

NO. 94804-6

SUPREME COURT
OF THE STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN
WHITEWATER, AND SIERRA CLUB,

Appellants,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY AND JAY
INSLEE,

Respondents

APPELLANTS' BRIEF OF CENTER FOR ENVIRONMENTAL LAW
AND POLICY, AMERICAN WHITEWATER, AND SIERRA CLUB

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I. INTRODUCTION

This case involves a challenge to part of the Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer, Chapter 173-557 WAC (the “Rule”). Appellants take issue only with the 850 cubic feet per second (cfs) summer instream flow adopted for the reach downstream of the Monroe Street Dam (WAC 173-557-050(2)), which is too low to “preserve and protect” recreational, aesthetic, and navigational uses of the river, as required by statute and by the public trust doctrine. Appellants’ position is that a larger portion of the streamflow that *currently exists* in the River should be protected from new appropriations.

The parties’ central dispute involves interpretation of the instream flow provisions of the 1969 Minimum Flows and Levels Act (RCW 90.22.010) and the Water Resources Act of 1971 (RCW 90.54.020), and the extent of Ecology’s obligations to protect instream uses and values. The Legislature could not have been more clear: Ecology is required to protect “wildlife, fish, scenic, aesthetic and other environmental values, and navigational values” when setting minimum instream flows. This command is in accord with the State’s obligations under the public trust doctrine, which is based in Washington’s Constitution and requires that the public’s interests in navigation and recreation on the state’s navigable

waterways be protected.

Ecology asserts, however, that the instream flow statutes give it discretion to decide which of the listed instream values to protect and which to ignore. Ecology's view of these statutes and of its obligations under them would lead to many or most of these enumerated instream values being left unprotected both on the Spokane River and in future instream flow rules, and would violate the state's public trust obligations. Ecology has also compounded the errors in setting the instream flow caused by its misinterpretation of the law by improperly excluding important, relevant materials from the administrative record produced in support of this rulemaking. By doing so, Ecology has effectively deprived the public and the courts the opportunity to evaluate the merits of Ecology's decision.

II. ASSIGNMENTS OF ERROR

CELP assigns error to the following decisions or actions by Ecology:

1. Ecology exceeded its statutory authority by interpreting RCW 90.54.020's mandate that "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" to allow Ecology to adopt an instream flow that "provide[d] for preservation" of only *one* of the listed instream values.

2. Ecology's decision to set an instream flow designed only to protect fish populations, based on the unsupported proposition that a flow protective of fish would necessarily protect other instream resources, was outside of its statutory authority or arbitrary and capricious.
3. Ecology's interpretation of RCW 90.54.020 is impermissible because it is inconsistent with the constitutionally-based public trust doctrine, which requires protection of the public's interest in navigation and recreation on the state's navigable waterways.
4. Ecology's failure to include all of the available instream flow recommendations from WDFW, and from Ecology itself, in the administrative record or to consider this information in rulemaking was arbitrary and capricious.

III. STATEMENT OF THE CASE

The Spokane River is a treasured natural wonder uniquely located in the front yard of the city of Spokane. Many residents and visitors use the river for whitewater rafting, float trips, fishing, swimming, birdwatching, and for enjoyment of its scenic beauty.¹ Much of the shoreline has frequently-used parks, hiking/biking trails, picnic areas, and campgrounds.² The River supports recreation-based businesses including

¹ AR011576-011578, AR003460 ("The Spokane River provides excellent whitewater boating opportunities with both river runs and park-and-play areas"); AR000250, 266, 287, 352, 386, 399, 431; AR008025-27.

² *Id.*; AR002515; AR001238; AR001245; AR001250; AR001252 (noting importance of maintaining views of Falls); AR001255-6; AR001262; AR001267; AR001272-3; *see also* AR001324 (cataloging over 700,000 recreational visits annually).

river rafting and fishing guide services, which provide employment in the Spokane area³.

Like most Western rivers, flow in the Spokane is highly variable through the year and between different years.⁴ The River's natural flow regime, including both high and low flows, is important to the overall health of the River.⁵ Summer flows show large year-to-year variation,⁶ and have declined: in the 118 years that data has been collected the average summertime seven-day low flow has dropped nearly 30 percent, from 1800 to 1141 cubic feet per second (cfs).⁷ Very recently, seven-day low flows ranged between 679 and 1268 cfs for the years 2008-2015.⁸ The River's "low flow trend"⁹ can be attributed to a number of factors, including increased municipal pumping in both Washington and Idaho, and upstream reservoir operations.¹⁰ Low flows in the River affect both

³AR011451-5; AR011444-8; AR011461-2

⁴ Unless otherwise specified, all instream flows discussed here refer to flow at the Spokane gage just downstream of the Monroe Street Dam. The hydrology of the Spokane River is set forth in detail in the Petition to Amend. AR010498-010504.

⁵ AR003831 ("the natural timing and range of variation in hydrology is needed to sustain ecological functions and processes in a river.").

⁶ AR001908.

⁷ AR002224; AR010503.

⁸ AR011377; AR001908.

⁹ AR001095; AR001487.

¹⁰ AR010501-2; AR011189.

water quality and river ecology and can lead to increased temperatures in the River, which “can exceed lethal levels for trout.”¹¹

The River, along with the Spokane Valley-Rathdrum Prairie Aquifer (“SVRPA”) which underlies it, is a critical water source for the region (and was designated a “sole source aquifer” for the region by the U.S. Environmental Protection Agency in 1978).¹² A very large amount of the River’s flow has already been allocated. Hundreds of water rights in the Middle Spokane watershed, totaling about 294,000 acre-feet/year for permits and certificates and 319,000 acre-feet per year for claims, pre-date the Rule, and thus their future use will not be restricted by its operation.¹³ Approximately 18 municipal water suppliers hold water rights, about half of which (152,223 acre-feet) have not yet been put to beneficial use.¹⁴ It is expected that these inchoate rights will be put to use as population grows and demand increases in both Washington and Idaho, further depleting the River’s flow.¹⁵

Avista Corporation operates six hydroelectric dams on the Spokane River, two of which (Upper Falls Dam and Monroe Street Dam) are

¹¹ AR10504; AR011521 (“Extremely low flows in developed areas lead to algal blooms and fish kills.”); AR013611; AR001083 (water temperature expected to increase due to climate change); AR011389-93 (discussing temperature requirements for redband trout and effect of higher stream temperatures).

¹² AR010501.

¹³ AR010538.

¹⁴ *Id.* Approximately half of these inchoate rights are held by the City of Spokane.

¹⁵ AR010538-9.

located in downtown Spokane, just upstream of the river reach at issue in this appeal.¹⁶ The 2009 relicensing order for the projects requires a minimum release of 850 cfs from the Monroe Street and Upper Falls Dams; however, this figure is a minimum that must be released if water is available, not a maximum or a specific streamflow target.¹⁷ Both the Upper Falls and Monroe Street Dams are operated as “run-of-the-river” facilities, meaning that they do not store appreciable quantities of water.¹⁸ Fortunately, even with current dam operations, the River’s flow above the Monroe Street Dam exceeds 850 cfs for most of the summer and in most years, meaning that flow in the reach below the dam is also greater than 850 cfs.¹⁹ For example, the 50% exceedance flow (roughly speaking, this represents an average flow year) is greater than 1000 cfs throughout the summer.²⁰ Even in a very dry year, flows exceed 850 cfs at the beginning and end of the summer period. *Id.*

¹⁶ AR008063-5. The 850 cfs flow at issue in this case is measured just downstream of the Monroe Street Dam (at the “Spokane gage.”)

¹⁷ AR008074.

¹⁸ AR008068. Their ability to regulate streamflow is therefore limited by the river’s flow above them, and the 850 cfs minimum release from the dams does not provide protection for the River’s flow generally.

