

NO. 94004-5

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent,

and

CENTER FOR ENVIRONMENTAL LAW & POLICY,

Intervener/Respondent

CENTER FOR ENVIRONMENTAL LAW AND POLICY'S
RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION1

II. COUNTERSTATEMENT OF THE CASE 2

III. Appellants’ Statement Of The Case Is Improperly Argumentative
And Contains Significant Factual Misrepresentations. 2

A. Essentially All Of The Dungeness River’s Flow Has Already Been
Appropriated For Irrigation. 3

B. Diversion of Water Threatens Fish Populations. 3

C. Groundwater Withdrawals Affect Streamflows 4

D. The Dungeness Rule Is The Product Of A Long Collaborative
Process Involving Governments, Tribes, Agencies And Other
Stakeholders. 5

E. The Dungeness Rule Provides For Mitigated Use Of New Permit-
Exempt Wells. 6

IV. STANDARD OF REVIEW 7

V. ARGUMENT 8

A. Appellants’ Arguments That The Rule Took Away A “Right” To Use
Groundwater And That The Public Interest Was Not Considered Are
Logically Incorrect. 8

1. The Rule Does Not Foreclose Use Of Permit-Exempt Wells, But
Provides Increased Certainty For Well Users. 8

2. There Is No Vested Right To Use Of A Permit-Exempt Well
Simply By Virtue Of Land Ownership. 10

B.	Appellants Cannot Establish that the “Four-Part Test” Applies to Adoption of Instream Flows.	12
1.	Instream flows and permit-based appropriations are established by different mechanisms.	13
2.	Petitioners’ Argument Regarding <i>Swinomish</i> Rests On A False Equivalence Between Instream Flows And Reservations Of Water.	14
3.	The Statutes Providing For Establishment Of Instream Flows Are More Recent And Specific Than RCW 90.03.290.	15
4.	The Four-Part Test Would Not Demand The Allocation Of Water For Domestic Use Urged By Appellants	17
C.	The Argument Regarding the Water Availability Prong of RCW 90.03.290(3) is Actually an Attack on Instream Flow Setting.	19
D.	The Details of How the Dungeness Water Bank Operates Are Not Part of the Rule, And Are Not Before the Court in This Case.	20
E.	The Legislature Has Specifically Explained That The Dungeness Reservations Are Consistent With Legislative Intent And Therefore Within Ecology’s Statutory Authority.	21
F.	The Water Code’s Maximum Net Benefits Language Does Not Require That Additional Water Be Set Aside For Development Where All Of The Water In The River Has Already Been Appropriated	23
VI.	CONCLUSION	25
VII.	CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

CASES

Aviation West Corp. v. Dep’t of Labor & Industries, 138 Wn.2d 413, 980 P.2d 701 (1999) 8

Cannabis Action Coal. v. City of Kent, 183 Wn.2d 219, 227, 351 P.3d 151 (2015) 10

Ecology v. Bureau of Reclamation, 118 Wn.2d 761, 827 P.2d 275 (1992) 23

Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 43 P.3d 4 (2002) . . 9, 10, 22

Estate of Little, 106 Wn.2d 269, 283, 721 P.2d 950 (1986). 16

Foster v. Ecology, 184 Wn.2d 265, 362 P.3d 959 (2015) 20, 21, 22

Fox v. Skagit County, 193 Wn. App. 254, 372 P.3d 784 (2016) (*review denied* January 4, 2017) 9, 10, 12

Hillis v. Ecology, 131 Wn.2d 373, 932 P.2d 139 (1997). 7

Postema v. Poll. Cont. Hrgs Board, 142 Wn.2d 68, 11 P.3d 726 (2000) 9, 12, 19, 23

Swinomish Indian Tribal Community v. Department of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013) 11, 13, 14, 16, 19, 22, 23

Tunstall ex rel. Tunstall v. Bergeson, 141 Wn.2d 201, 5 P.3d 691 (2000) 16

STATUTES

RCW 19.27.097 3, 8, 10

RCW 19.085.030 6

RCW Chapter 34.05 7, 14

RCW 34.05.310 6

RCW 34.05.320 6

RCW 34.05.325	6
RCW 34.05.325(6)	6
RCW 34.05(328)(1)	6
RCW 34.05.570(1)	7
RCW 34.05.570(2)	7
RCW 90.03.005	22, 24
RCW 90.03.010	10, 11
RCW 90.03.247	15, 18
RCW 90.03.250	13
RCW 90.03.250-340	15
RCW 90.03.260	13
RCW 90.03.290	1, 15, 16, 17, 18
RCW 90.03.290(1)	13
RCW 90.03.290(3)	11, 12, 13, 15, 16, 17, 18
RCW 90.03.345	14, 19
RCW Chapter 90.22	17
RCW 90.22.010	13, 14, 15, 16, 17, 24
RCW 90.22.020	13
RCW 90.44.030	10
RCW 90.44.050	1, 6, 15
RCW Chapter 90.54	17
RCW 90.54.020	11, 13, 16, 19
RCW 90.54.020(2)	22, 24
RCW 90.54.020(3)	14, 15, 17, 21, 24

