

NO. 94004-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

and

CENTER FOR ENVIRONMENTAL LAW & POLICY,

Intervenor/Respondent.

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**RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF  
ECOLOGY'S RESPONSE TO APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

The Department of Ecology adopted the Dungeness Water Management and Instream Flow Rule, WAC 173-518, after approximately twenty years of negotiations with multiple and diverse stakeholders. The Rule satisfies Ecology's statutory obligation to preserve and protect instream values in the basin, including endangered fish, while also providing legislatively approved reserves of water to allow for some new development in the basin.

Ecology adopted the Rule pursuant to its statutory rulemaking authorities, RCW 90.82, the Watershed Planning Act, RCW 90.22, the Minimum Water Flows and Levels Act, and RCW 90.54, the Water Resources Act of 1971. The Rule meets Ecology's statutory mandate that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values." RCW 90.54.020(3)(a).

Appellants' challenge to the Rule ignores these authorities, as well as this Court's decision in *Dep't of Ecology v. Public Utility District No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (*Elkhorn*). In *Elkhorn*, the Court approved of the scientific Instream Flow Incremental Methodology

(IFIM) that Ecology uses to determine what minimum flows are necessary to preserve and protect instream values.

The fundamental flaw in Appellants' challenge is their argument that the Rule allocates all remaining water in the basin to instream flows. The basin has been overappropriated for decades. Appellants' challenge to the Rule thus improperly seeks to elevate out-of-stream uses for growth above instream values. Appellants argue that instream flow rulemaking should involve a "maximum net benefits" test and application of the "four-part-test" that the agency employs when it evaluates applications for water permits. If these separate authorities applied to Ecology's instream flow rulemaking activities, Ecology could not satisfy the statutory mandates in RCW 90.22 and RCW 90.54 to preserve and protect *instream* values. Instream flow rulemaking also does not require a "maximum net benefits" test to weigh the public interest before rule adoption because the public interest is thoroughly weighed through watershed planning and the Administrative Procedure Act rulemaking process.

Although instream flows have the status of water rights once they are established by rule, this does not change that they are established differently and for different purposes than consumptive water rights. Recent decisions of this Court do not support Appellants' arguments. The Court should therefore fully uphold the Rule.

## II. COUNTERSTATEMENT OF ISSUES

1. Whether the Rule is consistent with Ecology's statutory rulemaking authorities, which Appellants largely neglect to discuss.
  - a. Whether the Watershed Planning Act, RCW 90.82, legally obligated Ecology to adopt by rule the flow levels set in the Rule.
  - b. Whether the "four-part-test" only applies when people apply for a permit to use water out of streams.
  - c. Whether Appellants' "maximum net benefits" argument fails because the public interest is already well-considered through the rule adoption process.
  - d. Whether the Legislature fully validated the reserves of water in the Dungeness Rule when it adopted RCW 90.54.210.
  - e. Whether Appellants' argument that Ecology lacks authority to close waters to further appropriation is precluded by the Supreme Court's decision in *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000).
  - f. Whether the plain language of RCW 90.44.050 defeats Appellants' argument that the common law relation-back doctrine should apply to permit exempt wells.
2. Whether Appellants have satisfied their burden of demonstrating that Ecology adopted the Dungeness without compliance with statutory rulemaking procedures.
  - a. Whether Ecology's economic analyses are reasonable and supported by the record.
  - b. Whether the Rule's mitigation requirement is valid.
3. Whether Appellants have satisfied their burden of demonstrating that the Dungeness Rule is arbitrary and capricious.

### III. STATEMENT OF THE CASE

Ecology offers this statement of the case, based upon the comprehensive administrative record filed herein. Citations to the agency record begin with “ECY” followed by a Bates number.<sup>1</sup>

#### A. Background on the Dungeness Basin and the Dungeness Rule

##### 1. The Dungeness River Basin

The Dungeness River watershed is located in Clallam County and a small portion of Jefferson County. ECY 1838. The river is 32 miles long and drops 7,300 feet from the Olympic Mountains to the Strait of Juan de Fuca. ECY 71216. Flows in the river are heavily dependent on mountain snowfall. ECY 71217. The Dungeness Valley is a prime agricultural area with mild winters and summers, and precipitation averaging just 15 to 20 inches a year. ECY 6610. Clallam County and Sequim have experienced rapid population growth in the last 20 to 30 years. *Id.* More people in the watershed place greater pressure on the basin’s finite water resources. ECY 71217.

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<sup>1</sup> Appellants’ Statement of the Case is almost entirely legal argument and thus non-compliant with RAP 10.3(a)(5), which requires a fair statement of the case “without argument.” Additionally, Appellants improperly refer the Court to their pleadings below for the facts relevant to their claims: “The facts relevant to Appellants’ claims are set out in Plaintiffs’ Opening Brief, CP 5, at pp. 3-16, and in Plaintiffs’ Reply Brief, CP 9, at pp. 8-15.” *See* Appellants’ Opening Brief (Opening Br.) at 5–6.

Groundwater in the basin is contained in several aquifers that are highly connected to surface water bodies, including the Dungeness River, and nearly everyone in Clallam County gets their drinking water from a well. ECY 7984. Because of the connections between ground and surface water, pumping water in a well can reduce the amount of water that flows into a stream. ECY 2172, ECY 7984. Over the past thirty years, groundwater levels in the basin have been declining. ECY 7985. Residents outside the city of Sequim rely on small community water systems and permit-exempt wells.<sup>2</sup> *Id.* Thousands of permit-exempt wells have been drilled in the county since the 1970s, most in the shallowest of three aquifers in the basin. ECY 7986–7987. In 2008, Ecology modeled the impacts of groundwater withdrawals to surface water bodies in the Dungeness Basin using the “best tool currently available to estimate hydrologic impacts within the local groundwater flow system.” *Id.*

The basin is one of 16 “fish critical” basins in Washington, with a known shortage of water for endangered species. ECY 71464. The basin is home to several important fish species including Chinook, Coho, pink and chum salmon, steelhead, cutthroat, and bull trout. There are four species protected under the federal Endangered Species Act: Chinook and summer

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<sup>2</sup> RCW 90.44.050 requires a state permit to withdraw and use groundwater, excepting certain small uses, including single and group domestic uses that are less than 5,000 gallons per day. These small domestic uses are known as “permit exempt wells.”

chum salmon, steelhead, and bull trout. ECY 1838, ECY 6610, ECY 71218.<sup>3</sup> Stream flows during the critical low-flow months of the summer and fall have been identified as an important factor in the decline and potential future recovery of these populations. ECY 1838.

Three federally recognized Native American tribes have interests in the Dungeness Watershed—The Lower Elwha Klallam, Jamestown S’Klallam, and Port Gamble S’Klallam. ECY 71218. Through treaties, these tribes have fishing rights in their historic “usual and accustomed fishing areas,” along with asserted rights to healthy salmon habitat. *Id.*<sup>4</sup> The Dungeness River is the river of most interest to the nearby Jamestown S’Klallam Tribe. ECY 3233. The Jamestown S’Klallam Tribe, particularly, has expressed its desire to pursue a path of cooperation throughout the watershed planning and rule making process as an alternative to litigation. ECY 31906, ECY 68266.