¹⁹ Ecology argued below that “Avista’s federal license controls minimum releases to the river,” and that “to change the actual flow in the river . . . one would need to seek changes in Avista’s license because it has control over water storage and controls releases . . .” CP223. This is irrelevant, because the Petition for Review and this lawsuit seek only that *existing* flows in the River be protected, not that flows be changed.

²⁰ See AR003874. River flows are commonly referred to in terms of “exceedance flows.” For example, the 50% exceedance flow is the flow that is exceeded in 50% of years, and represents a “median.” The river flows at or above the 90% exceedance flow

Two instream flow studies were carried out as part of the relicensing process for Avista's hydroelectric projects and the WRIA 55/57 watershed planning process.²¹ Only one of these, a 2007 study by EES Consulting ("EES") that examined fish habitat downstream of the Monroe Street Dam, is directly relevant to the river reach at issue here.²² EES used a method called Instream Flow Incremental Methodology (IFIM)²³, which generates a curve of usable habitat for fish at various streamflows. IFIM is not designed to generate data regarding any other instream uses or values, and the EES study made no conclusions or recommendations regarding non-fish uses such as navigation or aesthetics.

The Little Spokane-Middle Spokane (WRIA 55-57) Watershed Planning Unit (WPU) was convened in 1999 and attempted to develop and recommend instream flows for the Spokane River by establishing a Joint Instream Flow Work Group.²⁴ The Group and the WPU were unable to reach consensus on instream flows for the lower river at the Spokane gage,

in 90% of years (this represents flow in a very dry year), and at or above the 10% exceedance flow in only the wettest 10% of years.

²¹ AR003842-3882; AR003883-3980.

²² AR003842-3882. In addition to the EES Consulting report, Ecology cites a 2003-4 study by Northwest Hydraulics Consultants and Hardin-Davis, Inc. (Hardin-Davis"), a 2011 study by Addley and Peterson and two 2003 studies by Parametrix Research Group. AR003883-3980; AR003981-4156; AR004157-4198; AR005615-5673. However, only the EES Consulting report examined summer habitat below the Monroe Street Dam.

²³ The component of an IFIM study that actually calculates the amount of available habitat is also referred to as Physical Habitat Simulation (PHABSIM).

²⁴ AR003429-31; AR007892.

so by statute the decision to set instream flows defaulted to Ecology.²⁵ In establishing an instream flow, Ecology is required to “consult with, and carefully consider the recommendations of, the department of fish and wildlife.”²⁶

In this case, Ecology received numerous flow recommendations from WDFW, of which the 850 cfs figure ultimately adopted was the lowest. Dr. Hal Beecher at WDFW made the 850 cfs recommendation²⁷ based on the EES Consulting study²⁸ of summer rearing habitat for redband trout and mountain whitefish.²⁹ WDFW made it very clear, however, that 850 cfs was a minimum instream flow that would be tolerated by these species, and that higher flows would not be detrimental to fish.³⁰ Dr. Beecher stated, “I would oppose lower flows, but not higher summer flows,” and that “the proposed flows are not seen by me as an enhancement, rather as a floor.”³¹

Numerous other recommendations (nearly all for higher summer flows) were made before the Rule was adopted, all but one of which were

²⁵ RCW 90.82.080(5).

²⁶ RCW 90.03.247.

²⁷ AR003833-3834.

²⁸ The EES consulting report actually recommended summer flows of 850-1100 cfs in a scenario where fish habitat was the predominant concern. AA003381.

²⁹ *Id.*

³⁰ AR013609; AR014232; AR018528.

³¹ AR014232; AR013609.

also made by Dr. Beecher.^{32,33} These recommendations were expressed in memos from WDFW staff to Ecology, and in one case, by Ecology itself as part of the relicensing process for the Spokane River hydroelectric dams.³⁴ The majority of these were absent from the administrative record; only the December 23, 2007 memo recommending 900-1050 cfs and the January 2008 memo recommending 850 cfs were included in the record produced by Ecology.³⁵

Ecology began formal rulemaking for the Spokane River instream flow in January 2014.³⁶ The draft Rule proposed instream flows at levels below the median flow (that is, water is present at levels higher than the instream flow) for essentially the entire year.³⁷ The proposed summer

³² Previous recommendations included a flow of 700 cfs at Post Falls (this is equivalent to 1091 cfs at Spokane) (CP149); 1100 cfs (CP142); 1040 cfs (CP144); 900-1050 cfs (AR007749-51); and 1100 cfs (AR019091). As part of the trial court proceeding, CELP moved to supplement the record with three of these documents: a memo marked “Ecology’s comments to FERC regarding minimum instream flow relationship between lower Spokane River and upper Spokane River,” which recommends 1100 cfs at the Spokane gage, an April 23, 2007 memo from Hal Beecher noting that “when upper and lower rearing indices are weighted equally, the peak rearing habitat is 1040 cfs at Spokane gage . . .”, and a June 30, 2004 document written by Hal Beecher and co-authors from WDFW and Ecology, recommending a minimum discharge from the Post Falls Dam of 700 cfs (equating to 1091 cfs at the Spokane gage). (CP58-67).

³³ Dr. Beecher drafted two nearly identical memos dated January 9, 2008. One of these recommended a summer flow of 850 cfs, and the other a flow of 1100 cfs. The recommendation for 850 cfs was included in the administrative record produced by Ecology (AR0077852), and the memo recommending 1100 cfs was added to the record at CELP’s request (AR019091).

³⁴ CP142.

³⁵ CELP received the remaining documents as the result of Public Records Act requests. CP136-7.

³⁶ AR000071.

³⁷ AR013649.

instream flow was 850 cfs, measured at the Spokane gage.³⁸ Flows at Spokane currently exceed this level for most or all of the summer in most years, supporting recreational uses including kayaking, rafting, swimming, picnicking, and fishing as well as the aesthetic values associated with the River.³⁹ Even the seven-day low flow (the average flow in the lowest seven-day period of the year) exceeds 850 cfs in most years.⁴⁰

During the rulemaking process, Ecology received thousands of comments critical of the proposed 850 cfs summer flow, many of which stated that such low flows would impair instream uses such as navigation, recreation and aesthetics.⁴¹ Petitioner American Whitewater conducted a recreational use survey and provided the data to Ecology during the rulemaking process.⁴² The American Whitewater survey found that 1000 cfs was the minimum flow to allow navigation, with recreational boaters having a preferred minimum flow of 1500 cfs.⁴³ These results were in agreement with a 2004 Whitewater Paddling Instream Flow Assessment Study Report that was prepared for the Spokane River Hydroelectric licensing process and that found that a flow of 1350 cfs was preferred and

³⁸ AR002709.

³⁹ As shown by the hydrographs for years 1968-2005, the river's flow exceeds 1000 cfs throughout the summer in all but very dry years (represented by the 90% exceedance flow). AR003874.

⁴⁰ AR010509.

⁴¹ AR003001-11.

⁴² AR002290-2494; AR002495-2514, AR002519-45.

⁴³ AR016257-59.

that 1000 cfs was an absolute minimum.⁴⁴ In November 2015, CELP provided Ecology with an expert report by aesthetic and recreation flow researchers Drs. Bo Shelby and Doug Whittaker that was also highly critical of Ecology's lack of analysis of aesthetic and recreation flows as well as the 850 cfs summer flow.⁴⁵

Despite the evidence demonstrating that an 850 cfs summer flow failed to preserve recreational and navigational use, Ecology adopted this flow in its final Rule.⁴⁶ Ecology has stated that it adopted the 850 cfs flow based only on considerations of fish habitat, and that it "has chosen not to establish instream flow values" based on recreational needs.⁴⁷ As the law allows, Ecology plans to use the 850 cfs flow as a benchmark to determine whether water is available for new appropriations.⁴⁸ This means that water rights will be issued that are conditioned on the 850 cfs flow (water users will be permitted to withdraw water so long as streamflow is at or above the 850 cfs level).⁴⁹ Over time, the flow of the river will predictably be reduced to the 850 cfs level for essentially all of the summer, that is, the "floor" will become the "ceiling." As shown by all of the paddling studies

⁴⁴ AR002225-89.