RCW 90.54.040.	14
RCW 90.54.050	15, 16
RCW 90.54.050(1)	14
RCW 90.54.210.	22
RCW 90.82	5
RCW 90.82.080(1)(b)	6
Laws of 1917, Ch. 117, section 31.	16

REGULATIONS

WAC 173-201A-310	19
Chapter 173-518 WAC	1
WAC 173-518-030	20
WAC 173-518-040	12
WAC 173-518-070	12
WAC 173-518-070(3).	2, 6
WAC 173-518-075(2)	21
WAC 173-518-080	15
WAC 173-546-070(1)(c)	15

I. INTRODUCTION

The Superior Court correctly applied the law when it found that the Dungeness River Rule, Chapter 173-518 WAC (the “Rule”) did not exceed Ecology’s statutory authority, that the Rule was not adopted without compliance with statutory procedures, and that Ecology’s adoption of the Rule was not arbitrary and capricious. Appellants simply argue that the law should be different than it is, because they believe that their interest in obtaining water for domestic use outweighs both settled Washington law and the time-honored prior appropriations system. They ask this Court to remove permit-exempt domestic wells¹ from Washington’s prior appropriations system, and allow their unfettered use to impair instream flows and more senior users of water.

Not only do Appellants seek to overturn the prior appropriations system as it relates to water for development, but they ask this Court to hold that establishment of instream flows must meet the “water availability” prong of RCW 90.03.290’s “four-part test.” This would eviscerate the protections granted to instream values by the Legislature, with disastrous consequences for Washington’s fisheries and other environmental resources. This Court should decline Appellants’ invitation to restructure our water laws, and should affirm the Superior Court.

¹ Certain small uses of groundwater are exempt from the permitting process, but not from other requirements of the Water Code, under RCW 90.44.050.

II. COUNTERSTATEMENT OF THE CASE

A. Appellants' Statement Of The Case Is Improperly Argumentative And Contains Significant Factual Misrepresentations.

Rather than being a “fair and brief summary” of the facts, much of the Statement of the Case consists of improper argument. Appellants also inaccurately paint a picture of a Rule that places extraordinary burdens on landowners. For example, they claim that future domestic water use is subject to an “unwieldy well-by-well ‘mitigation’ apparatus,” and that the Rule’s provisions are “so complicated and uncertain that they fail to deliver a ‘yes or no’ answer” to questions of water availability.

Appellants’ Opening Brief (App. Br.) at 11, *Id.* at 12. Both statements are objectively false. The Rule provides that new permit-exempt water use may be mitigated either through a water banking system or through an individual mitigation plan. WAC 173-518-070(3)(a). By its very nature, a water bank *avoids* any need to provide mitigation on a “well-by-well” basis; rather, it allows a landowner to simply pay the cost of mitigation to the water bank without having to do any sort of individualized analysis. There is nothing “unwieldy” or “complicated” about this process; in fact, from a homeowner’s point of view it is simple and predictable.

Appellants also suggest that “[t]his 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.” App. Br. at 42-3. This dire contention is belied by the provisions of the very Rule that Appellants challenge, which specifically allows for new permit-exempt well use even while adopting an instream flow.

B. Essentially All Of The Dungeness River’s Flow Has Already Been Appropriated For Irrigation.

Because the Dungeness River’s basin is relatively dry, it is the most heavily developed for irrigation of all Western Washington rivers; as much as 80% of its flow has historically been diverted for irrigation. ECY071754; ECY007890. Flow is lowest in late summer, when the mean flow (measured above the major agricultural diversions) is 230 cfs in August and 161 cfs in late September. ECY070224; ECY 065845-6. Enough water rights have already been issued to more than account for the entire late summer flow.²

C. Diversion of Water Threatens Fish Populations.

The Dungeness River (the “River”) is home to salmonids including

² A 1924 adjudication identified 579 cfs of water rights. ECY069967. A 2000 review by Ecology identified certificates and permits for diversion of 207.7 cfs from the Dungeness. ECY069966. The fact that there is still water in the River indicates that not all of these rights are being exercised, but the fact remains that any new water right would be junior to all existing rights and potentially interruptible.

pink, chinook, coho, and chum salmon, steelhead, and bull trout. Fish populations have decreased dramatically since European settlement,³ and low summer flows, largely due to diversion of water for irrigation, are a primary cause.⁴ ECY071782; ECY070554; ECY071736. Occasional high flows or floods are also important in supporting a healthy stream environment by affecting channel shape, cleaning out debris, and creating habitat for some species. ECY012658; ECY015377, ECY071768; ECY065844.