## **2. Adjudicated Over-allocation of the Dungeness River**

Basin agriculture depends on water from the Dungeness River. ECY 71217. By 1923, the state had issued nine large water rights for

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<sup>3</sup> Dungeness Chinook is one of the five key populations of Chinook identified as in need of restoration, and must be recovered to meet federal recovery goals. ECY 71218, ECY 3233

<sup>4</sup> The 1974 “Boldt” decision held that the tribes who had signed Stevens Treaties in 1855, in what is now Washington, were entitled to the opportunity to harvest up to half of the harvestable salmon and steelhead returning to off-reservation usual and accustomed fishing areas. *United States v. State of Wash.*, 384 F. Supp. 312 (1974).

irrigation, most of which withdrew water directly from the Dungeness River. *Id.* Clallam County Superior Court adjudicated the surface water rights for the Dungeness River in 1924. ECY 1838, ECY 71218.<sup>5</sup> The adjudication over-allocated water in the river, and the combined adjudicated water rights of the irrigation districts in the valley greatly exceed the Dungeness River's summer flows. ECY 6261, ECY 6610. In particular, the Dungeness River has less water in the river than what can legally be taken out under existing water rights during the July 15 to September 15 time frame. ECY 1839. The adjudication confirmed water rights totaling 518 cubic feet per second (c.f.s.) during the irrigation season. This total legally allowable diversion rate compares to actual average flows of 171 c.f.s. during September, when flows are typically at their lowest in the river. ECY 1838–1839.

As a result of over-allocation, river flow levels have dropped precipitously. To illustrate, around 1900, during the late summer, the lower Dungeness River flowed at 210 c.f.s. ECY 2111. By the late 1980s flows dropped as low as 21 c.f.s. *Id.* In 1994, irrigators voluntarily began to limit their diversions to 50 percent of the flow resulting in the September monthly average flow increasing to 90 to 125 c.f.s. *Id.*

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<sup>5</sup> An adjudication is a legal process that determines the extent and validity of existing water rights for a given water source. *See* RCW 90.03.100–245.

Because Washington is a “prior appropriation” state, meaning the first in time to the resource is the first in right, the irrigators for decades have the most senior rights to what is effectively the entire river, while urban and rural developments rely upon groundwater rights that are junior in priority, including permit-exempt wells. ECY 3233.

**3. Cooperative watershed planning in the basin as an alternative to litigation**

**a. The Chelan Agreement and the Dungeness-Quilcene Plan**

The Dungeness Instream Flow Rule was preceded by nearly two decades of regional planning efforts. Following the contentious litigation over tribal fishing rights in the 1980s and the uncertainties that resulted therefrom, state policy makers and tribal leaders began cooperating in recognition that protection of fish habitat was a mutual goal. ECY 68264. Discussions over water policy eventually broadened to include a range of water users, and culminated in the historic “Chelan Agreement” in November 1990. ECY 68264–68265. This agreement incorporated the goals of state, local, and tribal governments, and agricultural, business, environmental, fisheries, and recreation interests. It also created a unique framework for the development of regional water plans. *Id.*

Legislation passed that year provided funding for two pilot areas to test the process of regional water planning, including the northeast portion

of the Olympic Peninsula, which became known as the Dungeness-Quilcene Project. ECY 68265. The planning group developed the Dungeness-Quilcene Plan and submitted it to Ecology in 1994. ECY 68233–68821.<sup>6</sup> The Plan contained “recommendations and strategies developed to provide water protection and management for the quality and quantity of the region’s surface and ground-water.” ECY 68245.<sup>7</sup>

The Plan includes water resource recommendations for the Dungeness Basin, many of which carried through in subsequent watershed planning efforts. ECY 68487–68535. These include: (1) that instream flows should be protected and supplemented, and improved in the future as possible, to provide minimum flows needed for salmonids and other species in the area’s rivers and streams (ECY 68507); (2) that the 1993 IFIM numbers established for the Dungeness River as minimum instream flows should be adopted by rule (ECY 68508); (3) that no surface water permits should be issued from small streams in eastern Clallam County (*Id.*); and (4) that new community water systems should be metered. ECY 68522.

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<sup>6</sup> Signatories included business, environmental, fish, local government, recreation, state, and tribal caucuses, as well as a technical committee co-chair. ECY 68244–68245, ECY 68248.

<sup>7</sup> The plan recognized a “substantial” gap between the needs of fish expressed by recommended instream flows and the present instream flows after existing withdrawals of water for agriculture, municipal, business, and future growth. ECY 68248. The group thus developed a “gap strategy” to try to “bring the sides of the gap closer together.” *Id.*

**b. The 2005 Watershed Plan**

In 1997, through the newly passed Watershed Planning Act, RCW 90.82, the Legislature authorized watershed planning on a statewide basis. Planning efforts in the Dungeness Basin thus continued under the authority of the Act, culminating in the Elwha-Dungeness Watershed Plan (WRIA 18 Plan) in December 2004, and amended in May 2005.<sup>8</sup> ECY 69771–69772. The initiating governments for the WRIA 18 Plan included Clallam County, Port Angeles, the Elwha-Klallam Tribe, the Jamestown S’Klallam Tribe, Agnew Irrigation District, and Ecology. ECY 69771.

The WRIA 18 Plan is recognized as being a “community plan, the result of many individuals and organizations working together for more than five years on a consensus basis.” ECY 69773. The Plan notes that the Dungeness watershed “has a long-established tradition of collaborative water resource and watershed planning.” ECY 69824.

The WRIA 18 Plan also recognizes that instream flows are a central purpose of watershed planning. ECY 70473. The Plan discusses the “extensive work” that has been done in the basin, including the IFIM study,

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<sup>8</sup> Watershed Planning is not mandatory and may be initiated only with the concurrence of all counties within the territory of the Water Resource Inventory Area (WRIA), the largest city or town in the WRIA, and the largest water purveyor in the WRIA. RCW 90.82.060(2).

discussed below, and the Dungeness-Quilcene Plan. *Id.* The WRIA 18 Plan notes that “[s]everal streams in WRIA 18 have surface water rights exceeding natural flows in some low flow seasons, and many streams probably have summer low flows impacted by withdrawals from wells in hydraulic continuity with surface water.” *Id.* The Plan thus states:

These existing low stream flows and the potential for exacerbation of low flows through development and further withdrawals reinforce the importance of determining and setting instream flows. **Ecology will, through its rule-making procedure, adopt instream flow levels and then use them in its management of subsequent water rights applications for WRIA 18 streams.**

ECY 70473 (emphasis added).

The WRIA 18 Plan’s recommendations include that flows for all WRIA 18 streams be set to protect flows adequate for all life stages of salmonids. ECY 70474.<sup>9</sup> The Plan also recommends seasonal closures for some flow limited streams and year round closure of unnamed tributaries. *Id.* The planning unit sought to prioritize achievement and restoration of flows, as the Plan recommends that water availability for future appropriations and growth be identified after instream flows are met in rivers and streams. ECY 70476. The Clallam County Commission approved

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<sup>9</sup> Those flows are found in Tables 3.4.1 and 3.4.2 of the WRIA 18 Plan. ECY 70477–70478.

the Plan on June 7, 2005, which obligated Ecology to engage in rulemaking to implement the Plan's recommendations. ECY 69772.

**c. The IFIM process for setting the Dungeness flows**

Scientists arrived at the minimum flow recommendations for the Dungeness River through the well-established IFIM, a methodology that optimizes fish habitat by establishing recommended minimum flows.<sup>10</sup> The purpose of an IFIM study is to scientifically and technically answer the question of how much water salmon need, recognizing that adequate flows are an essential factor in salmon recovery. ECY 7990. What constitutes enough water for fish depends on many factors that affect fish survival, for example, enough water to keep temperatures cool, sufficient flow for adult and juvenile fish to move up and down the river, enough water moving over spawning areas when eggs are in gravel, water in side channels where small fish take refuge, sufficient vegetation and insects to provide food for fish, and deep pools for fish to take cover from predators. ECY 7990. These requirements vary by season and are different for all species of fish at all life stages. *Id.* “[S]tudies to establish a set of recommended numbers for instream flows are thus very complex.” *Id.*

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<sup>10</sup> In their reply brief below, Appellants' conceded that they do not challenge Ecology's use of IFIM to set minimum flows (“Plaintiffs don't dispute that Ecology has authority to protect instream flows and *they have no dispute with the flow setting methodology per se.*”) CP at 496 (emphasis added).