⁴⁵ AR011552-11611. This expert report supplemented more general aesthetic-recreation flow recommendations from Drs. Shelby and Whittaker that were provided to Ecology during the rulemaking process. AR002516-2518.

⁴⁶ WAC 173-557-050.

⁴⁷ AR002985.

⁴⁸ AR002984.

⁴⁹ WAC 173-557-060; AR013330-1; AR010602.

cited above, navigation of the river by many recreational craft will become difficult if not impossible. The iconic Redband trout fishery will also be affected, as will businesses that depend on recreational use of the river.⁵⁰

Ecology's final rule was adopted as WAC Chapter 173-557 on January 27, 2015 and became effective February 27, 2015.⁵¹ On February 29, 2016, CELP filed a Petition to Amend the Rule pursuant to RCW 34.05.320, supported by numerous Exhibits.⁵² Ecology began work on a response to the Petition on March 1, and made the decision to deny the 89-page Petition and its 33 supporting exhibits just three days later, by the afternoon of March 4.⁵³ A letter formally denying the Petition was finally issued on April 27, 2016.⁵⁴ Ecology stated that it stood by its work on the Rule and reiterated its position that the 850 cfs flow would be protective of other uses as well as fish.⁵⁵ CELP then filed this action in Thurston County Superior Court, alleging that both the Rule and Ecology's denial of the petition were outside Ecology's statutory authority and arbitrary and

⁵⁰ CP199-200.

⁵¹ AR018130.

⁵² AR010489-578; AR018245; AR010612-35; AR011185-205; AR011373-443; AR011514-17; AR011518-43; AR011544-51; AR011552-89; AR011612-5; AR011618-52; AR010636-60; AR019128-31; AR006039-6205; AR010725-29; AR010730-42; AR010743-8; AR010749-834; AR010835; AR010998-1169; 011170-184; AR011206-213; AR011245-304; AR011306; AR011307-16; AR011317-28; AR011329; AR011330-4; AR011335-72; AR011444-9; AR011451-5; AR011460-4; AR011467-77.

⁵³ AR018243; AR018519. The record also shows that it was four days *after* Ecology recommended the Petition to Amend be denied when Ecology finally reviewed the recreation/aesthetic flow expert report attached as an exhibit to the Petition. AR018523.

⁵⁴ AR10598-10609.

⁵⁵ AR010602.

capricious.⁵⁶ On June 9, 2017, Thurston County Superior Court Judge James Dixon denied the petition.

IV. ARGUMENT

A. Standard of Review

The Washington Administrative Procedure Act of 1988 (“APA”; Chapter 34.05 RCW) governs review of agency action. The APA authorizes relief if an agency’s decision is unconstitutional, outside of the agency’s statutory authority or the authority conferred by a provision of law, or arbitrary and capricious; such a decision is invalid and will be reversed.⁵⁷

When the inquiry demands construction of a statute, review is *de novo*. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). A court may substitute its interpretation of the law for the agency’s. *Postema v. Pollution Cont. Hearings Board*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Where the statute is within the agency’s special expertise, the agency’s interpretation is accorded great weight, provided that the statute is ambiguous. *Id.* Absent ambiguity, however, the Court does not defer to an agency’s interpretation of a statute. *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals*

⁵⁶ CP5-54

⁵⁷ RCW 34.05.570(2)(c) (review of a final rule); RCW 34.05.570(4)(c) (review of other agency action).

Bd., 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005). Deference to an administrative agency “does not extend to agency actions that are arbitrary, capricious, and contrary to law.” *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn.App. 84, 94, 982 P.2d 1179 (1999). And a court will not defer to an agency interpretation that conflicts with the statute. *Postema*, 142 Wn.2d at 77 (citing *Waste Mgmt. of Seattle v. Util. & Trans. Comm.*, 123 Wn.2d 621, 628, 869 P.2d 1034).

Administrative action is arbitrary and capricious if it is willful, unreasoned, and taken without regard to the attending facts and circumstances. *WA Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998). Action with “disregard for the welfare of the whole community” has also been held to be arbitrary and capricious. *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 870, 576 P.2d 401(1978); *Anderson v. Island County*, 81 Wn.2d 312, 325, 501 P.2d 594 (1972).

An administrative rule that “is not reasonably consistent with the statute being implemented” is invalid and unenforceable. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). A rule is invalid where the agency too narrowly construes the authorizing statutes. *Id.* (rule applying Minimum Wage Act protection to some but not all employees invalid as inconsistent with purposes of Act). Similarly, a rule that

excluded some organizations from coverage under a campaign finance statute was invalid where the statute’s plain language demanded coverage for all such organizations. *Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 591-2, 99 P.3d 386 (2004).

Judicial review is ordinarily limited to the agency record as contained in the rulemaking file,⁵⁸ subject to certain exceptions.⁵⁹ The reviewing court may remand a matter to the agency with directions for fact-finding or other proceedings if the agency “improperly excluded or omitted evidence from the record.”⁶⁰

The Washington Legislature stated that its intent in enacting the APA included “achiev[ing] greater consistency with other states and the federal government in administrative procedure. . .” RCW 34.05.001. The Legislature also intended for courts to accept precedents from other jurisdictions to aid in the Act’s interpretation, directing that “courts should interpret provisions of [the APA] consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts.” *Id.*

⁵⁸ RCW 34.05.370; RCW 34.05.562.

⁵⁹ For example, the court may receive evidence outside the record “if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding . . . Unlawfulness of procedure or of decision-making process . . .” RCW 34.05.562(1).

⁶⁰ RCW 34.05.562(2)(c).

Washington courts have relied on RCW 34.05.001 when citing to cases from Federal courts and those of other states. In *Seattle Building and Construction Trades Council v. Apprenticeship and Training Council*, 129 Wash. 2d 787, 801-802, 920 P.2d 581 (1996), this Court used Federal statutes and case law interpreting the Federal APA to interpret a section of the Washington APA dealing with adjudicatory hearings for license applications. See also *Union Bay Preservation Coalition v. Cosmos Development & Administration Corporation*, 127 Wash.2d 614, 619, 902 P.2d 1247 (1995) (citing RCW 34.05.001 and other state precedents to find that the Washington APA does not allow for service on attorneys, as opposed to parties); *KS Tacoma Holdings, LLC v. Shoreline Hearings Board*, 166 Wn. App. 117, 126-127, 129, 272 P.3d 876 (2012)(citing RCW 34.05.001 and U.S. Supreme Court precedent to interpret RCW 34.05.530, addressing qualifications of an “aggrieved party.”)

B. The 850 cfs summer low flow in the Rule exceeds Ecology’s statutory authority because it is based on an impermissible interpretation of RCW 90.54.020.

As the steward of the state’s water resources, Ecology is tasked with protecting instream flows and the full set of uses and values that they support. Ecology’s authority and obligation to establish instream flows are based on two statutes. The 1969 Minimum Flows and Levels Act

provides that 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.”⁶¹

Two years later, the Legislature enacted RCW 90.54.020(3) (part of the Water Resources Act of 1971), which mandated⁶² that Ecology protect a suite of instream values:

The quality of the natural environment *shall* be protected and, where possible, enhanced as follows: (a) 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.*

RCW 90.54.020(3) (emphasis added).⁶³

⁶¹ RCW 90.22.010.

