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No. 68162-1-I  
Thurston County Cause No.: 08-2-01403-4

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

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SWINOMISH INDIAN TRIBAL COMMUNITY,  
a Federally Recognized Indian Tribe,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

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BRIEF OF AMICUS CURIAE CENTER FOR ENVIRONMENTAL  
LAW AND POLICY

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## IDENTITY AND INTERESTS OF *AMICUS CURIAE*

*Amicus* Center for Environmental Law & Policy (“CELP”) submits this brief in support of the Swinomish Indian Tribal Community and to address the Department of Ecology’s (“Ecology”) authority to reserve water for new uses that impair minimum instream flow levels established by regulation. CELP has a long history of engagement with water resource issues in Washington, particularly regarding instream flows. Clarifying the legal status of minimum flows set by rule is essential to preserving CELP’s and the public’s interest in protecting instream flows necessary to support fish and wildlife and maintaining the ecological integrity of state waters. In accordance with Rule of Appellate Procedure 10.6(b), CELP has filed a motion for leave to file this brief, which further articulates CELP’s longstanding interest in the issues before the Court.

## STATEMENT OF THE CASE

Ecology promulgated the Skagit River Instream Flow Rule (the “Rule”) in 2001 to preserve flows in the river and its tributaries necessary to sustain fish and wildlife; protect scenic, aesthetic, and environmental values; support navigation and recreation; preserve water quality; and satisfy stock-watering objectives. WAC 173-503-020. The Rule establishes minimum flows and limits on diversions “to protect the aquatic ecosystem in the region covered by [the] rule.” WAC 173-503-030(1). Ecology enacted the Rule pursuant, in part, to its authority under the 1969

Minimum Water Flows and Levels Act (“Minimum Flows Act”), which provides Ecology “may establish minimum water flows or levels for streams, lakes or other public waters, whenever it appears to be in the public interest to establish the same.” RCW 90.22.010. The minimum flows established in the Rule are perfected water rights under the state’s prior appropriation system. RCW 90.03.345. The Rule accordingly mandates that all new water rights on the Skagit and its tributaries “shall be expressly subject to” the minimum flow levels. WAC 173-503-040(5).

In 2006, Ecology amended the Rule to allow later in time water uses to supplant priority of the instream flow right. WAC 173-503-073 (“Amendment”). Despite the fact that “minimum flows . . . constitute appropriations . . . with priority dates as of the effective date of their establishment,” RCW 90.03.345 (emphasis added), Ecology impaired the priority of the instream flow right by claiming to reserve water in favor of several classes of new consumptive uses. WAC 173-503-073. The Amendment allows new diversions in the Skagit basin ahead of the instream flow right and without regard to whether those new uses will impair instream flows. WAC 173-503-073(1)(a)–(b); WAC 173-503-075.

As sole authority for the Amendment, Ecology alleged that the interest in these broad classes of new uses “clearly overrides” the harm to minimum flows, and cited a provision from the general declaration of principles from the 1971 Water Resources Act, WAC 173-503-073(1) (citing RCW 90.54.020(3)(a)). That provision requires maintenance of

“base flows” necessary to protect environmental values in all “[p]erennial rivers and streams of the state,” and precludes any new use that would impair such “base flows” unless “it is clear that overriding considerations of the public interest will be served” by the proposed use. *See* RCW 90.54.020(3)(a) (the “OCPI exception”).

The Swinomish Indian Tribal Community (the “Tribe”) petitioned for judicial review of the Amendment in Thurston County Superior Court. Tribe’s Opening Br. at 22. The Superior Court denied the petition on December 3, 2010, and the Tribe filed a notice of appeal on December 30, 2010. *Id.* at 23. This brief demonstrates that Ecology exceeded its statutory authority and acted contrary to law by invoking the OCPI exception to allow impairment of minimum flows established by the Rule.