Steps for the IFIM process for the Dungeness River included: (1) selecting study sites that represent different sections of the river; (2) the technical measurement of instream flow and fish habitat; (3) the running of a Physical Habitat Simulation model; and (4) the recommendation of instream flows month by month. ECY 7990–7991. For the Dungeness River for the months of July through September, biologists concluded that 180 c.f.s. is the minimum level necessary to support viable fish runs and preserve and protect instream values. ECY 7138.<sup>11</sup>

Regulatory flows are set based upon historic flow records and the IFIM study to be available during enough years to protect and preserve fish. Biologists have concluded that it is necessary to protect the high flow years to preserve and protect fish populations. If fish do not have the opportunity to benefit from good flow years, they will not be able to sustain their populations in the long-term. ECY 7992. If instream flows are set at a low number so it could always be achieved during every summer, including dry years, then salmon populations would drop because new uses, which could further reduce stream flows, would be allowed.<sup>12</sup> ECY 7138.

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<sup>11</sup> Ecology and Department of Fish and Wildlife biologists have found that setting flows at low levels, such as the lowest flow of historic record or at hydrologic base flow levels, do not adequately preserve and protect fish habitat. ECY 41267. Flows must be high enough to protect existing resources and allow for the different needs of fish species at different times of the year. ECY 7992.

<sup>12</sup> Water above minimum flows can be allocated to out of stream uses if the river is not closed.

**d. Rulemaking and adoption of the Dungeness Rule**

Ecology took its first steps towards a formal Rule in 2006 after Clallam County's adoption of the WRIA 18 Plan. After multiple early drafts, Ecology suspended Rule development in 2010 so that local leaders could engage in a cooperative effort to address water supplies for development, resource protection, and flow restoration. ECY 8161. In February 2011, local leaders signed a "Cooperators Agreement," outlining their goals including: (1) preventing permanent reductions in the Dungeness River or small streams due to new appropriations; (2) supplying adequate and reliable water for new uses; (3) maintaining sustainable agriculture in the valley; (4) restoring flows in the main-stem Dungeness and small streams, where feasible; and (5) having an instream flow rule in place that protects instream resources and existing rights within 18 months after the agreement is signed. ECY 19735

During this "pause" period in rulemaking, a local leaders work group also formed that included the City of Sequim, the Clallam County Public Utility District, the Clallam County Conservation District, some members of the public, and the Jamestown S'Klallam Tribe. *Id.* The workgroup issued a final report in March 2012 that expressed support for

establishing a water exchange to mitigate for new water uses. The report also reiterated the shared commitment to rule adoption. ECY 7369–7391.

The “Dungeness Water Exchange Mitigation Plan” was developed by the Washington Water Trust in December 2012. ECY 71280–71291. The purpose of the exchange is to mitigate for new water uses by generating mitigation credits through water right purchases/leases, shallow aquifer recharge, and/or changes in existing and future storage. ECY 71281–71284.

Ecology filed its proposed Rule in May, 2012. ECY 8161, ECY 71266. Key elements of the proposed (and final) Rule include: (1) setting instream flow levels in the watershed to protect aquatic resources, including habitat for threatened salmonids; (2) closing surface waters to new withdrawals with the exception of seasonal water from the Dungeness River; (3) requiring mitigation for all new consumptive use of water, including permit-exempt groundwater withdrawals;<sup>13</sup> (4) establishing reserves of water for future indoor domestic use; (5) setting maximum allocations of water from the mainstem Dungeness River during the open period; (6) allowing storage projects; and (7) requiring measuring of new water uses. ECY 71266, ECY 71268.

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<sup>13</sup> The Rule contains a mitigation requirement and establishes small reservations of water for future indoor domestic uses. WAC 173-518-070 to -080. Mitigation can occur through the purchase of mitigation credits through the Dungeness Water Exchange, or through Ecology’s approval of a mitigation plan. WAC 173-518-070(3).

During the course of Rule development, Ecology prepared an optional Final Cost-Benefit and Least Burdensome Alternative Analyses for the Rule. ECY 2355–2449. Ecology directed one of its staff economists, Tryg Hoff, to develop an economic analysis based upon a similar baseline he had used for the Kittitas Basin Rule, which was based on over-allocation. ECY 3323–3330. Mr. Hoff conducted no formal analysis of his own and refused to do this assignment based upon his own personal feelings regarding the legal baseline for the analysis. ECY 3323–3328. Mr. Hoff also asked to be removed from the assignment, a request his supervisors obliged. ECY 3329–3330. Ecology’s top economist, Kasia Patora, thus prepared the Final Cost-Benefit and Least Burdensome Alternative Analyses. ECY 2355–2429.

A summary of the economic analysis based upon building permit and population growth shows costs estimated to be just over \$30 million dollars. ECY 2767. This summary also estimates projected benefits based on the same factors to be just over \$140 million dollars. *Id.*

Ecology’s Least Burdensome Alternative Analysis concluded that the Rule presented the least burdensome approach to achieving the general goals and objectives of Ecology’s regulation—to preserve and protect fisheries while also providing some secure water for growth. ECY 2403–

2429. In November, 2012, Ecology’s Director signed the Rule, which went into effect on January 2, 2013. ECY 71270.<sup>14</sup>

The final Rule contains water reserves to accommodate future development in the basin. WAC 173-518-080. After the Supreme Court’s decisions in *Swinomish Indian Tribal Community v. Dep’t of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) and *Foster v. Dep’t of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015), the Legislature wanted to make it clear that the reserves in the Dungeness Rule are authorized and consistent with legislative intent. The Legislature thus passed Engrossed Substitute Senate Bill 6513 which declares the Dungeness reserves as “consistent with legislative intent” and specifically authorizes these reserves “be maintained and implemented” by Ecology. RCW 90.54.210.

#### **IV. STANDARD OF REVIEW**

This case involves judicial review of an agency rule. Under the Administrative Procedure Act (APA), Appellants bear the burden to prove that the Rule is invalid. RCW 34.05.570(1)(a). The Court may declare a 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

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<sup>14</sup> Ecology also entered into a “Memorandum of Understanding” with Clallam County regarding implementation of the Rule in December 2012 that outlines the cooperative roles and responsibilities of Ecology and the County. ECY 71273–71277.

arbitrary and capricious.” RCW 34.05.570(2)(c). Appellants argue all grounds except that the Rule violates the constitution.

In considering whether a rule “exceeds the statutory authority of the agency,” our courts will uphold a duly enacted rule if it is reasonably consistent with the statute that it implements. *See Wash. Pub. Ports Ass’n v. Dep’t of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). Rules are presumed to be valid, and the burden is on the party attacking the validity of the rule to present compelling reasons why the rule is in conflict with the intent and purpose of the statute being implemented. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986). Additionally, agency action is “arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Trans. Comm’n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). The reviewing court must consider the relevant portions of the rulemaking file and the agency’s explanations for adopting the rule in order to determine whether the agency’s action was willful and unreasoning and taken without regard to the attending facts or circumstances. *Id.* at 906. Courts are required to uphold a rule that the court deems erroneous as long as the rule was enacted with due consideration. *Id.* at 904.