D. Groundwater Withdrawals Affect Streamflows.

Surface streams in East WRIA 18, including the Dungeness River itself, are in “hydraulic continuity” with groundwater and may gain or lose water depending on groundwater level. See ECY069200-268; ECY069889. Much of the lower River loses water in this way. ECY069208; ECY069234. Significant declines in groundwater levels have been documented in association with the City of Sequim’s well field.

³ Most Dungeness salmonid stocks are either listed as Threatened under the Endangered Species Act, or state-listed as “depressed” or “critical.” ECY 070553. Natural (non-hatchery) spring chinook spawning escapement has been fewer than 100 fish in some years. ECY 071783. “Only a handful” of fall chum salmon return to the Dungeness and other streams in the watershed on an annual basis. ECY071785. Wild coho and pink salmon stocks are similarly reduced. ECY 071786; ECY 071789.

⁴ As early as 1930, it was recognized that irrigation ditches depleted the river of water during the spawning season. ECY071836. The Dungeness River Management Team identified water withdrawals as the primary reason preventing upstream migration of pink and chinook salmon. ECY010382. The National Marine Fisheries Service, in a letter commenting on the proposed Rule, also expressed concern (“NMFS believes there is abundant evidence that most years, withdrawals from the Dungeness River are a substantial limiting factor for productivity of chinook salmon by adversely affecting streamflows . . .”) ECY072186.

ECY069882-3. Additional withdrawals would be expected to further reduce groundwater storage. ECY069888

E. The Dungeness Rule Is The Product Of A Long Collaborative Process Involving Governments, Tribes, Agencies And Other Stakeholders.

Appellants contend that the Rule was imposed on landowners in the Dungeness Basin without concern for the public interest. App. Br. at 5; *Id.* at 22-3. In fact, the Rule was adopted only after decades of consultation and study.⁵ The Dungeness Instream Flow Group (“DIFG”; made up of representatives of the National Marine Fisheries Service, Ecology, the then-existing Washington Departments of Fisheries and of Wildlife, the U.S. Fish and Wildlife Service, and the Jamestown S’Klallam Tribe) developed recommendations for instream flow in 1993.⁶ Watershed Management Act (RCW 90.82) planning for WRIA 18 began in 1998 and the Watershed Planning Unit⁷ agreed to use the DIFG’s recommendations in 2004. ECY069771-070954; ECY070477-8; ECY069775-6. Where a Watershed Planning Group has agreed on

⁵ See Chapter 1 of the Watershed Plan for a full history and description of the various working groups and the reports that have been produced. ECY069824-836.

⁶ The recommendations are for flows of 575 cfs from November through March, 475 cfs from April-July, and 180 cfs from August to October. ECY070274.

⁷ The team making recommendations for the East WRIA 18 flows (the Dungeness) included representatives from government (Clallam County, City of Sequim, Washington Departments of Ecology and Fish & Wildlife), property owners (Riverside Property Owners, River Mile 0-3.25 and River Mile 3.25-4.25), water users (Dungeness River Agricultural Water Users Association), and environmental groups (Protect the Peninsula’s Future, North Olympic Land Trust). ECY069774.

instream flows, Ecology is obligated to undertake rulemaking to adopt those flows⁸. RCW 90.82.080(1)(b). Ecology developed the Rule, incorporating the instream flow recommendations, through the APA rulemaking process, which provides for substantial public input.⁹

F. The Dungeness Rule Provides For Mitigated Use Of New Permit-Exempt Wells.

In order to protect streamflows while still allowing development, the Rule contemplates new permit-exempt domestic wells as provided for by RCW 90.44.050, provided that the water use is mitigated or is shown not to impact surface water. WAC 173-518-070(3). The Rule neither requires that mitigation be done on a case-by-case basis nor sets out exactly how it is to be accomplished¹⁰; rather, water use may be mitigated through credits purchased from the Dungeness Water Exchange (“Exchange”) or through an individual, Ecology-approved mitigation plan. WAC 173-518-70(3)(a).

⁸ To the extent that Appellants argue the instream flows were set too high, this statutory requirement should be dispositive.

⁹ A Preproposal Statement of Inquiry (RCW 34.05.310) and Notice of Proposed Rule (RCW 34.05.320) were prepared and made available. ECY071266-7; ECY070955. Opportunities for public participation as required by RCW 34.05.325 included an oral hearing in Sequim and solicitation of written comments. ECY000977-00172. A Concise Explanatory Statement, Cost-Benefit Analysis, and Small Business Economic Impact Statement were prepared according to RCW 34.05.325(6)(a), RCW 34.05.328(1), and RCW 19.85.030. ECY001830-2354; ECY002380-002402; ECY072295-072303.

¹⁰ Because the Rule does not prescribe how mitigation is to be done, any challenge to the operation of the water bank is not properly part of this lawsuit. *See* Section IV.D, *infra*.