## BACKGROUND

Washington is a water-stressed state, with many streams and rivers over-appropriated and with flows regularly falling below critical levels needed to sustain community water supplies, fish, and other resources. *See* Ecology, *Protecting Our Stream Flows*, at 1 (2007), <http://www.ecy.wa.gov/pubs/0211021.pdf> (visited 11/7/11); and Ecology, *Managing Our Water Successfully*, at 3 (2007), <http://www.ecy.wa.gov/pubs/0611023.pdf> (visited 11/7/11). Diminished instream flows threaten the productivity and survival of people and fish,

including salmon protected by the Endangered Species Act.<sup>1</sup> *See* Managing Our Water at 3. Reducing water withdrawals during low-flow periods is the most effective way to mitigate fisheries impacts. Climate Impacts Group, Washington Climate Change Impacts Assessment (2009), <http://ceses.washington.edu/cig/res/ia/waccia.shtml#report>, at 241 (visited 11/7/11).

Rapid population growth in the Skagit Basin has decimated water supplies, threatening fish populations. Minimum instream flows, which Ecology determined are essential to the integrity of the Skagit, are already unmet for substantial portions of the year. RA 000780. Because of the harmful effect of low flows on salmon, state biologists have long recommended curtailing diversions in the Skagit Basin, including denial of all applications for new water rights on the small tributaries. RA 014135.

#### STANDARD OF REVIEW

This appeal presents a legal question of statutory interpretation:

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<sup>1</sup> All major Puget Sound and Columbia River salmon runs are listed as endangered or threatened under the Endangered Species Act. *See* U.S. Fish and Wildlife Service, Species Reports, Listings and Occurrences for Washington, [http://ecos.fws.gov/tess\\_public/pub/stateListingAndOccurrenceIndividual.jsp?state=WA&s8fid=112761032792&s8fid=112762573902](http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=WA&s8fid=112761032792&s8fid=112762573902) (visited 8/15/11). Reduced stream flows from consumptive uses are a primary obstacle to salmon survival and recovery. *See, e.g.*, National Marine Fisheries Service, Factors Contributing to the Decline of Chinook Salmon, at 6 (1998), <http://www.nwr.noaa.gov/ESA-Salmon-Listings/Salmon-Populations/Reports-and-Publications/upload/chnk-ffd.pdf> (visited 8/15/11).

whether the Legislature intended the OCPI exception to authorize broad exemptions from rules protecting minimum flows established pursuant to a different statute. This Court reviews the meaning of a statute *de novo*, with the objective of ascertaining and implementing legislative intent. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 42 P.3d 4 (2002). To that end, the Court will consider the plain meaning of the relevant provision(s), the statute as a whole, and related statutes on the issue. *Id.* at 11. If the statute is ambiguous, the Court turns to legislative history, including the circumstances surrounding a statute's passage and the historical context in which it was enacted. *Id.* at 12; *Restaurant Dev., Inc. v. Cannanwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

A court will not defer to an agency interpretation where a statute is plain. *See Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998). "Simply because the words of a statute are not defined in a statute does not make the statute ambiguous." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813–14, 828 P.2d 549 (1992). Only if the court finds a statute ambiguous will it turn to the agency for guidance. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

## ARGUMENT

The plain language, structure, and history of Washington's water resource statutes make clear that the OCPI exception does not authorize

new water rights that impair minimum flows set by rule. Flow levels set by rule are perfected water rights within the prior appropriation system, protected from impairment by new uses under fundamental principles of western water law. Further, Washington's public trust doctrine prohibits Ecology from authorizing impairment of the public's instream flow right. These principles foreclose Ecology's broad use of the OCPI exception and make plain the exception is not available to prioritize broad new classes of water rights for new development, but instead is available only if the proposed new use will serve truly emergent needs on a case-by-case basis.