For rule challenges, the agency’s rulemaking file serves as the record for judicial review. RCW 34.05.370(4); *Musselman v. Dep’t of Soc. & Health Servs.*, 132 Wn. App. 841, 853–854, 134 P.3d 248 (2006). “The rule-making file is necessary for effective judicial review because it contains information the agency considered contemporaneously with the adopting the rule.” *Musselman*, 132 Wn. App. at 854. The validity of a rule is determined as of the time the agency adopted it. RCW 34.05.562(1), .570(1)(b); *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 906 n.16.

Lastly, contrary to Appellants’ assertion, courts “give the agency’s interpretation of the law great weight where the statute is within the agency’s special expertise.” *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). The Court has specifically deferred to Ecology’s expertise in interpreting water resources statutes. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

## V. ARGUMENT

Appellants’ challenge to the Rule fails. First, the Rule is consistent with Ecology’s *relevant* statutory authorities. Second, Appellants have not demonstrated that the Rule is procedurally flawed. Finally, the Rule is well reasoned and fully supported by the record.

**A. The Dungeness Rule is consistent with Ecology’s statutory authorities**

**1. RCW 90.82, RCW 90.22, and RCW 90.54 govern Ecology’s rulemaking activities**

The Dungeness Rule is consistent with the plain language of the statutes that authorize the Rule: RCW 90.82, RCW 90.22, and RCW 90.54. In light of these statutes, Appellants’ “maximum net benefits” and “four-part-test” arguments fail because those arguments rely on different statutes that are not relevant here. Appellants thus fail to show that Ecology exceeded its authority in adopting the Rule.

**a. Ecology was required to adopt the instream flow rule under the Watershed Planning Act**

In RCW 90.82 the Legislature recognizes that “local development of watershed plans for managing water resources and for protecting existing water rights is vital to both state and local interests.” RCW 90.82.010. Local watershed planning serves these interests by putting planning in the hands of those “who live and work in the watershed[,] and who have the greatest stake in the proper, long-term management of the resources.” *Id.*

Importantly, RCW 90.82 requires Ecology to adopt by rule flow recommendations achieved by consensus through the Act’s local planning

process.<sup>15</sup> *See* RCW 90.82.080(1)(a)(ii); (1)(b). Here, the 2005 WRIA 18 Plan contains consensus on the minimum flows for the Dungeness River; and Clallam County signed off on the Watershed Plan. ECY 70477. Those acts cemented Ecology's legal obligation to adopt by rule the flows recommended in the WRIA 18 Plan.<sup>16</sup>

As a matter of law, Ecology acted consistently with the express language of RCW 90.82 when it adopted the WRIA 18 Plan flows by rule.

**b. The Rule is consistent with RCW 90.22 and RCW 90.54**

The Rule is also consistent with Ecology's statutory instream flow and water management rulemaking authorities, RCW 90.22 and RCW 90.54. Under RCW 90.22.010:

The department of ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.

RCW 90.22.020 then provides in relevant part, “[f]lows or levels authorized for establishment under RCW 90.22.010 . . . shall be provided for through the adoption of rules.” Also, RCW 90.54.020(3) states “[t]he

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<sup>15</sup> Under the Act, consensus requires unanimous approval of a planning unit's government and tribal members and a majority approval of a planning unit's non-governmental members. *See* RCW 90.82.080(1)(a)(ii).

<sup>16</sup> *See* WAC 173-518-040(1) (“The instream flows established in this section are based on recommendations in the 2005 Elwha-Dungeness watershed plan[.]”).

quality of the natural environment *shall* be protected and, where possible, enhanced as follows: Perennial rivers and streams of the state *shall* be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” (Emphasis added.)<sup>17</sup> The Legislature thus has a long history of recognizing the importance of instream values, which this Court discussed at length in *Swinomish*, 178 Wn.2d at 591–598.

These authorities authorize Ecology to adopt minimum flow rules to preserve and protect *instream values*. To answer the complex and technical question of what flows are minimally necessary to protect instream values, Ecology uses the well-established IFIM. *See Elkhorn*, 121 Wn.2d at 199–204 (reversing lower tribunal and expressly affirming Ecology’s use of the IFIM as a tool to establish minimum, rather than optimal, flow levels for rivers).

Here, the Rule is expressly consistent with RCW 90.22 and RCW 90.54 because it establishes flows “at levels necessary to protect instream values and resources.” WAC 173-518-020. Appellants’ brief not only ignores the aforementioned *controlling* authorities, but it also

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<sup>17</sup> *See also* RCW 90.54.040, which authorizes Ecology through the adoption of rules “as a matter of high priority to insure that the waters of the state are utilized for the best interests of the people, to develop and implement in accordance with the policies of this chapter a comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use.”

disregards the Court's history of deference to Ecology on technical issues such as the setting of minimum flows. *Cornelius*, 182 Wn.2d at 585; *Port of Seattle*, 151 Wn.2d at 593. The Court should therefore defer to Ecology's interpretation of the aforementioned statutes.

**c. Instream flow rulemaking does not require a maximum net benefits analysis and a "four-part-test"**

Appellants argue: (1) that Ecology was required to conduct a "maximum net benefits" analysis in order to weigh the public interest before it is "too late," and (2) that Ecology must also conduct a "four-part-test" when it adopts flows by rule because instream flows, once adopted by rule have the same status as consumptive water rights. Appellants' Opening Brief (Opening Br.) at 18–28. The first argument fails because the public interest is appropriately weighed through both watershed planning and the APA rulemaking process. The second argument fails because the "four-part-test" applies only to water permit applications for consumptive uses of water. It does not apply when Ecology seeks to preserve and protect instream values, including fish, under its well-established authorities to set instream flows.

**(1) There is no requirement that Ecology make “maximum net benefits” findings**

The term “maximum net benefits” appears in the Water Resources Act at RCW 90.54.020(2) and the Water Code at RCW 90.03.005.<sup>18</sup> Appellants argue that these statutes “mandate” that Ecology make “maximum net benefits” findings before allocating all remaining water available in the river to a stream by rule, lest it be too late to weigh the public’s interest in the allocation of the resource. *See* Opening Br. at 21, 22. This argument is flawed in fact and in law.

First, the Dungeness Basin as a matter of *undisputed fact* is legally overappropriated and has been since the 1924 adjudication confirmed more water rights than exist in the river at certain critical times of the year. ECY 1838–1839. The Rule thus does not “allocate” water to the river. It simply ensures that the water that scientists have deemed is minimally necessary to preserve and protect environmental values, including fisheries, is protected during the times that it is in fact there.<sup>19</sup>

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<sup>18</sup> RCW 90.54.020(2) states, “[a]llocation 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 90.03.005 reads in part that “[i]t is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state’s public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.”

<sup>19</sup> *See* RCW 90.03.345 (providing that minimum flows established under RCW 90.22.010 or RCW 90.54.040 constitute appropriations under the water code “as of the effective date of their establishment.”).

Second, the argument is legally flawed because the public interest is already weighed through the watershed planning process and APA rulemaking. *See, e.g.*, RCW 34.05.325 (Public participation—Concise explanatory statement), RCW 90.82.005 (“The purpose of this chapter is to develop a more thorough and cooperative method of determining what the current water resource situation is in each water resource inventory area of the state and to provide local citizens with the maximum possible input concerning their goals and objectives for water resource management and development.”). Appellants’ argument that a “maximum net benefits” analysis is necessary to weigh the public interest would needlessly duplicate the extensive public processes in place when instream flows are adopted by rule.