The Washington Water Trust (“WWT”) was chosen to operate the Exchange. WWT submitted a Mitigation Plan to Ecology that included purchasing or leasing water rights for mitigation and aquifer recharge during times of high flow. ECY071280-91. Ecology approved the Plan on December 19, 2012, before the effective date of the Rule. ECY071278. Under the Mitigation Plan, the Exchange issues mitigation certificates in exchange for a one-time payment.¹¹

III. STANDARD OF REVIEW

Administrative rules are reviewed under the Administrative Procedure Act, Chapter 34.05 RCW. The party challenging a rule has the burden to demonstrate its invalidity. RCW 34.05.570(1)(a). A court will find a rule invalid only if it finds that the rule violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with statutory rule-making procedures, or is arbitrary and capricious. RCW 34.05.570(2)(c). Agency action is arbitrary and capricious if it is “willful and unreasoning, and taken without regard to the attending facts or circumstances.” *Hillis v. Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Where there is room for two opinions, an action

¹¹ Mitigation certificates are intended to provide mitigation for basic indoor domestic use, with the option to purchase mitigation for basic or extended outdoor water use. ECY071287. These mitigation packages are priced at \$1000-\$3000. ECY071291. Mitigation certificates are recorded with the title to the land. ECY024061. Once mitigation has been purchased, a landowner has no further obligation and no case-specific study is required.

taken after due consideration is not arbitrary and capricious. *Id.* This is so even if the reviewing court believes the action was in error. *Id.* In reviewing an agency regulation, the court must “scrutinize the record to determine if the result was reached through a process of reason, not whether the result was itself reasonable in the judgment of the court.” *Aviation West Corp. v. Dep’t of Labor & Industries*, 138 Wn.2d 413, 432, 980 P.2d 701(1999).

IV. ARGUMENT

A. The Argument That The Rule Took Away A “Right” To Use Groundwater Without Considering The Public Interest Is Factually And Legally Incorrect.

1. The Rule Does Not Foreclose Use Of Permit-Exempt Wells, But Provides Increased Certainty For Well Users.

The core of Appellants’ position is that Ecology improperly stripped landowners of a “right” to use of permit-exempt wells for domestic supply without properly considering the public interest. This is both factually and legally incorrect. Appellants claim that the Rule will bar use of permit-exempt wells, so that water for domestic use will not be available. App. Br. at 7 (“loss of the ability to use a permit-exempt well”); *Id.* at 20 (“Ecology ignore[d] ‘out-of-stream needs’”); *Id.* at 42 (setting instream flows “eliminate[s] permit-exempt wells as a source of water under RCW 19.27.097”); *Id.* at 44 (post-Rule permit-exempt wells cannot

serve as water supply for building); *Id.* at 48 (Ecology “ignore[d] rights of the public to access drinking water”). What Appellants fail to acknowledge is that the Rule does *not* prevent use of permit-exempt wells, and in fact provides additional certainty that a landowner will be able to rely on such a well in the future.

Permit-exempt wells, like any other water uses, are subject to the prior appropriations system’s “first in time, first in right” principle. RCW 90.44.030; *Campbell & Gwynn*, 146 Wn.2d at 9; *Fox v. Skagit County*, 193 Wn. App. 254, 264, 372 P.3d 784 (2016) (*rev. denied* January 4, 2017). Under prior appropriations, if there is not sufficient water in the river to provide for all users, junior users with more recent priority dates, including permit-exempt well users,¹² are subject to curtailment of water use in order to protect the water supply for more senior users. RCW 90.44.030; *Postema v. Poll. Cont. Hrgs Board*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000). The Dungeness River’s flow is already greatly over-allocated (*see* Section II.B, *supra*). There is currently an agreement in place by which senior irrigators voluntarily reduce their diversions, but there is no guarantee that they will do so indefinitely. ECY003450. Prior to adoption of the Rule, therefore, any new permit-exempt well was in reality

¹² It appears that Ecology has, to date, refrained from curtailing water use from permit-exempt wells. This does not, however, change the relative priorities of users. As water becomes scarcer, it will become more and more likely that permit-exempt users will be regulated according to their priority dates.

withdrawing water that had already been allocated to senior users.

Pre-Rule, then, new permit-exempt wells could not serve as uninterrupted water sources for domestic use under Appellants' reasoning¹³. RCW 90.44.030. This was true whether or not Clallam County issued building permits based on those wells; County permitting decisions cannot trump state law. *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 227, 351 P.3d 151 (2015); *Fox*, 193 Wn.App. at 270.

Post-Rule, on the other hand, a permit-exempt well user who mitigates (either through the water bank or through an individual mitigation plan) does not impair the instream flow, so faces a much lower risk of curtailment in times of drought. Mitigation purchased through the water bank remains with the title to the land, providing assurances of water availability in the future as well. ECY024056 at 024061. Contrary to Appellants' analysis, then, the effect of the Rule is to provide more, not less, certainty for a property owner who uses a permit-exempt well.