⁶² The Water Resources Act was enacted partly to provide more specific direction to Ecology regarding instream flow protection. Although Fisheries and Wildlife had requested that minimum flows be adopted for several dozen streams, even by the mid-1970s only one had been adopted. Robert F. Barwin, Kenneth Slattery, and Steven J. Shupe, “*Protecting Instream Resources in Washington State*,” in *INSTREAM FLOW PROTECTION IN THE WESTERN UNITED STATES: A PRACTICAL SYMPOSIUM* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1988) at 5. The same authors noted that “Ecology and its predecessor agency lacked the necessary resources and expertise to effectively implement this statute.” *Id.* As a response, the WRA provided Ecology with “specific direction for developing a statewide water resources program addressing all beneficial uses including instream flows,” and mandated that Ecology implement the program through rulemaking. *Id.*

⁶³ “Base flows” as used in RCW 90.54.020 means the same thing as “instream flows” referred to in RCW 90.22.010. Ecology has stated this in numerous documents, including the Spokane River Rule itself:

**1. Ecology is Obligated by Statute to Protect
And Preserve *All* Instream Values, Including
Navigation, Recreation and Aesthetics.**

To begin with, the Water Resources Act's use of the mandatory term "shall" indicates that protection of adequate minimum instream flows to support the suite of enumerated values, including scenic, aesthetic, navigation, and recreation uses, is not optional or discretionary. *See Crown Cascade, Inc. v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983) (citing *Kanekoa v. Dep't of Social & Health Services*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981))(use of "shall" creates mandatory duty). RCW 90.54.020(3)(a)'s use of "and" rather than "or" in enumerating the values to be protected also shows that the Legislature intended that Ecology protect and preserve *all* of the instream values and uses listed in RCW 90.54.020(3), not a single value or use selected from the list.

This Court has recently reaffirmed this basic proposition, stating that "RCW 90.54.020(3)(a) provides that perennial streams and rivers *must* be retained with base flows sufficient to preserve fish and wildlife, scenic, aesthetic *and* other environmental values, *and* navigation") (emphasis added). *Swinomish Indian Tribal Community v. Department of*

"**Instream flow**" means a stream flow level set in rule to protect and preserve fish, wildlife, scenic, aesthetic, recreational, water quality, and other environmental values; navigational values; and stock watering requirements. The term "instream flow" means "base flow" under chapter 90.54 RCW, "minimum flow" under chapters 90.03 and 90.22 RCW, and "minimum instream flow" under chapter 90.82 RCW. WAC 173-557-030.

Ecology, 178 Wn.2d 571, 602, 311 P.3d 6 (2013).⁶⁴ The *Swinomish* Court highlighted the importance of protecting these values, and the emphasis the Legislature placed on their protection, by noting the “very narrow” exception that “requires extraordinary circumstances before the minimum flow water right can be impaired.” *Id.* at 576.

2. Ecology’s interpretation of RCW 90.54.020 is contrary to the statute’s language.

Despite the clear statutory language and this Court’s precedents, Ecology justifies its failure to protect the instream values listed in RCW 90.54.020(3)(a) by casting this section as nothing more than one item in a list of optional “general fundamentals” that may be ignored in any given case.⁶⁵ Ecology impermissibly seizes on the single word “or” in RCW 90.22.010, arguing that the Legislature gave it unfettered discretion “to determine the purposes to protect when establishing minimum flows in a rule.”⁶⁶ But this provision of RCW 90.22.010 cannot be considered alone and does not control here.⁶⁷ A court is to consider “all that the Legislature

⁶⁴ See also *Postema*, 142 Wn.2d at 94-5 (“base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic *and* other environmental values, *and* navigational values” *must* be protected) (emphasis added).

⁶⁵ CP234.

⁶⁶ CP233 (arguing that “under 90.22 Ecology is not required to establish minimum flows for fish **and** recreational values or aesthetic values.”)

⁶⁷ Even if the statutes may be considered individually, Ecology may not rely solely on RCW 90.2.010’s “or” language. Under established principles of statutory construction, a later-adopted statute or one that is more specific will take precedence in the event of a conflict with a more general or older statute. “The later statute governs when the two

has said in the statute and related statutes.” *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). Here, when RCW 90.22.010 is read together with RCW 90.54.020(3), the law requires Ecology to establish instream flows in a manner that protects and preserves the full list of enumerated values, not only fish.⁶⁸ Ecology’s interpretation would allow degradation of any instream values and uses that Ecology decides not to protect, in violation of the Legislature’s directive.

Ecology further attempts to distinguish the “base flows” cited in RCW 90.54.020(3)(a) from “minimum flows” as described in RCW 90.22.010.⁶⁹ This is a distinction without a difference. *Swinomish*, 178 Wn.2d at 580. Indeed, Ecology itself has stated many times that the two are equivalent.⁷⁰

Based on its reading of RCW 90.54.020(3)(a)’s requirements as optional, Ecology selected flows that it believed would be the minimum needed to protect fish habitat, without regard to recreational, navigational,

conflict.” *Ass'n of Washington Bus. v. State of Washington, Dep't of Revenue*, 155 Wash. 2d 430, 449, 120 P.3d 46, 55 (2005) (citing *Bailey v. Allstate Ins. Co.*, 73 Wash.App. 442, 446, 869 P.2d 1110 (1994) (“Another general rule of statutory construction gives preference to the later-adopted statute and to the more specific statute if two statutes appear to conflict.”)). RCW 90.54.020 is both more recent and more specific than RCW 90.22.010. See note 62, *supra*).

⁶⁸ Ecology is well aware that both statutes apply here, as it cites both RCW 90.22 and RCW 90.54 as its authority for adopting the Rule. AR002980.

⁶⁹ CP234.

⁷⁰ See WAC 173-557-030 and note 63, *supra*.

or aesthetic values.⁷¹ By adopting an instream flow solely based on fish habitat, Ecology eliminated any meaningful protection for aesthetics or recreational use of the river, in contradiction to the Legislature's command.⁷² Instream flows are water rights for the river, and more junior water rights that would impair instream flows may not be granted. Ecology uses the instream flow as an indicator of whether there is more water available for junior appropriators, and will issue new water rights so long as the actual streamflow is above the instream flow.⁷³ The predictable result is that new water rights will be issued until the flow of the river is reduced to 850 cfs, too low to support its important navigational, recreational and aesthetic uses. Ecology's interpretation of RCW 90.54.020 is thus at odds with the statute's purpose and its plain language, and adoption of the 850 cfs summer low flow based on this erroneous interpretation exceeded Ecology's statutory authority.

⁷¹ AR002985 ("The department has chosen not to establish instream flow values based on those recreational needs expressed during the FERC process or any other process including this comment period."); AR010475 ("The adopted flow numbers are based on studies of fish habitat.").

⁷² CELP does not suggest that Ecology should establish minimum flows that protect navigation, recreation and aesthetics to the detriment of fish, but rather that Ecology must select a minimum flow that protects and preserves *all* instream uses.

⁷³ AR002984; *see* Section II, *supra*.

3. Ecology’s interpretation of RCW 90.54.020(3)(a) fails to give meaning to all of the language in the statute.

Statutes should be interpreted such that all of the language in the statute is given meaning. *Lakemont Ridge Homeowners’ Assn. v. Lakemont Ridge Ltd Partnership*, 156 Wn.2d 696, 699, 131 P.3d 905 (2006); *Davis v. State ex rel. Department of Licensing*, 137 Wn.2d 957, 969, 977 P.2d 554 (1999). Ecology’s view of RCW 90.54.020(3)(a) impermissibly ignores the second clause in the list of values (“base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, *and navigational values*”) (emphasis added). Even if Ecology *were* authorized to pick and choose from the statute’s list of “environmental values” (including wildlife, fish, scenic, aesthetic, and other), navigational values are called out separately. By failing to preserve navigational values, Ecology improperly fails to give effect to all language in the statute.

4. Ecology’s interpretation of RCW 90.54.020(3) is owed no deference because the statute is not ambiguous.

Absent any ambiguity, a court does not defer to agency interpretation of a statute. *Postema*, 142 Wn.2d at 77; *Friends of Columbia Gorge, Inc. v. Wash. St. Forest Prac. Bd.*, 129 Wn. App. 35, 55-6, 118 P.3d 354 (2005). Although Ecology argued below for deference to

their interpretation of RCW 90.54.020, none is owed. RCW 90.54.020(3)(a) is not ambiguous with respect to the requirement to protect all listed instream values, and indeed Ecology has never claimed that it is. Because there is no statutory ambiguity, this Court owes no deference to Ecology's interpretation.