The term “maximum net benefits” in RCW 90.54.020(2) and RCW 90.03.005 represents a legislative policy statement regarding water resource management, not a formal test that is required during rulemaking. Indeed the Supreme Court recognized as much in *Swinomish*. After engaging in a detailed exposition of legislation pertaining to minimum instream flows, the Court went on to note that RCW 90.03.005, which the Legislature adopted in 1979, “made explicit what by then had long been apparent, i.e., that public policy had dramatically changed from . . . the 1917 law that encouraged maximum diversion of water.” *Swinomish*, 178

Wn.2d at 595–596. The term “maximum net benefits” in RCW 90.03.005 thus represents a shift away from out-of-stream appropriation towards wiser water management for protection of instream resources. Here, Appellants argue just the opposite, that a “maximum net benefits” analysis is necessary to ensure out-of-stream domestic uses remain a priority.

Lastly, RCW 90.54.020(2) states that “[a]llocation 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.” This statute too does not suggest a procedurally required test *before* Ecology sets flows by rule. Ecology has interpreted this statute to mean that a maximum net benefits test is required only when *allocations of water* are made above minimum flow levels.<sup>20</sup> This is because it is first necessary to know what flow levels are necessary instream before “allocations” can be made for out-of-stream uses.

Ecology’s interpretation is consistent with that of former Assistant Attorney General Charles Roe, who wrote a memorandum in 1986 interpreting RCW 90.54.020(2) and the base flow provision in RCW 90.54.020(3)(a). Therein he concluded that “[t]he *first* determination

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<sup>20</sup> See ECY 1846: “Until a decision is made on what stream flows are needed in the stream to protect fish and other instream resources, it is difficult to know if there is any water to allocate for future out-of-stream needs. Secondly, if stream flows are a limiting factor for salmon production in a watershed [as is the case with the Dungeness], it is problematic to plan for salmon recovery until instream flows are set.”

is to provide for ‘minimum flows’ (or ‘base flows’) as contemplated by RCW 90.22.010 and RCW 90.54.020(3)(a),” and that “[t]he *second* is to determine, after conducting a ‘maximum net benefits’ test as described in RCW 90.54.020(2), whether an additional increment of flow should be provided above ‘minimum’ flows to satisfy instream beneficial uses, such as aesthetic and fisheries uses.”<sup>21</sup> ECY 64235–64245 (emphasis added).<sup>22</sup>

In sum, there is no “maximum net benefits” analysis requirement *before* Ecology adopts flows by rule.

## (2) “Four-part-test”

Appellants also wrongly argue that a “four-part-test” must be applied for the *establishment* of instream flows because the water code treats flows as appropriations *once they are established by rule*. Opening Br. at 25, 26 (citing RCW 90.03.345). This argument ignores the separate statutory scheme that the Legislature established for the adoption of flow rules, as well as the distinct purposes flow rules and consumptive water rights serve.

The “four-part-test” is part of the comprehensive scheme the Legislature established for people to obtain *permits* to make use of the

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<sup>21</sup> Although this memorandum is not binding authority, it is persuasive, particularly because Mr. Roe was the principal author of RCW 90.54. ECY 64238.

<sup>22</sup> Ecology adopted its current position, consistent with Mr. Roe’s analysis, into its Policy 2025. ECY 2959–2960.

state's water resources *through an application process*. See RCW 90.03.250–.340. The test inquires: (1) whether water is available; (2) whether the proposed use is beneficial; (3) whether the proposed use will impair existing rights; and (4) whether the proposed use will prove detrimental to the public welfare. If an application meets each of these criteria, Ecology will issue a permit to the applicant that must then be developed with diligence or be cancelled. RCW 90.03.290(3), .320.

Appellants' argument that the "four-part-test" should supplant Ecology's existing rulemaking authorities for establishing flows by rule renders those authorities meaningless. For example, if Ecology were required to employ the "four-part-test" to adopt a flow rule for an overappropriated basin like the Dungeness it could not satisfy the statutory purposes of protecting instream values because water is not "available" in late summer when fish need it most. In other words, Ecology could never set instream flows in the basins that need them the most because water would be unavailable under the "four-part-test."

The record demonstrates that Ecology and Department of Fish and Wildlife biologists have found that setting flows at low levels, such as the lowest flow of historic record or at hydrologic base flow levels, does not adequately preserve and protect fish habitat. ECY 41267. Flows instead must be set at achievable levels that when present are sufficient to sustain

instream values, including fisheries. ECY 7992. Otherwise, fish will die. *Id.* Application of the “four-part-test” would severely undermine the purposes for which Ecology sets instream flows by rule and render RCW 90.22 and RCW 90.54 meaningless. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (“[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

This Court stated in *Swinomish* that reservations of water established by rule must satisfy the “four-part-test,” which makes sense in that context because reservations, like appropriative water rights, serve the same purpose—allowing people to make beneficial and consumptive use of water.<sup>23</sup> *Swinomish*, 178 Wn.2d at 588–589. Moreover, in *Swinomish*, following a discussion of a litany of acts dating back to 1955, the Court recognized:

This broad statement of overall goals—the public health, the state’s economic well-being, and **preservation of natural resources and aesthetic values**—shows the legislature continued to recognize that retention of waters instream is as much a core principle of state water use as the other goals, including economic well-being.

*Swinomish*, 178 Wn.2d at 594 (emphasis added).

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<sup>23</sup> Ecology is authorized by rule to reserve and set aside water for beneficial utilization in the future. RCW 90.54.040(1).

Appellants' "four-part-test" argument runs counter to this long history of legislative intent to retain waters instream. When Ecology adopts a flow by rule under its relevant authorities, it does not file an application for a permit to make beneficial use of the stream. Instead, it scientifically determines what flows are necessary through the IFIM, which Appellants concede is the right methodology to determine minimum flows. Ecology then adopts those flows by rule. Appellants' "four-part-test" argument would upend this well-established, scientific process and substitute a procedure that would actually be contrary to the stated goals of the instream flow statutes. Their argument thus fails.

**2. Appellants' additional arguments that Ecology exceeded its authority also fail**

Appellants offer three additional arguments as to why the Rule allegedly exceeds Ecology's statutory authority. Each fails because existing authorities require the issue to be resolved in Ecology's favor.

**a. The Rule's domestic reserves are valid as a matter of law**

The Rule includes "reserves" (also termed "reservations") of water for domestic use that are intended to satisfy a limited amount of domestic need without being subject to the instream flows. WAC 173-518-080. Ecology concluded that the reserves serve an overriding consideration of public interest (OCPI): the "public interest advanced by these limited

reserves clearly overrides the potential for negative impacts on instream resources [OCPI].” *Id.* Ecology derives its OCPI authority from RCW 90.54.020(3)(a), which states:

Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. . . . Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

In 2016, the Legislature expressly validated the Rule’s reserves:

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 the effective date of this section. **The legislature declares that the reservations of water established in WAC 173-518-080 and 173-545-090, as those provisions existed on the effective date of this section, are consistent with legislative intent and are specifically authorized to be maintained and implemented by the department.**

ESSB 6513, 64th Leg., Reg. Sess. (2016) (emphasis added.).

In an effort to avoid this legislative validation of the reserves, Appellants erroneously argue that RCW 90.54.210 does not “cure” the reserves because it applies to “water right applications” and not building permit applications that rely on permit exempt wells. Opening Br. at 30–31. This ignores the plain language of the last sentence in the statute that expressly declares the reservations of water in WAC 173-518-080 to be

“consistent with legislative intent” and specifically directs that they “be maintained and implemented by the department.” RCW 90.54.210(1). The first sentence commands Ecology to act on any applications for permits in the two affected basins, and the second sentence declares that the water reserves established in these two basins are valid and must be maintained and implemented by Ecology. The first sentence does not establish an “application” condition that carries over to the second sentence.