2. There Is No Vested Right To Use Of A Permit-Exempt Well Simply By Virtue Of Land Ownership.

A right to appropriate water is not established until the water has

¹³ Appellants themselves recognize this in their Opening Brief: "Interruptibility of a ground water right renders it inadequate as a water supply for a building permit under RCW 19.27.097." App. Br. at 44.

been put to beneficial use.¹⁴ *See also Campbell & Gwinn* at 9; *Fox*, 193 Wn. App. at 277. Appellants contend, to the contrary, that property ownership confers a “right” to use a permit-exempt well that relates back to the time of subdivision.¹⁵ This assertion is supported only by conclusory statements (“[t]he analogous point in time would be the notice of intent filed by a well driller, or date of application for subdivision . . .”), based on an analogy to “common-law relation-back doctrine.” App. Br. at 19. This reasoning would effectively create a “super-priority” class of water user by removing the beneficial use requirement to establish a water right, as well as improperly allowing new permit-exempt wells to interfere with existing uses (including instream flows). RCW 90.03.010; RCW 90.03.290(3).

Appellants’ position is at odds with both the prior appropriations system in general¹⁶ and with controlling Washington law. RCW

¹⁴ The right to use of water “shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise.” RCW 90.03.010.

¹⁵ Appellants argue that because a landowner must show a legal source of water before obtaining a building permit, certainty can only be provided by relating back the priority date for a permit-exempt well to “when the project was initiated,” perhaps as early as when the land was subdivided.¹⁵ App. Br. at 20. Appellants would create a water right with an early priority date just because a landowner wants “certainty,” not because he or she has complied with the prior appropriations system and the requirements for establishing use of water.

¹⁶ The prior appropriation doctrine, and the “first in time is first in right” priority principle, are founded on the idea that at some point the water in a stream or lake will be insufficient to satisfy all potential users. *Swinomish*, 178 Wn.2d at 598 n 14 (discussing “hardships attendant to *any* water right with a late priority date and too little water available to satisfy all users”). That point is determined by how much water is available, not by whether or not everyone who wishes to build a house has done so.

90.54.020; *Swinomish Indian Tribal Cmty v. Dept. of Ecology*, 178 Wn.2d 571, 598, 311 P.3d 6 (2013) (statutes do not allow “jump to the head of the line” for permit-exempt wells); *Postema*, 142 Wn.2d at 81 (instream flows may not be impaired by subsequent groundwater withdrawals); *Fox*, 193 Wn. App. at 277 (subdivision of property “not sufficient to prove an appropriative water right.”)

The instream flow scheme in the Rule is consistent with *Swinomish*, *Postema*, and *Fox*: permit-exempt wells whose use was not established prior to the Rule’s adoption may not interfere with the Rule’s instream flow, and new permit-exempt water use must be mitigated to prevent any impairment. WAC 173-518-040; -070.

B. Appellants Cannot Establish that the “Four-Part Test” Applies to Adoption of Instream Flows.

Appellants contend that in-stream flow regulations are to be treated in all ways like any other appropriation of water, and that Ecology should therefore employ the same procedures, including the “four-part test”¹⁷ contained in RCW 90.03.290(3), when deciding whether or not to implement an instream flow. Appellants can provide neither statute nor case law in support of this notion.

¹⁷ The “four-part test” requires Ecology to find, before issuing a water right, that 1) water is available for 2) a beneficial use and 3) the proposed appropriation will not impair existing rights or 4) be detrimental to the public interest. RCW 90.03.290(3).

1. Instream Flows And Permit-Based Appropriations Are Established By Different Mechanisms.

Persons who wish to appropriate water must generally apply for a permit from Ecology. RCW 90.03.250, -.260; *Swinomish*, 178 Wn.2d at 583. Ecology’s investigation as to whether water is available is invoked “when an application . . . has been filed.” RCW 90.03.290(1) (emphasis added). Ecology is then directed to issue a permit if it finds that “there is water available . . . and the appropriation thereof *as proposed in the application* will not impair existing rights or be detrimental to the public welfare,” RCW 90.03.290(3) (emphasis added). These passages clearly refer to the process of filing and evaluating an application for a water permit, and neither makes any reference to adoption of instream flows.

Instream flows are established by a very different procedure. The Water Code contains different and more specific language regarding adoption of instream flows, expressly requiring that they be “provided for through the adoption of rules.” RCW 90.22.020. Importantly, establishment of an instream flow involves neither a permit nor a permit application. Rather, the process is initiated by Ecology under the statutory authority provided by the Water Resources Act and the Minimum Flows and Levels Act. RCW 90.54.020; RCW 90.22.010. Neither statute makes

any mention of the four-part test.¹⁸ Rather, establishment of instream flows through rulemaking implicates the APA’s requirements, RCW 34.05.310 *et seq.* And nothing in the APA rulemaking procedures makes any mention of the four-part test. *Id.*

2. Petitioners’ Argument Regarding *Swinomish* Rests On A False Equivalence Between Instream Flows And Reservations Of Water.

