evaluate and balance the public interests.

C. The Watershed Planning Act Does Not Supersede the Water Code

Ecology argues that RCW 90.82.080(1)(a)(ii), (1)(b) requires adoption of the recommended minimum flows from the 2005 Plan. This statute does not supersede the Water Code, nor does it authorize Ecology to go further in closing groundwater or requiring mitigation than the local watershed plan recommends. The challenged DR adopted by Ecology differs from the 2005 Rule in many respects, including the requirement that all new permit-exempt appropriations are subject to the stream closures and minimum flows and must be mitigated as provided in the rule (WAC 173-518-070(3)); the failure to recognize inchoate permit exempt water rights, crafted as an exclusion of only those permit-exempt uses “where regular beneficial use began before the effective date of this chapter” (WAC 173-518-010(3)(b)); the adoption of very limited groundwater reservations that must be replenished with mitigation (WAC 173-518-080); and the adoption of maximum depletion amounts that trigger denial of new water uses, including permit-exempt wells (WAC 173-518-085). These elements of the DR were not addressed in the 2005

Plan. It would be absurd to excuse Ecology from its statutory obligations because of the recommendations of a planning unit on a different subject.

Because of these significant differences between the 2005 Plan and the DR, Ecology cannot claim that its adoption of the groundwater closure, reservations, and mitigation requirement were “required” by RCW 90.82.080. The Court should not interpret RCW 90.82.080 in isolation from the Water Code and allow Ecology to use it to evade Water Code procedures designed to protect the public interest.

D. RCW 90.82.080 does not exempt the Dungeness Rule from Economic Analyses under the APA

Ecology argues that RCW 90.82.080 exempts the DR from economic analyses required for “significant legislative rules.” As disclosed in the previous section, the rule Ecology adopted differs substantially from the rule recommended by local watershed planning. Despite the fact that these regulations significantly altered the availability of water in the basin and were not part of the 2005 Plan, Ecology claims that the economic analyses were “optional.” The Court should take note that property owners and associations of farmers, realtors, and builders do not have one of the statutory vetoes to adoption of minimum instream flows by watershed planning units – those are limited to governmental entities and participating tribes. RCW 90.82.080(1)(a)(ii). Therefore,

Ecology's compliance with the MNB, the four-part test, and APA economic analyses is particularly important to Appellants.

E. RCW 90.54.210 Does Not Cure the Dungeness Rule's Reliance on Flawed and Inadequate Reservations

Appellants challenged the validity of the reservations at WAC 173-518-080 because they were based on OCPI. Ecology admits the OCPI basis for the reservations, but argues that ESSB 6513, a special legislative act in response to the *Swinomish* decision, cures the DR reservations. Appellants disagree. ESSB 6513, codified at RCW 90.54.210, is a vague statement of intent, not an amendment of the OCPI statute in response to the Court's interpretations in *Swinomish* or *Foster*. It does not validate Ecology's use of OCPI in a manner that is completely contrary to the Supreme Court's interpretation. The Dungeness reservations are permanent appropriations based on OCPI, and thus clearly contrary to the Supreme Court's interpretation of Ecology's OCPI authority in *Swinomish* and *Foster*. ESSB 6513 does not even mention either case or the Court's interpretations.

If ESSB 6513 is applied as suggested by Ecology, it would direct the outcome of this case (by blocking review of the validity of the DR reservations), which was pending at the time ESSB 6513 was adopted. That would interfere with judicial functions and violate the separation of

powers doctrine. See *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 507-11, 198 P.3d 1021 (2007).

Even if ESSB 6513 rescues the reservations at WAC 173-518-080, Ecology's rule adoption was premature because mitigation was not in place when the rule was adopted. Ecology cites *R.D. Merrill v. PCHB*, 137 Wn.2d 118, 969 P.2d 458 (1999) as authority that seasonal water rights can be changed to year-round uses for future mitigation sources for the Dungeness Water Bank (DWB), but Ecology ignores the current legal standard that would apply to change applications in a basin with minimum instream flows. *Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015) rejected out-of-kind and out-of-season mitigation for legal impacts to year-round minimum flows. Under the *Foster* standard, adequate year-round legal mitigation for the DWB is not likely to be available in the future, which will result in the inability to obtain building permits based on the rule's close and mitigate approach to groundwater. Ecology's mitigation plan for the DR assumed incorrectly that there would be no problem finding mitigation sources for the DWB. Because of this defect in the DR, the DWB will eventually run out of water rights and fail to support the very domestic uses of groundwater that Ecology's economic analyses claim credit for preserving.

Ecology’s regulatory approach for the DR, including “close and mitigate” with limited reservations that are not “Foster-compliant,” is doomed to fail and was not adequate to support adoption of the rule. It is inconsistent with the assumptions by Ecology in its economic analyses for the DR, by which Ecology presumed that there were significantly more benefits to development of rural land than costs. Clearly then, it is also not an adequate balancing of interests under MNB and four-part test.