If the Court agrees that RCW 90.54.210 validates the Rule’s reserves, then it need not reach Appellants’ argument that the reserves are contrary to the Supreme Court’s narrow treatment of Ecology’s OCPI authority in the *Swinomish* and *Foster* decisions, both of which were decided after Ecology adopted the Rule. If the Court reaches this argument, each case is distinguishable.

In *Swinomish*, the Court rejected Ecology’s use of OCPI in an amendment to the Skagit instream flow rule, WAC 173-503, that established reserves of water that would allow new uses of water which would impair the *previously established* instream flows. *Swinomish*, 178 Wn.2d at 576. And, in *Foster*, the Court rejected Ecology’s use of OCPI to grant a heavily conditioned water permit to the City of Yelm that would at times negligibly impair *previously established* flows in the Deschutes Basin. *Foster*, 184 Wn.2d at 469. In each case, the Court was primarily

concerned with Ecology's use of OCPI to undermine the prior appropriation doctrine ("Our cases have consistently recognized that the prior appropriation doctrine does not permit even de minimis impairments of senior water rights."). *Foster*, 184 Wn.2d at 476. In *Foster*, the Court also made clear that OCPI "does not allow for the permanent impairment of minimum flows." *Id.* at 475.

In contrast to these cases, the Dungeness Rule's reserves do not allow the impairment of previously established flows in derogation of the prior appropriation doctrine. This is because the reserves and flows were adopted concurrently, unlike the fact pattern in *Swinomish*. As a matter of fact and law, the Rule's reserves *cannot* impair previously established flows because each shares the same priority date. Thus, Appellants' reliance on *Swinomish* and *Foster* is not helpful to their position.

**b. Ecology has authority to close streams by rule when water is unavailable for appropriation**

Appellants argue that the Court in *Postema* did not say what it clearly said, which is that Ecology has authority to close streams by rule when water is unavailable for appropriation.<sup>24</sup>

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<sup>24</sup> See WAC 173-518-050, wherein Ecology closes certain surface water bodies in the basin because "water is not reliably available for new consumptive uses from the [listed] streams and tributaries in the Dungeness River watershed." WAC 173-518-050.

In *Postema*, the Court examined Ecology's denial of several ground water permit applications in the context of basins that had both regulatory instream flows and outright closures, stating:

**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. . . .**

**Stream closures by rule embody Ecology's determination that water is not available for further appropriations.**

*Postema*, 142 Wn.2d at 94–95 (emphasis added).

Appellants argue that Ecology only has authority to “withdraw” water when it lacks sufficient information to make a sound decision regarding water allocation. RCW 90.54.050. This ignores the plain language of *Postema* and RCW 43.21A.064(9), which authorizes promulgation of rules governing administration of RCW 90.03.<sup>25</sup>

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<sup>25</sup> Appellants also disregard the principle that the Legislature is presumed to be aware of judicial interpretations of its enactments and that its failure to amend a statute following a judicial decision interpreting it indicates legislative acquiescence in that decision. See *Friends of Snoqualmie Valley v. King Cty. Boundary Review Bd.*, 118 Wn.2d 488, 496–497, 825 P.2d 300 (1992). The Court decided *Postema* in 2000.

**c. The Dungeness Rule properly subjects all new uses of water established after the effective date of the Rule to the Rule's requirements**

Appellants lastly argue that the Rule exceeds Ecology's statutory authority because it conflicts with the *common law* relation back doctrine.<sup>26</sup> Opening Br. at 38, 39. Under this doctrine, Appellants contend that the Rule should exclude permit exempt uses where construction, but not beneficial use of water, commenced prior to the adoption of the Rule. *See id.* This argument fails because the Rule is consistent with existing authority.

First, Appellants fail to appreciate that rule challenges are governed by the APA. The proper test of rule validity under the APA with respect to this claim is not, as Appellants contend, whether the Rule is invalid because it fails to incorporate common law principles. The proper test is whether Ecology exceeded its statutory authority when it adopted the Rule. RCW 34.05.570(2)(c). It did not. The Dungeness Rule is consistent with RCW 90.44.050, which exempts certain uses from obtaining a permit but does not exempt those uses from the priority system for water rights.

Second, with respect to *surface water rights*, the Legislature codified the common law relation back doctrine by making the effective date of a water right the date of application. RCW 90.03.340. While the

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<sup>26</sup> Under the common law relation back doctrine, the priority date of a water right "relates back" to the date that a party first expressed overt intent to use water. *Hunter Land Co. v. Laugenour*, 140 Wash. 558, 565, 250 P. 41 (1926).

Legislature could have codified this doctrine into the groundwater code for permit exempt uses, it instead codified *regular beneficial use* as the touchstone for establishing a permit exempt right.<sup>27</sup> The pertinent language reads, “to the extent that it is *regularly used beneficially*, [permit exempt use] shall be entitled to a right equal to that established by a permit.” RCW 90.44.050 (emphasis added). This language means that a permit exempt use must be beneficially used on a regular basis before it shares the same status as a permitted water right.

The Dungeness Rule expressly *excludes* permit exempt uses “where regular beneficial use began before the effective date of [the Rule].” WAC 173-518-010(3)(b). The Rule is thus consistent with RCW 90.44.050 by subjecting all new uses to the Rule, while excluding those where beneficial use commenced prior to Rule adoption.

Appellants also neglect RCW 90.03.247, which expressly conditions new uses of water to flows that were adopted prior to approval of the new uses.<sup>28</sup> Under RCW 90.03.247, Ecology is mandated to protect instream flows against future uses from the same source, regardless of

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<sup>27</sup> This legislative difference makes sense because there is no application process for permit exempt rights to relate back to.

<sup>28</sup> RCW 90.03.247 states in relevant part, “[w]henver an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the levels or flows.”

earlier intent or priority date. This statute also applies to permit-exempt uses, which are entitled to a “right equal to that established by a permit.” *See Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 17 n.8, 43 P.3d 4 (2002) (“RCW 90.44.050 itself provides that a right acquired under the exemption is to be treated as all other rights.”).

In sum, each of Appellants’ arguments that the Rule exceeds Ecology’s authority fails because it is countered by existing authority that Appellants would rather sweep under the rug than confront head-on.

**B. The Rule’s Cost-Benefit and Least Burdensome Analyses are Valid and Supported by the Law and the Record**

Appellants challenge the optional Cost-Benefit analysis and the Least Burdensome analysis that Ecology prepared in support of the Rule. From Appellants’ briefing it is unclear whether Appellants allege a procedural violation of the APA, i.e., that the Rule was adopted without compliance with statutory rulemaking procedures, or whether Appellants are challenging the substance of the analyses, which would more appropriately be reviewed under the arbitrary and capricious standard of review.<sup>29</sup> RCW 34.05.570(2)(c). Either way, Appellants’ challenge fails.<sup>30</sup>

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<sup>29</sup> Challenging the substance of the analysis is no different than challenging whether any other part of the administrative record supports the Rule, and so the appropriate standard of review is whether the analysis itself is “arbitrary and capricious” under RCW 34.05.570(2)(c).