Appellants next offer a tenuous rationale for imposing the four-part test on adoption of instream flows based on the Washington Supreme Court’s 2013 *Swinomish* decision.¹⁹ Beginning from the premise that both instream flows and reservations of water for future beneficial uses are referred to as “appropriations” in RCW 90.03.345, Appellants cite to a single sentence in *Swinomish* for the proposition that because reservations must “meet the same requirements as any appropriations of water under the Water Code,” so must instream flows, and that this includes the four-part test. App. Br. at 27. But RCW 90.03.345 states only that reservations of water under RCW 90.54.050(1) and minimum flows under RCW 90.22.010 or 90.54.040 “constitute appropriations.” It neither makes all “appropriations” equivalent, imposes the same requirements for their

¹⁸ This is why the fact that the Legislature did not “exempt the appropriation of water for MIFs from the 4-part test of RCW 90.03.290” (App. Br. at 25) is irrelevant.

¹⁹ The issue in *Swinomish* was Ecology’s use of the “overriding considerations of the public interest” exception in RCW 90.54.020(3) to impair *existing* instream flows. *Swinomish* did not address *adoption* of instream flows.

establishment, nor makes any reference whatsoever to the four-part test.

Appellants' cherry-picking of a single statutory reference²⁰ ignores the fact that the Water Code treats reservations and instream flows quite differently. They are authorized by different statutes, and serve different purposes. Ecology "may" set aside reservations of water, while protection of instream flows is mandatory. RCW 90.54.050; RCW 90.54.020(3). Reservations of water under RCW 90.54.050 are set aside to allow for future beneficial uses, generally out-of-stream, consumptive uses.²¹ In contrast, instream flows are adopted with the intent that where possible, the quantity of water designated by the instream flow rule will remain in the river, to preserve instream values and uses. RCW 90.22.010; RCW 90.54.020(3)(a). These differences demonstrate that the Legislature did not intend instream flows and reservations to be precisely equivalent; because they are not, appellants' argument that the four-part test must be applied to creation of instream flows by rule fails.

²⁰ Appellants are not just cherry-picking RCW 90.03.345's single reference to the term "appropriation," but they are also cherry-picking the four-part test itself. The water permit processes set forth in RCW 90.03.250 through 90.03.340 explicitly establish a statutory "infrastructure" for individual permits, of which the four-part test is one component. Appellants do not argue that this entire structure (for example, RCW 90.03.247's requirement for an application) is also applicable to instream flows, because that would plainly make no sense. Rather, they select one component from this statutory scheme (the four-part test), and impermissibly ignore the statutory whole.

²¹ *See, e.g.*, WAC 173-518-080 (Dungeness River - reserves of water "for domestic use only"); WAC 173-546-070(1)(c) (Entiat River - reserves of water for "domestic, stock watering, commercial agriculture, and commercial/light industrial uses").

3. The Statutes Providing For Establishment Of Instream Flows Are More Recent And Specific Than RCW 90.03.290.

A basic principle of statutory construction is that the more recently enacted and specific statute will control over an older, more general law. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (citing *Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986)). Here, the statutes providing for establishment of instream flows are both more recent *and* more specific than the law governing appropriations of water by permit (including use of water set aside by reservation).

Appropriations based on permit applications, including reservation of water for future use under RCW 90.54.050, must meet the requirements of RCW 90.03.290. *Swinomish*, 178 Wn.2d at 589-90. The four-part test language of RCW 90.03.290 has been essentially unchanged since 1917:

If [the state hydraulic engineer] shall find that *there is water available for a beneficial use*, and the appropriation thereof as proposed in the application will *not impair existing rights or be detrimental to the public welfare*, he shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied.²²

Laws of 1917, Ch. 117, section 31 (emphasis added).

The statutes providing for instream flows, the Water Resources Act

²² The language of current RCW 90.03.290(3) is identical, except for the insertion of “for appropriation” before “for a beneficial use” and substitution of the Department of Ecology for the hydraulic engineer. RCW 90.03.290.

of 1971 and the 1969 Minimum Flows and Levels Act, were enacted long after RCW 90.03.290. RCW 90.22.010; RCW 90.54.020. Neither requires filing an application for a permit or performing the four-part test; rather, RCW 90.22.020 provides that instream flows are to be established by rulemaking. RCW 90.22.020 is also more specific than RCW 90.03.290's general scheme, as it deals with only a single kind of water appropriation.