F. The Dungeness Rule Stream Closures Exceed Ecology’s Authority

Ecology cites to *Postema* for authority to close streams in an instream flow rule. The appellants in *Postema*, however, were challenging the application of existing instream flow rules to new permit applications, not the adoption of stream and groundwater closures in an instream flow rule. In *Postema*, the Court was not asked to address the arguments raised in Appellants’ Opening Brief, which turn on the interpretation of RCW 90.54.050 and 77.57.020. Ecology’s stream closure authority derives from 90.54.050:

[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.)

This statute is more specific to the subject than the general Water Code rulemaking statute cited by Ecology:

“The director shall establish and promulgate rules governing the administration of chapter 90.03 RCW.” RCW 43.21A.064(9)

The CES describes Ecology’s intentions, admitting that the purpose of the closures in the DR was to protect the new minimum flows. *ECY001915, 001947*. This does not meet the criteria of RCW 90.54.050, and prevents the determination of availability and impairment for new applications on a case by case basis under the four-part test of RCW 90.03.290.

Ecology also cites to authority to close surface waters under RCW 77.57.020, but this statute by its terms applies only to individual applications, not to rule-making.

G. Public Involvement in a Rulemaking is no Substitute for MNB or the Public Welfare Prong of the Four-Part Test

The process of comment gathering after publishing a CR-102 under the APA is not the same as a determination of the public welfare under the four-part test, or a MNB determination balancing the public’s interest in water for instream and out-of-stream uses. In the former, Ecology merely has to hold a public meeting and accept comments, but is under no obligation to deliberate their merit, especially if they contradict

Ecology's preferred result. For the latter, Ecology has to make an actual determination regarding the merits, which is reviewable under the APA. It is more than checking off a procedure on a checklist.

This Court determined in the *Postema* and *Foster* cases that no further public interest evaluation can lead to impairment of minimum flows after they are adopted.⁷ It is Ecology's and CELP's position that MNB and four-part test public welfare evaluations are not required before appropriating water for MIFs by rule. If not before or after adoption, then when? Ecology's argument effectively writes the public interest out of the statutory scheme, contrary to the plain meaning of the MNB clauses and the Water Code.

H. Ecology Has no Authority with Respect to Altering the Priority Date of Permit-Exempt Water Rights

In *Rettkowski v. Ecology*, 122 Wn.2d 219, 227, 858 P.2d 232 (1993), the Court held that Ecology has no authority to adjudicate or alter existing water rights, that being the sole province of the superior courts. Permit-exempt water uses are appropriations and subject to the same "first in time, first in right" rule as permits and certificates. *Campbell & Gwinn*,

⁷ "[N]o statute ... requires any further weighing of interests ... and none requiring that economic considerations influence permitting decisions once minimum flows are set." *Postema*, at 82-83. In *Foster*, the Court decided that OCPI could not be used to impair a MIF water right regardless of the public interests in favor of a later permit application. 184 Wn.2d at 476-77.

146 Wn.2d at 17, n. 8. An administrative agency cannot modify or amend a statute through its own regulation. *State v. Thompson*, 95 Wn.2d 753, 759, 630 P.2d 925 (1981). Therefore, Ecology exceeds its statutory authority when, as it did in the DR at WAC 173-518-010(3), it alters the priority date of permit-exempt water uses.⁸

Ecology's argument that rule challenges are governed by the APA, not by common law, is circular. Ecology has no more authority to amend the common law than it does statutory law. The APA does not authorize Ecology to make or amend any laws concerning priority dates, and neither do chapters 90.03, 90.22, 90.44, 90.54 or 90.82 RCW. If Ecology exceeded its statutory authority by regulating existing permit-exempt water rights with senior relation-back priority dates, then that is a valid ground for challenging (and vacating) the DR under the APA.

Beneficial use is the measure of a water right, and is required to perfect a water right, but it has nothing to do with the priority date for permits or permit-exempt water rights. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-90, 957 P.2d 1241 (1998). Under the

⁸ 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).

Water Code, priority dates relate back to the date of an application. RCW 90.03.260. Because permit-exempt uses require no application by definition (see RCW 90.44.050) it can be inferred that the pre-code method of notice and relation-back priority dates applies. So long as a permit-exempt well user is diligent in applying water to a beneficial use, her priority date relates back to the first notice of intention to do so. *See Hunter Land Co. v. Laugenour*, 140 Wn. 558, 565 (1926).

Ecology and CELP's arguments completely miss this point. The language cited by Ecology in 90.44.050 does not relate to the question of priority dates, only to the equality of permit-exempt and permitted ground water rights based on ongoing beneficial use. Ecology's citation to RCW 90.03.247 is also inapplicable, because that statute does not, by its terms, apply to permit-exempt uses of water, only to "applications."