5. Ecology's interpretation of RCW 90.54.020(3) is owed no deference because it conflicts with the statute's purposes.

An agency's statutory interpretation is also owed no deference where it is contrary to the statute's purpose. *Postema*, 142 Wn.2d at 77. Ecology's interpretation of RCW 90.54.020(3)(a), which would allow it to protect only one of the listed instream values, is contrary to the purpose of the statute, which requires that *all* of the listed instream values be protected and preserved. It is therefore not owed deference from this Court. Put another way, Ecology's reading violates the principle that "the interpretation which best advances the overall legislative purpose" should be adopted. *Hart v. Peoples' Nat. Bank of Wash.*, 91 Wn.2d 197, 203, 588 P.2d 204 (1978). If allowed to stand, Ecology's interpretation of RCW 90.54.020(3)(a) not only fails the Spokane River, but could result in failure to protect instream values in future instream flow rulemaking⁷⁴,

⁷⁴ Currently, instream flows have been set in only 29 of the 64 Water Resource Inventory Areas (WRIAs). Much of the state has no instream flow rules and no

and widespread harm to the public's water resources.⁷⁵

6. The 850 cfs flow adopted in the Rule fails to meet even Ecology's interpretation of the statutory requirements.

Even if Ecology's interpretation of RCW 90.54.020(3)(a) *were* correct (it is not), the 850 cfs low summer flow would fail to meet its requirements. Ecology argues that it "satisfies the general fundamental under RCW 90.54.020(3) to preserve and protect base flows for all listed values so long as the minimum flows established by Rule do not undermine those values."⁷⁶ But the record in this case, including hundreds of public comments critical of the 850 cfs flow, expert reports regarding the needs of fish and the recreational community, and user surveys discussing flows needed for recreation and navigation⁷⁷, amply demonstrates that the flow established by Ecology *does* undermine recreational and aesthetic instream values of the River.⁷⁸

protection against overallocation, despite RCW 90.54.020's plain language requiring that Ecology protect baseflows in the state's rivers. If instream flows are established on those WRIAs, Ecology's interpretation of the statute would allow it to ignore any of the required instream values that it chose to.

⁷⁵ As explained in section IV.D, *infra*, Ecology's interpretation of RCW 90.54.020(3)(a) also conflicts with the public trust doctrine by impairing the public's rights to navigation and fishing in the river.

⁷⁶ CP234.

⁷⁷ AR002982-003238; AR016352-AR018096 (public comments); AR016257-016259 (American Whitewater user survey); AR002225-002289 (Louis Berger whitewater recreation survey); AR011552-011589 (expert report, Drs. Doug Whittaker and Bo Shelby); AR011451-011455; AR011444-011448; AR011461-011462 (affidavits from recreational business owners); AR011373-011443 (expert report by Dr. Allan T. Scholz).

⁷⁸ CP197-201.

C. Ecology’s selection of instream flows based only on protecting adequate streamflow to support fish populations was arbitrary and capricious, and places the other instream values listed in RCW 90.54.020 at risk.

The “attending facts and circumstances” regarding adoption of an instream flow include the instream values supported by the River, including navigational and recreational uses, and the effect of streamflows on these values. Ecology’s decision to protect only fish habitat failed to consider all of these “facts and circumstances,” and is therefore arbitrary and capricious.⁷⁹

1. Ecology failed to protect instream values other than fish habitat.

To comply with RCW 90.54.020(3)(a)⁸⁰, Ecology must first ascertain what flows are protective of all instream uses and strike a balance if there is any conflict among uses.⁸¹ Ecology’s own guidance documents recognize that the agency must preserve all instream uses:

When developing an instream flow to protect one instream flow resource or value (e.g., fish), the potential effect on other instream resources and values must also be considered. The recommended instream flow must adequately protect and preserve these other resources and

⁷⁹ *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998).

⁸⁰ As discussed in Sec. IV.B, *supra*, Ecology’s belief that it need not protect all the instream values listed in RCW 90.54.020(3)(a) is mistaken.

⁸¹ See *CELP et al. v. Ecology, et al.*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law and Final Order) (As Amended Upon Reconsideration) (Aug. 30, 2013) (Appendix A) at 25.

values. Accordingly, the instream flow recommendation must include documentation of the consideration of all instream resources and values that are present in the stream, and how these resources and values might be affected by the recommended instream flows.

Washington Department of Ecology, *A Guide to Instream Flow Setting in Washington State* (2003) at 21.

Here Ecology missed the first step because it never ascertained what flows would protect and preserve navigation, aesthetics and recreation. It never considered “how [those] resources and values might be affected by the recommended instream flows,” but relied instead on the conclusory statement that protecting fish habitat would necessarily protect the other instream values. Neither RCW 90.22.010, RCW 90.54.020(3)(a), nor any other statute gives Ecology the discretion to ignore other uses of the river simply because the agency believes that the 850 cfs flow will protect and preserve native fish populations.⁸² Here, Ecology’s Rule purports to protect only a subset of what the law requires (i.e. fish), and the Rule’s 850 cfs flow provision is therefore invalid.

2. The record does not show that protecting fish habitat will protect other instream values such as recreation, navigation, or aesthetic uses.

Ecology summarily asserts that the minimum flow levels it selected to protect fish automatically protect navigation, recreation and

⁸² AR002985.

aesthetics.⁸³ But nothing in the administrative record supports this assumption. Indeed, the record overwhelmingly shows just the opposite: Ecology's protection of only the 850 cfs minimum flows in the summer is detrimental to navigation, recreation and aesthetic uses of the river. The record contains ample demonstrations of this point, including two studies of recreational river users that concluded 850 cfs was far below the minimum for recreational use of the River and thousands of public comments stating that 850 cfs was an inadequate summer flow.⁸⁴

This is unsurprising, because the method Ecology relies on to determine the instream flow level (Instream Flow Incremental Methodology; IFIM) by design addresses *only* habitat for fish.⁸⁵ It does not (and cannot) provide any information about other instream values, and in no way determines what level of flow is appropriate for protection of recreational, navigational, or aesthetic use of the river.

⁸³ AR002985;

⁸⁴ AR002982-003238; AR016352-AR018096; AR016257-016259; AR002225-002289. As well as the documentation in the rulemaking file, Ecology was provided with significant new information on this point during consideration of the Petition for Rule Amendment. This included a study of recreational use of the river by two recognized experts in the field (AR011552-011589), affidavits from owners of river-dependent recreational business (AR011451-011455; AR011444-011448; AR011461-011462), and a library of photographs taken from key observation points along the River that demonstrate the effect of low flows on aesthetics. (AR009220-22.)

⁸⁵ For an explanation of the IFIM method and its use in assessing fish habitat, see AR001144-1168.

3. 850 cfs does not represent “the best flow[s] available.”

In response to nearly two thousand⁸⁶ public comments, the vast majority of which requested that summer instream flows be set at higher levels, Ecology claimed that the 850 cfs instream flows are “the best flows available to protect the instream resources of the Spokane River.”⁸⁷ This position is not supported by the record, and indeed is contradicted in several key respects. First, a flow higher than 850 would not be harmful to fish. WDFW has made it clear that the 850 cfs flows were the absolute minimum that would be protective of fish and that they would not oppose higher flows.⁸⁸ Professor Allan Scholz, the leading expert on the fishes of the Columbia Basin and on redband trout in particular, submitted an expert report on how the 850 cfs summer flow would affect the Spokane River’s fish populations in support of the Petition for Rule Amendment.⁸⁹ Dr. Scholz opined that flows higher than 850 cfs “almost certainly will improve survival” of redband trout and mountain whitefish.⁹⁰

⁸⁶ See, e.g., AR016352-018096.