If the Legislature had wanted to make instream flow setting subject to the four-part test, it could have done so. The legislators who enacted the instream flow statutes were surely aware of the appropriations mechanism of RCW 90.03.290, yet chose to prescribe different procedural requirements for setting instream flows. A 1986 memo regarding "the meaning of the State's instream flow statutes," written by Senior Assistant Attorney General Charles Roe, the primary drafter of RCW 90.22 and RCW 90.54 ("Roe Memo"), makes no mention of the four-part test. ECY064235-45.

4. The Four-Part Test Would Not Demand The Allocation Of Water For Domestic Use Urged By Appellants.

Even if the four-part test of RCW 90.03.290(3) *were* required for establishing an instream flow (it is not, and CELP expressly does not concede otherwise), the argument regarding the water availability requirement would be incorrect. There is no absolute requirement that

water be available at all times before a water right can be granted. For example, new water rights may be issued in basins where the instream flow is not always met. Such rights are simply made interruptible in favor of a more senior instream flow right. RCW 90.03.247. And that is precisely the situation with respect to instream flows themselves: the full amount of the instream flow is only available where that much water is left in the stream after more senior users are satisfied. In other words, instream flows are interruptible by their nature.²³ The Roe Memo discusses this: “it should be noted that the establishment of minimum flows for a stream does not assure that such flows will be in the stream. . . . minimum flows settings constitute only state policy objectives for the stream rather than a reality.” ECY064242.

Protecting “potential habitat” by setting an instream flow is no different than protecting “potential farm production” when an interruptible permit is issued to an agricultural user. The habitat provided by the full amount of the instream flow will be present only in some (wet) years, just as the farmer holding the interruptible water right would be able to use it for irrigation only in wet years.

²³ This is also the reason that the third prong (no impairment of existing water rights) of the four-part test *cannot* apply to instream flows. Because they are “automatically” interruptible, instream flows cannot impair other water rights.

C. The Argument Regarding The Water Availability Prong Of RCW 90.03.290(3) Is Actually An Attack On Instream Flow Setting.

It is important to understand the implications of Appellants' four-part test argument: they seek nothing less than abolition of meaningful instream flow protections. Appellants' argument that an instream flow right could be adopted only where there was sufficient water in-stream to meet the instream flow at all times (and in all years) has profound implications. Most importantly, it would effectively mean that no instream flow could be adopted to protect more than the lowest flow seen in dry or drought years. Protecting only this level of flow would be in conflict with RCW 90.54.020's mandate to protect instream values, as well as the non-degradation provisions of WAC 173-201A-310, as drought-level flows are insufficient to protect instream values such as fish and wildlife, recreation, aesthetics, and navigation.

Requiring all of the water to satisfy an instream flow to be present at all times before a flow could be established would also render instream flows a lesser class of water right (one that could not be issued in an interruptible fashion), and effectively remove instream flows from the prior appropriations scheme. This would surely be the proverbial "absurd result," as it is well-established that instream flows are water rights squarely within the prior appropriations system. RCW 90.03.345;

Swinomish, 178 Wn.2d at 585 (“minimum flow may not be impaired by subsequent withdrawals”); *Postema*, 142 Wn.2d at 82 (instream flow rights subject to same protections as other water rights).

D. The Details Of How The Dungeness Water Bank Operates Are Not Part Of The Rule, And Are Not Before The Court In This Case.

Petitioners’ Brief is rife with statements regarding what they identify as problems with availability of mitigation and allegations that the water banking system in place is contrary to law, in particular this Court’s decision in *Foster v. Ecology*, 184 Wn.2d 265, 362 P.3d 959 (2015). *See* App. Br. at 13 (mitigation plan “fails to comply with court’s standards for mitigation of impacts”); *Id.* at 45. This issue is irrelevant to this case, because the Rule does not govern operation of the Water Bank.²⁴

Appellants argue that mitigation supported by leases of agricultural water is barred by *Foster* because water is not provided year-around and there may be times when impacts on the instream flow are not fully mitigated. App. Br. at 45. Because the Water Bank’s mitigation is inadequate, the argument goes, the Water Bank cannot provide a non-interruptible water supply for homeowners. In turn, they assert that this

²⁴ “Dungeness water exchange” is defined in the Rule as “a water bank pursuant to the Water Resources Management Act, chapter 90.42 RCW.” WAC 173-518-030. The Rule does not set forth how mitigation credits will be generated by the Water Bank. And the Rule does not require that the Water Bank use partial-season, full-season, or any other particular type of water right as mitigation.

“may result in building permit moratoriums²⁵ [sic] unless the Dungeness Rule is invalidated.” *Id.* at 46.

But *Foster* has no bearing on the Rule itself. The issue of whether mitigation *as practiced by the Water Bank* is permissible is irrelevant to the validity of the Rule, and is not before the Court in this lawsuit. Even assuming, *arguendo*, that Appellants are correct and mitigation through the Water Bank’s current practices is not legally sufficient under *Foster*, this would amount to a violation of WAC 173-518-075(2)’s requirement that water uses be mitigated, but would not invalidate the Rule itself (validity of which is the *only* question here). This Court should decline to address this issue until it is properly raised (for example, a challenge to a permit-exempt groundwater use authorized via mitigation purchased through the water bank).