<sup>30</sup> Here, Appellants again improperly refer to their briefing below to support their arguments, rather than supporting their brief with the record on appeal, as is required by

**1. The Cost-Benefit analysis was procedurally optional**

Appellants are mistaken that the Dungeness Rule is a significant legislative rule that requires a cost-benefit analysis under RCW 34.05.328(5)(c)(iii). Ecology could have adopted the Dungeness Rule without performing an economic analysis because the Rule was adopted subsequent to watershed planning under RCW 90.82. RCW 90.82 allows for streamlined rulemaking because many of the goals of APA rulemaking, such as notice and opportunity for input, are achieved through the watershed planning process. Once a watershed plan is adopted, RCW 90.82.080(1)(b) provides that Ecology “may adopt the rules either by the regular rules adoption process provided in chapter 34.05 RCW, the expedited rules adoption process as set forth in RCW 34.05.353, or through a rules adoption process that uses public hearings and notice provided by the county legislative authority to the greatest extent possible.” The statute then states, “[s]uch rules do not constitute significant legislative rules as defined in RCW 34.05.328, and do not require the preparation of small business economic impact statements.”<sup>31</sup>

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RAP 10.3(a)(5). Opening Br. at 42 (“Appellants’ trial briefs disclosed a number of fatal flaws with the CBA and LBA.”).

<sup>31</sup> Ecology explains this important distinction in its Concise Explanatory Statement, stating, “Ecology was not required to do the Cost-benefit Analysis (CBA). Ecology chose to perform the CBA, like we do with virtually all our rulemaking, because we want to know and want the public to know the costs and benefits of our rules.” ECY 2251.

The Legislature thus expressly prioritized consensus-based watershed planning and deemed any resulting codification by Ecology sufficient for purposes of compliance with the APA. In contrast, agency actions deemed to be “significant legislative rules” require additional transparency and process, including more stringent notice, inter-agency coordination, and evaluation of economic impacts. RCW 34.05.328(1)(a)–(i).<sup>32</sup> Thus, while Ecology’s economic projections indeed support the Dungeness Instream Flow Rule, as discussed below, they were nonetheless procedurally optional. Therefore, to the extent that Appellants argue that the rulemaking process was procedurally flawed, they are incorrect.

**2. Ecology’s Final Cost-Benefit and Least Burdensome Alternative Analyses are supported by the record, based upon accepted methodologies, and well-reasoned**

The analyses that Ecology elected to prepare are well-reasoned and supported by the record.<sup>33</sup> Appellants’ challenge to the analyses is rooted in the economic baseline that Ecology used, which is one of overappropriation of water resources. Appellants claim this baseline fails to recognize an “expectation” for the unfettered future use of permit-exempt wells by

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<sup>32</sup> Under the APA, a “significant legislative rule” is “a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.” RCW 34.05.328(5)(c)(iii).

<sup>33</sup> The Final Cost-Benefit analysis is in the record beginning at ECY 2355, while the Least Burdensome Alternative section begins at ECY 2403.

people who have not yet established the right to use water in the basin. Opening Br. at 7. However, there is no legal right to water under RCW 90.44.050 until water is “regularly beneficially used.” *See* Section V.A.2.c.; RCW 90.03.247. The Dungeness Basin is adjudicated, overappropriated, and water rights are no longer being issued. *See* Section III.A.2. Without mitigation, new uses of water, including those that are permit exempt, are interruptible. *Swinomish*, 178 Wn.2d at 598 (permit-exempt groundwater uses cannot “jump to the head of the line” in priority). There is no guarantee in the water code that water will always be available. *Fox v. Skagit Cty.*, 193 Wn. App. 254, 268, 372 P.3d 784 (2016) (“there are hardships attendant to *any* water right with a later priority date and too little water available to satisfy all rights.”).<sup>34</sup> The economic baseline of overappropriation is therefore sound.

**a. The Cost-Benefit analysis is well-reasoned and supported by the record**

Substantively, the authors of the Cost-Benefit analysis assessed impacts based upon review of the Rule’s most significant provisions. ECY 2367–2379. Benefits and costs were discussed, explained in detail,

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<sup>34</sup> Appellants’ argument that building permits were available before the Rule is a red herring. Opening Br. at 44. Building permit or not, water use on those properties would still be subject to interruption in favor of senior water users without the Rule. Appellants disregard the comprehensive mitigation scheme that Ecology and others worked to put in place when the Rule was adopted to *ensure* that people like the Appellants would continue to have access to *uninterruptible* domestic supplies of water. ECY 71280–71291.

and where possible, quantified. Costs were based upon multiple sets of data to assess projected population growth and building permit approvals for the next twenty years, and values were assigned to the Rule impacts that affected the growing community. A range of values was then assigned to costs associated with specific Rule impacts, including the following: (1) compliance with the Rule requirement to install well meters and report water use; (2) fish loss that may occur in limited geographic areas where the Rule allows use when mitigation is unavailable (WAC 173-518-080); (3) securing mitigation to comply with the Rule for new domestic groundwater users; (4) county and state administration of the new mitigation market; and (5) foregone development and construction that may result from higher costs imposed by the mitigation requirement. ECY 2380–2392.

Benefits were similarly identified, explained, and assigned either a quantitative or qualitative value. Potential benefits included the following: (1) avoided fish losses due to regulation of new domestic water uses throughout the watershed; (2) increased certainty in development, which before the Rule would be vulnerable to a water use being regulated or curtailed, or a lawsuit initiated by an adjudicated or non-adjudicated senior water user; (3) avoidance of legal costs associated with a large long-term

lawsuit filed by the federal government or tribes;<sup>35</sup> (4) water supply improvements, resulting from storage projects that are authorized by the Rule (WAC 173-518-095); (5) water service consolidation, resulting from the Rule requirement for new users to connect to a public water supply when connecting is timely and reasonable (WAC 173-518-070(2)); (6) additional data and early discovery of leaks, resulting from metering requirement (WAC 173-518-060); and (7) protection of existing habitat restoration efforts that rely upon streamflow to fully function. ECY 2393–2399.

These factors were compared and evaluated, ECY 2400–2402, resulting in the following conclusion: “[b]ased on qualitative and quantitative assessment of the likely costs and benefits, Ecology concludes that there is reasonable likelihood that estimated benefits of the rule exceed its costs.” ECY 2400. The analysis relied upon 21 total references; including federal and fishery valuation models, local water use reports, sales records, and economic methods for estimating housing demand. ECY 2408–2409. Appellants offer nothing in the way of contrary data to attack the veracity of the analysis. Instead, they rely solely on a handful of electronic mail

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<sup>35</sup> Appellants are wrong that “[t]he ‘litigation prevention’ values assigned to the Dungeness Rule lack [any semblance of] credibility.” Opening Br. at 6 n.4. Indeed the Rule avoids the type of basin-wide tribal water rights adjudication that the regulation was designed to prevent. *See* ECY 68264–68269 (Dungness-Quilcene Plan discussing Tribes’ decision to follow process leading up to the Rule as an alternative to taking federal water right claims to court). The record reflects that the agency thoroughly contemplated and reasonably considered the threat of litigation in the basin as an appropriate cost that would be avoided by adoption of the Rule. *See, e.g.*, ECY 23717–23721, ECY 30159.

messages of program economist Tryg Hoff who did no formal or peer reviewed analysis of his own.<sup>36</sup> This is not sufficient to overcome the veracity of the Cost-Benefit analysis.

**b. The Least Burdensome Alternative analysis is reasonable and supported by the record**

Appellants' challenge to the Least Burdensome Alternative analysis also fails. RCW 34.05.328(1)(e) provides "[t]hat 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." One of the three stated objectives of the Rule includes, "[p]rotecting the quality of the natural environment, including retaining base flows in rivers and streams to preserve fish, wildlife, and other environmental values." ECY 2403. Ecology concluded that the Rule presented the least burdensome approach to achieving the general goals and objectives of Ecology's regulation to preserve and protect fisheries while also providing some secure water for growth. ECY 2403–2429.