⁸⁷ AR002984.

⁸⁸ AR014232 (“The proposed flows are not seen by me as an enhancement, rather as a floor.”); AR018528 (“I would caution that you [Ecology] not state that instream flows above 850 cfs at Spokane Falls would harm native fish.”); AR010725 (“we are unaware of any rivers in the Pacific Northwest where high flow during summer was a limiting factor for fish,” and in most cases evidence showed that low flows “limit fish.”); AR014229 (“maintaining natural flow is not harming the river.”).

⁸⁹ AR011373-011443.

⁹⁰ AR011377.

Second, the statement that 850 cfs is “the best flow available” is false. Water to support higher flows is available, as flows currently exceed this level for most of the summer. Ecology has repeatedly referred to the requirement in Avista’s FERC license that Avista release a minimum of 850 cfs from its hydro projects, and claimed that the increased instream flow that CELP seeks would constitute “enhanced” flows on the Spokane River that would require changes in Avista’s license.⁹¹ This argument is without merit. The license does require that, when flows fall below 850 cfs, Avista make efforts to release water up to that minimum. But Avista does not determine the maximum river flow; as “run-of-the-river” facilities, its dams do not impound significant amounts of water or control the flow of the River. When the River’s flow above the dams exceeds 850 cfs, flow below the dams also exceeds 850. As a result, even with the dams in place flows are greater than 850 cfs for part or all of the summer in most years.⁹² Current flows, without any “enhancement,” would therefore support a summer instream flow greater than 850 cfs.⁹³

Despite Ecology’s repeated claims to the contrary, CELP does not ask (and has never asked) that the river’s flow be “enhanced,” or that water be “put back” in the river. Ecology’s argument on this point is a

⁹¹ CP223; CP234.

⁹² AR003873-3874.

⁹³ AR000039-000040.

straw man designed to deflect this Court's attention from the real issue: the 850 cfs low flow would represent a significant degradation of current conditions on the River. Flows greater than 850 cfs should be protected when they are available, in order to preserve what is left of the natural hydrograph and better support instream values.

Third, the issue is not whether flows greater than 850 cfs are "available." Ecology is not required to determine that water is always present before adopting an instream flow; the agency may select a level that is not met in all years or at all times. Once adopted, an instream flow does not require that water actually be present at any particular level. Rather, when water *is* present at the instream flow level, that flow is protected from future appropriations. Adopting an instream flow at a level that is not met in all years is fully consistent with protection of "the quality of the natural environment," as required by RCW 90.54.020(3) and fulfills WDFW's stated goal of protecting the good flow years when they occur.⁹⁴

Ecology's "race to the bottom"⁹⁵ approach of selecting the lowest flow possible to protect is inconsistent with legislative intent to protect the instream environment. Ecology itself recognizes this:

[i]f the instream flow number is high relative to the average stream flow in the stream in the summer, this does not

⁹⁴ AR010739.

⁹⁵ See AR000039 (a visual depiction of the "race to the bottom").

mean that the instream flow number is wrong. Rather it means that the stream will provide more fish habitat in wet years than in dry ones. *Protecting the occasional “good water year” is needed to preserve a healthy population of fish.* If we want to protect the habitat available in those good wet years, then the instream flow needs to be set at that higher flow level.⁹⁶

WDFW agrees on this point, stating that we “can’t afford to eliminate good years when they occur.”⁹⁷ But that is exactly what Ecology has sanctioned by adopting the summer low flow of 850 cfs, which fails to protect even the current average low summer streamflows, let alone “the occasional ‘good water’ year” needed to protect fish.⁹⁸ The Rule will result in drought-level stream flows in most years because Ecology plans to condition new appropriations of water on the 850 cfs instream flow.⁹⁹ Such a result, where drought conditions become the norm, does not comport with Ecology’s statutory duties to protect and (where possible) enhance all of the instream values listed in RCW 90.54.020(3)(a).

In summary, the evidence before Ecology overwhelmingly showed that the 850 cfs flow developed to protect fish is not adequate to support

⁹⁶ Ecology, *Intro to Streamflows and Instream Flow Rules*, at <http://www.ecy.wa.gov/programs/wr/instream-flows/isf101.html> (last visited April 25, 2017) (emphasis added).

⁹⁷ AR010739; AR007749 (“Native fish have survived natural flows for thousands of years.” “Setting a rule and issuing perpetual water rights that would not allow recovery to previous flows would not be prudent, just risky.”).

⁹⁸ Median daily flow is currently above the 850 cfs summer instream flow for essentially the entire summer. AR000039-40.

⁹⁹ Ecology recognizes this concept, demonstrating that if an instream flow is set at a “frequently achievable dry year level,” allocations of additional water could “make a dry year normal.” AR010659.

navigational, recreational, or aesthetic use of the River. Adoption of a flow that fails to protect instream resources, as required by RCW 90.54.020(3)(a), exceeds Ecology's statutory authority.¹⁰⁰ The decision to adopt this flow was made without consideration for the attending facts and circumstances regarding navigational, recreational and aesthetic uses and is therefore arbitrary and capricious.¹⁰¹ *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Trans. Comm'n*, 148 Wn2d 887, 905, 64 P.3d 606 (2003); *WA Theodoratus*, 135 Wn.2d at 598; *Hillis v. Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Further, as demonstrated by the enormous volume of comments in opposition to the 850 cfs flows, Ecology's decision was also arbitrary and capricious because it failed to take the "general welfare" into account. *Save A Valuable Env't.*, 89 Wn.2d at 870.¹⁰²

¹⁰⁰ Failure to protect existing instream uses also violates the antidegradation provisions of Chapter 173-201A WAC. Designated uses to be protected under that chapter include aquatic life uses, notably protection of redband trout (WAC 173-201A-200(1)(a)(v)) and salmonid rearing (WAC 173-201A-200(1)(a)(iii)), recreational use (WAC 173-201A-200(2)), and miscellaneous uses including "navigation, boating, and aesthetics" (WAC 173-201A-200(4)).

¹⁰¹ Under RCW 34.05.570(2)(c), the Rule is therefore invalid as it relates to the 850 cfs summer instream flow.

¹⁰² *Save a Valuable Environment* dealt with the effects of rezoning for a shopping center on the area community, including noise and aesthetic effects. Here, the analogous result is the effect on the Spokane community of depleted streamflows that will reduce recreational opportunities and harm the River's aesthetic value. In both cases, the community as a whole suffers the harms resulting from the decision in question.

D. Ecology's interpretation of RCW 90.54.020(3)(a) violates the constitutionally-based public trust doctrine.

If the statutory language discussed above was not clear enough, when viewed through the required lens of the public trust doctrine (PTD) it is undeniable that the WRA requires Ecology to protect navigational values. The public trust doctrine stems from English common law and protects the public's right to navigate and fish in the navigable waters. *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 990 (1987). Ownership of tidelands and the beds of navigable rivers and streams vested in Washington when it became a state. *Id.* at 666. The state's ownership of these lands is comprised of a fee interest (*jus privatum*), which may be alienated by the state, and a trust interest (*jus publicum*), which may not be. *Id.* at 668. The *jus publicum* includes the public's rights of navigation and fishing in the navigable waterways, even where the *jus privatum* has been disposed of. *Id.* at 669.

Washington's public trust doctrine operates under the principle that "[t]he control of the State for purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining." *Caminiti*, 107 Wn.2d at 670 (quoting *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453, 13 S. Ct.

110, 36 L. Ed. 1018 (1892)); *Palmer v. Peterson*, 56 Wash. 74, 76, 105 P. 179 (1909) (adopting *Illinois Central*'s description of the public trust doctrine as consistent with Washington's public trust doctrine).