Relation-back priority dates are a feature of common law prior appropriation, and the Legislature codified prior appropriation as the sole means of establishing water rights in Washington. If the Legislature intended to do away with relation-back priority dates for permit-exempt uses, which would distinguish them from all other water rights for out-of-stream uses, it would have done so expressly. RCW 90.44.050 is silent on the question of priority dates for permit-exempt water rights, which

indicates that the Legislature did not intend to treat such rights differently than all other post-Code water rights with relation-back priority.

I. The Cost Benefit and LBA Analyses Are Clearly Erroneous

Ecology's economic baseline of "over-appropriation" is not correct as to groundwater in the basin, because groundwater was never adjudicated in the Dungeness watershed and there was no instream flow rule in effect from which impairment or legal unavailability of water could be inferred. Ecology's references to *Swinomish* and *Fox v. Skagit County*, 193 Wn. App. 254 (2016), as authority that new permit-exempt uses of water were interruptible or required mitigation before the rule are therefore misplaced. It was the DR that closed groundwater to protect MIFs, not pre-rule conditions. Clallam County was still issuing building permits based on permit-exempt wells without mitigation until the DR went into effect. *ECY062241*. Neither the 1994 Dungeness-Quilcene Plan nor the 2005 Plan recommended closure of groundwater to all permit-exempt wells. Nevertheless, Ecology assumed closure or interruptibility of the groundwater as a baseline for its economic analysis,⁹ one of the primary objections Mr. Hoff raised before being reassigned by Ecology.

⁹ CELP makes the same mistake in its Response Brief at p. 10, without providing any evidence that groundwater was interruptible before adoption of the rule.

ECY023346. Ecology also used a baseline assumption that the existing right to use a permit-exempt well as a source of supply for building a home had no economic value to any member of the public. This was based on a significant error by the Attorney General's Office that Ecology refused to correct throughout the rule-making process. Assistant AG Steven North advised Ecology that the time permit-exempt water rights are perfected (beneficial use) is the same as their priority date, rather than a relation-back priority date of when that use of water initiated. Not only did Ecology exceed its authority by applying the DR to permit-exempt water rights with relation-back priority dates, but its economic analyses of the costs and benefits of the rule were completely skewed by this error. Multiple public comments on these errors in the draft CBA were ignored by Ecology. *See, e.g., ECY025673-75; ECY061534; ECY063385-91; ECY061239-40; and ECY62221 at 62227-30*. The CBA was therefore clearly erroneous and violated the APA.

Similarly, the Least Burdensome Alternative (LBA) analysis incorporated these Ecology errors and incorrect legal assumptions. *See* Opening Brief at pp. 41-45. Ecology could have achieved a total offset to the surface water effects of all projected permit-exempt groundwater withdrawals in the basin by purchasing 0.3 cfs of water rights over a twenty-year period. *ECY018885*. That less burdensome alternative was

pointed out to Ecology, *Id.*, but ignored in the final economic analyses. *ECY002355-2499*.

This case is about accountability. If the Court allows Ecology to get away with cooked economic analyses based on flawed legal assumptions to justify closing ground waters and requiring mitigation to protect new MIFs, and at the same time allows Ecology to avoid MNB and public welfare analysis of the effects on future water availability for the public, then what happened in the Dungeness Basin will likely be repeated elsewhere throughout the State. This will have significant economic impacts to rural areas, devastating impacts to individuals owning rural land, and a shifting of tax burdens to urban areas for public services. Based on this, the Court can firmly conclude that “a mistake has been committed,” and the economic analyses are clearly erroneous.

V. CONCLUSION

The act of appropriating water for minimum flows and reservations is more than just adoption of a rule under the APA. Ironically, Ecology refuses to follow the same procedures or conduct the same evaluations it requires of every other appropriation of water under state law. The trial court erred by failing to apply all of the relevant statutes to this appeal.

This case concerns groundwater availability, not just surface waters. Groundwater was not adjudicated in the Dungeness basin and

building permits were still being issued by the county based on permit-exempt wells before the rule. That changed with the appropriation of water for minimum flows and the closure of groundwater without mitigation in the DR. Those changes mandate Water Code procedures and evaluations, including meaningful public interest evaluation. Those changes also frame the economic analyses required by the APA.

The remedy is for this Court to invalidate the DR and hold Ecology accountable when it appropriates the public's water. Ecology has the ability to comply with the statutory scheme to create reservations that provide for both instream flow protection and reliable legal water availability for rural residential uses in the basin.

RESPECTFULLY SUBMITTED this 28th day of July, 2017



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I certify under penalty of perjury under the laws of the state of Washington that on July 28, 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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