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<sup>36</sup> While it is true that Ecology staff member Tryg Hoff disagreed with the agency's decision to adopt the Rule, Mr. Hoff's unsubstantiated opinions do not undermine the agency's final work product. Before the economic analysis was commenced, Mr. Hoff demanded he be allowed to conduct his own "legal analysis" and opined that the agency would be violating the law if he were denied the opportunity. ECY 3329. His request was denied and he was instructed to follow legal advice and provide an analysis based upon the same baseline he had used for another rule. ECY 3331. Mr. Hoff refused and asked to be reassigned from the project. ECY 3323–3328. Ecology complied and reassigned the analysis to its top economist. ECY 3329–3330, ECY 2355–2429.

It matters little that Appellants would prefer Ecology to “reserve enough water for future domestic uses without requiring mitigation (because the cumulative impact to flows was negligible)” or “tiny.” Opening Br. at 9. No regulation would ever be adopted if it could simply be avoided as a result of the preference by the regulated community—that of no regulation. Additionally, Appellants’ argument that exempt wells only have “tiny” impacts is contrary to law and fact. First, Appellants ignore the risk of cumulative impacts of multiple permit exempt wells; and second, the Court has repeatedly reaffirmed that even “de minimis” impacts on instream flows are not permissible. *Swinomish*, 178 Wn.2d at 590 (citing *Postema*, 142 Wn.2d at 90).

Boiled down, Appellants challenge to the Rule’s economic analyses reflects their desire to assign a higher economic value to out-of-stream domestic uses at the expense of instream uses. The overall statutory scheme surrounding instream flows, however, does not support the proposition that the economic value of a new use justifies encroachment on existing uses, including minimum flows set by rule. *See Swinomish*, 178 Wn.2d at 599 (“The high value placed on minimum flows is not overcome just because economically advantageous uses could be made of the water necessary to satisfy the minimum flow rights.”). Not only is the Dungeness Rule

supported by quantified economic benefits, the qualitative value of protecting flows necessary for aquatic use is also immeasurably significant.

Appellants may have a difference of opinion regarding the economics of the Rule. However, if there is room for two opinions, an action taken after due consideration is not arbitrary and capricious. *Wash. Fed'n of State Emps. v. Dep't of Gen. Admin.*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009).

### **3. The Rule's mitigation requirement is valid**

Appellants offer a flawed argument that the Dungeness mitigation plan is invalid because it fails to protect water for future domestic uses. Opening Br. at 45. Appellants rely on *Foster*, wherein the Court rejected a water permit that Ecology had issued for the City of Yelm that relied on out-of-kind mitigation to cover the time period during which water-for-water mitigation was unavailable to offset impacts on previously established flows. *Foster*, 184 Wn.2d at 476–477. Appellants thus reason that seasonal irrigation rights can never mitigate for future domestic uses. Opening Br. at 45–46.

Appellants' challenge to the Rule's mitigation requirement is premature. If Appellants' speculatively believe that future mitigation efforts in the basin will be insufficient to offset impacts on instream flows, then they should challenge a decision of the county to issue a building permit

based upon a mitigation credit received from the water exchange under WAC 173-518-070.<sup>37</sup>

The Rule's mitigation requirement is also valid and legislatively approved. The Rule requires mitigation of all new groundwater uses. WAC 173-518-070. One way to mitigate future groundwater use is to purchase a mitigation credit from the water exchange that relies on the Rule's reserves of water. WAC 173-518-080. As discussed above, the Legislature validated those reserves when it adopted RCW 90.54.210.

Finally, to the extent that Appellants argue that seasonal irrigation rights can never mitigate for year round domestic uses, they disregard this Court's decision in *R.D. Merrill v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999), which expressly approved the transfer of seasonal water rights to year round uses. In reviewing the question of whether seasonal water rights could be transferred to year round purposes, the Court stated that "[w]hile RCW 90.03.380 does not expressly mention a change in water rights from seasonal use to year-round use, such a proposed change is implicitly covered by the statute." *Id.* at 128. The Court then noted that "a change in purpose of use may require that time of use be

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<sup>37</sup> The speculative nature of Appellants' claims here is evident by the language they use in their brief: "the only senior water rights available for mitigation are seasonal irrigation rights." Opening Br. at 46. "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." *Id.* (emphasis added).

changed as well in order to put the water right to the proposed new use.” *Id.* The test is ultimately whether there will be detriment or injury to other water rights. *Id.*

As is evident, Appellants’ reliance on *Foster* to attack the Rule’s mitigation requirement fails. Seasonal rights may be transferred to year round uses so long as there is no injury to other water rights; and the time to evaluate that question is when a domestic use is credited from the Dungeness Water Exchange.

**C. The Rule Is Not Arbitrary and Capricious**

Appellants lastly argue that the Rule is “arbitrary and capricious.” Appellants have not met their burden of showing that Ecology’s Rule adoption was a willful and unreasoning action taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 905.

Appellants’ argument re-hashes their arguments that the Rule exceeds Ecology’s statutory authority and that the Rule’s economic analyses are flawed. *See* Opening Br. at 46–47. Appellants’ arguments also rest again on the fundamentally flawed notion that the Rule appropriates all remaining water in the basin to the stream, and that Ecology must apply the laws of appropriation when it adopts instream flows, rather than the laws that specifically authorize instream flow rulemaking.

The record, however, plainly reflects that the basin is overappropriated; and, as explained above, instream flow rights are established under different authorities for different purposes than consumptive water rights. In the Court's recent decision in *Whatcom County v. Western Washington Growth Management Hearings Board*, 186 Wn.2d 648, 381 P.3d 1 (2016) (*Hirst*) the Court held that counties have an independent obligation to ensure legal availability of water when issuing building permit applications in order to comply with the Growth Management Act's requirement to protect water resources. RCW 19.27.097(1). In her concurrence, Justice Madsen wrote "separately to emphasize the duty of States, tribes, and local governments to work together to ensure there is available water before issuing building permits, rather than letting their burden fall onto individual permit applicants." *Hirst*, 186 Wn.2d at 696. Justice Madsen could have been describing the long history of cooperation and local planning in the Dungeness Basin when she wrote her concurrence, a history that is well documented in the record and also designed to ensure that some water is available for building permits.

Appellants wrongly argue that Justice Madsen's concurrence in *Hirst* suggests a higher duty to protect availability of water for permit applicants "in addition to or even prior to protecting instream flows by rule."

Opening Br. at 14. Even if that were the case, which it is not, as a matter of fact, the Rule provides a management framework to ensure adequate water supply for domestic needs while simultaneously setting flows to preserve and protect instream values. WAC 173-518-020.

In sum, local governments and citizens in the Dungeness Basin have recognized since at least the early 1990s that endangered fish are in trouble and that the basin's water resources are over-allocated. When these parties recognized this problem, they did not cover their eyes, pretend there is no problem, and demand unfettered access to water for growth. Instead, they, along with Ecology, came together, sat down at a table for the first of many times, had frank discussions, evaluated science, and spent more than the next two decades working to solve a significant problem—preserving and protecting flows for fish while also providing some water for future growth. In a nutshell, the Dungeness Rule accomplishes both of these goals. The Rule is anything but arbitrary and capricious.

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**VI. CONCLUSION**

For the reasons stated, Ecology respectfully requests the Court dismiss Appellant's rule challenge and fully affirm the Dungeness Rule.

RESPECTFULLY SUBMITTED this 17th day May 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 17, 2017, I caused to be served the Respondent State of Washington, Department of Ecology's Response to Appellants. Opening Brief in the above-captioned matter upon the parties herein as indicated below:

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