Washington's courts have recognized our state's public trust doctrine as "quasi-constitutional" in that it is rooted in the Washington Constitution as well as the common law, and implicates a constitutional analysis. *Chelan Basin Conservancy v. GBI Holding Co.*, 2017 WL2876140 at *7. The state's ownership of "beds and shores of all navigable waters" both in tidal waters and in lakes and rivers is set forth in Article 17, Section 1 of the Washington Constitution, and it is the courts' "constitutional responsibility" to determine whether an exercise of legislative power violates the public trust doctrine. *Chelan Basin Conservancy*, 2017 WL2876140 at *7 (citing *Caminiti*, 207 Wn.2d at 670). Courts review legislation implicating the public trust doctrine "with a heightened degree of judicial scrutiny, as if they were measuring that legislation against constitutional protections." *Weden*, 135 Wash.2d 678, 698, 958 P.2d 273 (1998) (quoting Ralph W. Johnson, et al., *The Pub. Trust Doctrine and Coastal Zone Mgmt. in Washington State*, 67 Wash. L.Rev. 521, 525-27 (1992)).

The *Caminiti* Court set forth a two part test to determine whether particular legislation violated the public trust doctrine: "(1) whether the

State, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it." *Caminiti*, 107 Wn.2d at 670. This Court recently reaffirmed this test, stating that: "the legislature can dispose of the public right to use navigable waters in place only to promote the interests protected by the public trust doctrine, or to further some other interest if doing so does not substantially impair the public trust resource." *Chelan Basin Conservancy*, 2017 WL2876140 at *6 (quoting 2 *Waters and Water Rights* § 30.02(d)(3), at 30-46 (Amy K. Kelley ed., 3d ed. 2013)).

Ecology's statutory responsibilities contained in Chapters 90.54 and 90.22 RCW embody these constitutionally-reserved public trust principles, and Ecology cannot exercise its authority in a manner that substantially impairs the resource or destroys the public's interest in the continued viability of the resource. *Illinois Cent.*, 146 U.S. at 453 (prohibiting government management of trust resource in a way that results in "substantial impairment of the public interest").

Ecology argued below that the Court should ignore the public trust argument, citing to *Postema* for the proposition that "Ecology's enabling

statute does not permit it to assume the public trust duties of the state.”¹⁰³

But the issue here is not whether the agency is empowered to directly implement the public trust. Rather, it is whether or not Ecology’s actions violated the public trust, which falls squarely within this Court’s authority to review.

The Court can use the standard set out in *Caminiti* to determine whether Ecology’s rule violates the WRA, as informed by the PTD. Under the *Caminiti* test, the record shows that the 850 cfs summer instream flow of WAC 173-557-050 violates the public trust.¹⁰⁴ First, by allowing water to be withdrawn to a degree that will impair recreational use and navigation, Ecology gives up control over (and indeed will arguably diminish or destroy) the *jus publicum*. Second, nothing in the administrative record shows that withdrawal of water until streamflow is reduced to 850 cfs will promote the public’s interest in the *jus publicum*; to the contrary, the public’s interest in navigation and recreation will be substantially impaired.¹⁰⁵

¹⁰³ CP235. But *Postema* in no way holds that Ecology may violate the doctrine through its rulemaking; the court resolved that case on the basis of the relevant statutes rather than the PTD.

¹⁰⁴ There is no evidence in the record that Ecology ever conducted a *Caminiti*-type analysis, or that it even considered the public trust issues on the record. Indeed, Ecology’s statement that the PTD is not applicable demonstrates that these issues were not considered.

¹⁰⁵ See Section IV.D, *supra*.

Ecology's interpretation of RCW 90.54.020(3)(a) is thus in conflict with the constitutionally-based public trust doctrine because it will improperly impair the public's interests in navigational and recreational use of the River.¹⁰⁶ These public interests are attributes of the state's ownership of aquatic lands in trust, and impairment of those interests implicates Art. 17, Section 1. When "dealing with a public trust impairment," this Court has required that a statute "be strictly construed in preservation of the public trust interest absent express contrary language or necessary implication." *Chelan Basin Conservancy*, 2017 WL2876140 at *5. No language or implication in RCW 90.54.020 gives Ecology the statutory authority to so impair the public interest. On the other hand, interpreting the instream flow statutes (RCW 90.22.010 and RCW 90.54.020) to require protection of navigation and fishing would best preserve the public trust.

¹⁰⁶ If a statute has two possible constructions, only one of which would be constitutional, the constitutional interpretation should prevail. *Seattle v. Drew*, 70 Wn.2d 405 (1967).

E. Ecology’s failure to consider all of the relevant information in its possession or to place this information in the record sets a precedent that would allow agencies to tailor the administrative record to reach a predetermined outcome in rulemaking.

1. Review of agency action requires that the record be complete and accurate.

Both Washington and Federal courts have spoken to the importance of a complete administrative record.¹⁰⁷ This Court has stated that it is “impossible to intelligently review” an agency’s decision in the face of an incomplete and inadequate record. *Loveless v. Yantis*, 82 Wn.2d 754, 762, 513 P.2d 1023 (1973). The Ninth Circuit Court of Appeals has held that an incomplete record must be viewed as a “fictional account of the actual decision-making process,” and that “if the record is not complete, then the requirement that the agency decision be supported by ‘the record’ becomes almost meaningless.” *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1548-9 (9th Cir. 1993).

¹⁰⁷ The Federal statute addressing grounds for relief from agency action and specifying what record the reviewing court is to consider is 5 U.S.C. 706. This Court has previously noted that RCW 34.05.570 (specifying grounds for relief under Washington APA) and 5 U.S.C. 706 are analogous. *Northwest Ecosystem Alliance v. Washington Forest Practices Board*, 149 Wash.2d 67, 79, 66 P.3d 614 (2003) (citing Federal cases on issue of whether petition for rulemaking is requirement for seeking judicial review). By the same logic, RCW 34.05.370 (contents of administrative record) would be analogous to 5 U.S.C. 706’s provisions on the issue.

Ecology is obligated to consider the recommendations of WDFW in adopting instream flows.¹⁰⁸ WDFW has made numerous recommendations for Spokane River flows at various times, all of which are indisputably relevant to flow levels required for fish habitat. Yet several of the recommendations from WDFW, and even one from Ecology itself, were not included in the agency record for this rulemaking.¹⁰⁹ In response to CELP's Motion to Supplement the Record with these additional recommendations, Ecology offered the highly technical explanation that "they were not in the possession of Ecology's rulewriters at the time that the Rule was written" and that they "were not considered by them when they drafted the [Rule]."¹¹⁰

Such selective inclusion in the record is likely to frustrate both public participation in decision-making and effective judicial review. In *Nat. Courier Ass'n v. Board of Governors of the Fed. Res. Sys.*, 516 F.2d 1229, 1241 (D.C.Cir.1975)), the D.C. Circuit noted that "[p]rivate parties and reviewing courts alike have a strong interest in fully knowing the basis and circumstances of an agency's decision" and that "[t]he proper approach, therefore, would appear to be to consider any document that

¹⁰⁸ RCW 90.03.247 ("the department shall, during all stages of development by the department of ecology of minimum flow proposals, consult with, and carefully consider the recommendations of, the department of fish and wildlife . . .")

¹⁰⁹ See Section III, *supra*.

¹¹⁰ CP163. Ecology did not dispute that Ecology itself had been in possession of these documents.

might have influenced the agency's decision to be 'evidence' within the statutory definition . . ." And the Seventh Circuit has held that "[f]irst and most basically, a complete administrative record should include all materials that "might have influenced the agency's decision," and not merely those on which the agency relied in its final decision. *Bethlehem Steel v. EPA*, 638 F.2d 994, 1000 (7th Cir.1980).