The argument that the reservations are insufficient to supply future needs under *Foster* “because mitigation isn’t available year-round” is also misplaced. App. Br. at 12, note 7. This too, is a challenge to how the Rule is being implemented, not to what the rule actually says. As such it is not relevant to this case. In summary, nothing in *Foster* makes the Dungeness Rule itself invalid.

²⁵ Even if the Rule did result in a moratorium (nothing in the record supports this assertion), Appellants fail to explain why this would necessarily invalidate it.

E. The Legislature Has Specifically Explained That The Dungeness Reservations Are Consistent With Legislative Intent And Therefore Within Ecology’s Statutory Authority.

Appellants argue that the reservations of water in the Dungeness Rule are not permissible under the overriding concern of the public interest (OCPI) exception in RCW 90.54.020(3)(a), and suggest that this should invalidate the Rule.²⁶ App. Br. at 28-33. While it is the province of the court to determine legislative intent, a statute’s meaning is discerned from “all that the Legislature has said *in the statute and related statutes which disclose legislative intent* about the provision in question.” *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002) (emphasis added).

There can be no clearer indication of the bounds of statutory authority provided by the Legislature than a direct statement by the Legislature that the reservations of water in the Dungeness Rule were consistent with legislative intent, and that Ecology was “specifically authorized” to maintain and implement the reservations. RCW 90.54.210. Appellants’ argument that this Court’s prior *Foster* and *Swinomish* decisions, regarding different instream flow rules, should trump a specific statement of legislative intent is without merit.

²⁶ CELP submits that even if the reservations were invalidated, it would not require invalidating the Rule itself. This point is addressed in detail in CELP’s Response to Petitioners’ Opening Brief before the Superior Court. CP430-1.

F. The Water Code’s Maximum Net Benefits Language Does Not Require That Additional Water Be Set Aside For Development Where All Of The Water In The River Has Already Been Appropriated.

Two statutes provide that the waters of the state shall be managed to obtain “maximum net benefits.” RCW 90.54.020(2) (allocation to be based “generally” on securing maximum net benefits); RCW 90.03.005 (maximum net benefits arising from both diversionary uses and retention of water instream). Previous decisions of this Court have recognized that while total benefits may be maximized by including some out-of-stream uses, this should not occur at the expense of protecting instream values as required by RCW 90.54.020. As the *Swinomish* Court noted, “even as to allocation of water not already spoken for, best use of water does not necessarily mean economically beneficial use.” *Swinomish* at 599. *See also Ecology v. Bureau of Reclamation*, 118 Wn.2d 761, 773, 827 P.2d 275 (1992) (recognizing that “maximum net benefits” may be realized by leaving water in stream).

Appellants assert that Ecology should not “allocate all available water in a river or stream to instream flows,” and contend that if Ecology does not perform a maximum net benefits (MNB) balancing test when adopting instream flow rules, it will be “too late” and Ecology will be allocating an “empty pot.” App. Br. at 21; *Id.* at 22.

There are two problems with Appellants’ argument. Most

fundamentally, Appellants' position that "all available water" should not be allocated to streamflows ignores the reality that *there is no water to allocate* in the Dungeness. Rights have already been issued for appropriation of more water than normally flows in the river.²⁷ See Sec. II.B, *supra*. The Rule does not allocate all of the water to streamflows, as Appellants complain of, because there is no water to allocate. Rather, the instream flow protects what water is not being diverted by the users who already have rights to it, and prevents further over-allocation.

Second, Appellants' argument assumes that the MNB analysis involves only water that has not already been allocated at the time of rulemaking, and that only the benefits from in- and out-of-stream uses begun from the time an instream flow is set are to be considered. But nothing in RCW 90.03.005 or RCW 90.54.020(2) limits MNB analysis to future allocations; rather, consideration of MNB logically implicates *all* benefits flowing from both existing and contemplated uses of water (which would include the benefits from any diversionary uses already established). In this case, very large out-of-stream benefits have already been realized through appropriation of most or all of the River's water.

²⁷ For this reason, closing the basin to new withdrawals as part of the rulemaking process is appropriate and well within Ecology's statutory authority. *Postema*, 142 Wn.2d at 94-95.

V. CONCLUSION

For the reasons discussed above, Appellants' attempts to invalidate the Dungeness River Instream Flow Rule, and more generally their attack on instream flow setting, fail. The Rule is well within Ecology's statutory authority and is protective of the River and its instream resources, while still allowing development in the basin. Respondent/Intervenor CELP respectfully requests that this Court affirm the Superior Court's decision.

RESPECTFULLY SUBMITTED this 17th day of May, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 2017, I caused the forgoing Response Brief to be served on the parties herein as indicated below:

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

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