As discussed above, Ecology considered only fish habitat in adopting the 850 cfs low summer flow, making any recommendations relating to flow levels and habitat directly relevant. Ecology's stated reason for adopting the 850 cfs flow included the claim that 850 cfs is "the best flow[] available" to support instream values.¹¹¹ 850 cfs is far from the only figure recommended by WDFW, however. The 850 cfs figure was recommended in a 2012 memo by Dr. Hal Beecher at WDFW, based on habitat studies.¹¹² Dr. Beecher (and in one instance Ecology itself) also made numerous other flow recommendations based on the very same IFIM data, all but one of which were for more than 850 cfs, before the Rule was adopted.¹¹³ These recommendations for higher flows "might

¹¹¹ AR002983.

¹¹² Of the numerous streamflow studies referred to by Ecology, only one (the 2007 study by EES Consulting) addressed summer "rearing" habitat for redband trout in the reach of the River relevant to this case. All of Dr. Beecher's recommendations were based on these studies.

¹¹³ See section III, *supra*.

have influenced [Ecology's] decision,"¹¹⁴ but several of these documents were not included in the record as assembled by Ecology. Failure to consider these recommendations or to include them in the record is contrary to the Water Code's mandate that Ecology must, "during all stages of development . . . of minimum flow proposals, consult with, and carefully consider the recommendations of, the department of fish and wildlife . . ."¹¹⁵ Such a partial presentation of the available information prejudices both interested members of the public and the reviewing court.

While this appears to be an issue of first impression in Washington, Federal courts have held that an agency may not "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question." *Envtl. Def. Fund v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978).¹¹⁶ An agency also may not "exclude information on the grounds that it did not 'rely' on the excluded information in its final decision."

¹¹⁴ The Water Code actually *requires* that WDFW's recommendations be considered in the rulemaking process. RCW 90.03.247 provides that Ecology must "during all stages of development . . . of minimum flow proposals, consult with, and carefully consider the recommendations of, the department of fish and wildlife . . ."

¹¹⁵ RCW 90.03.247.

¹¹⁶ The *Blum* court noted that "the anomalous situation is presented that highly relevant submissions in the agency's files are not considered by EPA to be part of the record as not relied upon in reaching its final order. No standard is given to explain this willingness to exclude from consideration pertinent material submitted as an integral part of the rulemaking process or otherwise located in EPA's own files."

Fund for Animals v. Williams, 391 F.Supp.2d 191, 197 (D.D.C. 2005)(emphasis added).

Ecology argued below that the higher summer flow recommendations had been made in the context of the earlier "Watershed Planning Process and the Avista relicensing 401 process," and that the documents "do not relate to *Ecology's* decision making process at the time the agency adopted the Spokane River Instream Flow Rule" (emphasis in original).¹¹⁷ But the Avista relicensing procedure and the watershed planning process are necessarily bound up with the instream flow process. Each deals with the same river, the same existing flow conditions, and the same set of instream values that must be protected. Flow recommendations made at the time of the watershed planning and the relicensing 401 Certification processes for the Avista dams were based on the same habitat study as the eventual 850 cfs recommendation. The agency record for the rulemaking contains numerous other documents relating to watershed planning and to the AVISTA process, including the WRIA 54 watershed plan itself and the 2009 Order granting Avista's license.¹¹⁸ And at oral argument, Ecology's counsel stated that "many of the petitioners' concerns regarding the rule, recreation, aesthetics,

¹¹⁷ CP165-6.

¹¹⁸ AR010219-010467; AR008058-008224

navigation were, in fact, and are addressed not only by Avista's 2009 license, but the watershed planning process that also occurred here.”^{119,120}

Here, a court reviewing the record as assembled by Ecology¹²¹ could be left with the misleading impression that WDFW had simply recommended a flow of 850 cfs, which was then accepted by Ecology, and would be unaware that Ecology had actually chosen the lowest of a wide range of flow recommendations. This is especially critical in light of Ecology’s claim that 850 cfs represented “the best flows available.” Together with the current instream flow conditions, showing that streamflows generally exceed 850 cfs (that is, water above the 850 cfs level is available now), WDFW’s recommendations for higher flows demonstrate that higher flows are not only “available,” but would be acceptable and perhaps even helpful for fish.¹²²

WDFW’s memoranda regarding instream flow recommendations are essentially *ex parte* communications with Ecology, and as such should be included in the record so that they may be the subject of discussion and public comment. *See Blum*, 458 F. Supp. at 660 (technical information not

¹¹⁹ Verbatim Report of Proceedings at 33.

¹²⁰ It is ironic that Ecology attempts to rely on the watershed planning and relicensing processes to address concerns raised by CELP while simultaneously arguing that those processes were not relevant to the agency’s decision-making in establishing an instream flow.

¹²¹ CELP was aware of the documents relating to higher streamflow recommendations only because of a public records request made to WDFW. CP139-40.

¹²² AR013609; AR014232; AR018528.

generated by the agency and that might affect outcome should be “revealed for public comment”).

The US Court of Appeals for the District of Columbia Circuit has noted that this type of “asymmetry in information undermines the credibility of the court’s review upon those portions of the record cited by one party or the other.” *Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984) (documents critical of basis for agency’s decision omitted from record). Here, omission of numerous science-based recommendations for instream flows undermines a reviewing court’s ability to evaluate whether Ecology’s ultimate decision to adopt the 850 cfs summer flow was reached through a process of reason.

2. Agencies may not tailor the agency record to support a desired rule-making outcome.

This case also raises a larger issue of whether an agency can exclude available information from the decision-making process by not providing it to its rulemakers.¹²³ If so, an agency could readily avoid addressing issues of concern to the public (for example, here the omitted documents were directly relevant to strong public concern over the need for a higher streamflow) by selectively providing the agency staff with only a subset of the scientific information available.

¹²³ While CELP has no information to suggest that Ecology omitted these documents for the purpose of biasing this particular rulemaking, selective inclusion of information flies in the face of the APA’s purpose of providing greater transparency.

The *Williams* court discussed a test for determining when an agency's exclusion of information from the record is improper:

Supplementation of the record may be necessary when an agency excludes information adverse to its position from the administrative record. *Public Citizen v. Heckler*, 653 F.Supp. 1229, 1237 (D.D.C.1986) (citing *San Luis Obispo Mothers for Peace*, 751 F.2d at 1327 (D.C.Cir.1984)). A plaintiff can make a *prima facie* showing that an agency excluded adverse information from the record by proving that the documents at issue (1) were known to the agency at the time it made its decision, (2) "are directly related to the decision," and (3) "are adverse to the agency's decision."

Williams, 391 F. Supp. 2d at 198.

The *Williams* standard for a *prima facie* showing is readily met in this case. First, Ecology in no way denied that it was aware of the documents in question or had been in possession of them, rather, it relied on the technical distinction that they had not been in the possession of the rulewriters at the time that the rule was developed.¹²⁴ Second, there is no doubt that instream flow recommendations made by the same biologist on whom Ecology ultimately relied (or even by Ecology) are "directly related to the decision," and finally, the omitted recommendations are adverse to Ecology's position in that they called for a higher instream flow than Ecology was willing to establish.

¹²⁴ CP162.

V. CONCLUSION

For the reasons described above, Ecology's summer instream flow Rule for the Spokane River exceeded Ecology's statutory authority, and is arbitrary and capricious. In addition, Ecology's failure to include all of the relevant information before the agency in the administrative record was arbitrary and capricious. CELP respectfully requests that this Court remand WAC 173-557-050 to Ecology for reconsideration based on a complete record and in view of the statutory and constitutional requirements set forth above.

RESPECTFULLY SUBMITTED this 13th day of October, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2017, I caused the foregoing Appellants' Brief to be served on the parties herein as indicated below:

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Attorneys for Respondent Washington Department of Ecology Office of Attorney General Ecology Division Stephen H. North	<input type="checkbox"/> US Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> email: stephen.north@atg.wa.gov ecyolyef@atg.wa.gov

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

Dated this 13th day of October, 2017, in Seattle, Washington.

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