I. THE OCPI EXCEPTION DOES NOT APPLY TO MINIMUM FLOWS SET BY RULE.

In light of its longstanding recognition that diminished flows threaten ecological and economic harm, the Legislature authorized Ecology to protect instream flows by rule. The 1969 Minimum Flows Act provides that Ecology "may establish minimum water flows or levels for streams, lakes or other public waters, whenever it appears to be in the public interest to establish the same." RCW 90.22.010. The 1971 Water Resources Act requires maintenance of "base flows" necessary to protect environmental values in all "[p]erennial rivers and streams of the state." RCW 90.54.020(3)(a). The latter provision precludes new water uses that would impair the "base flow" of a water body unless "it is clear that overriding considerations of the public interest will be served" by the proposed use. *Id.* This is the so-called "OCPI exception" Ecology relied

upon in amending the Rule to allow new consumptive uses notwithstanding impairment of minimum flows. WAC 173-503-073(1).

A. Minimum Flows Are Vested Water Rights and May Not Be Impaired by Subsequent Uses.

Washington’s prior appropriation system derives from the principle that, with respect to competing water uses, “first in time is first in right.” See RCW 90.03.010; *Campbell & Gwinn*, 146 Wn.2d at 9. This fundamental tenet of western water law provides that new water uses may not lawfully impair “senior” water rights possessing an earlier priority date. See *Postema*, 142 Wn.2d at 79; see also *R.D. Merrill v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999). In keeping with these basic principles, Washington statutes and Supreme Court precedent are clear that minimum flows set by rule are vested water rights within the state’s prior appropriation system. See RCW 90.03.345 (“minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations [with] . . . priority dates as of the effective dates of their establishment”); *Postema*, 142 Wn.2d at 82 (the Water Code and Water Resources Act “plainly provide that minimum flows, once established by rule, are appropriations which cannot be impaired by subsequent withdrawals”) (emphasis added); see also RA 006957.

Ecology may not authorize new water rights that will impair senior rights, regardless of the agency’s judgment that the new use would be ‘more beneficial’ than some existing senior right. See *Neubert v. Yakima-*

*Tieton Irrig. Dist.*, 117 Wn.2d 232, 240–41, 814 P.2d 199 (1991) (quoting *Longmire v. Smith*, 26 Wash. 439, 447, 67 P. 246 (1901)) (applying “elementary principle” of prior appropriation that state water agency may not subrogate a vested water right in favor of new uses). Because “a minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights,” *Postema*, 142 Wn.2d at 82 (emphasis added), Ecology may not authorize impairment of minimum flows based on its opinion that a subsequent use is more valuable, *see id.* at 91 (rejecting the argument that minimum flows are “limited” water rights which may be impaired in favor of new consumptive uses). Allowing broad new classes of water rights to impair minimum flows is irreconcilable with their status as senior, vested water rights and contravenes a bedrock principle of Washington water law. *See id.* Ecology’s Amendment is contrary to law and must be set aside.

B. The Water Resources Act Does Not Authorize Impairment of Minimum Flows By Junior Water Rights.

The Minimum Flows Act grants Ecology authority to protect “minimum flows” by promulgating instream flow rules “whenever it appears to be in the public interest to establish the same.” RCW 90.22.010. Ecology exercised this authority to set the Skagit Rule. *See* WAC 173-503-040. To justify amending the Rule to impair the established minimum flows, Ecology attempts to graft the OCPI exception, which appears in a different statute and applies to “base flows,”

onto the provision authorizing “minimum flows” to be set by rule.

Ecology makes little attempt to justify this novel interpretation.

The term “base flows” is found solely in the Water Resource Act’s “General Declaration of Fundamentals for Utilization and Management of Waters of the State.” *See* RCW 90.54.010(2). The General Declaration of Fundamentals instructs, *inter alia*, that in order to “protect and enhance” the quality of the natural environment,

[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, and navigational values. Lakes and ponds shall be retained substantially in their natural condition.

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.

RCW 90.54.020(3)(a). What is plain is that “base flow” is not a regulatory designation, but rather an inherent natural property of a stream—the flow level “necessary to provide for preservation of” the enumerated wildlife and other environmental values.<sup>2</sup> *See id.*; *see also In the Matter of Appeals from Water Rights Decisions of the Dep’t of Ecology*, PCHB Nos. 96-8, et al., 1996 WL 514630, at \*6, (July 17, 1996) (“*Water Appeals*”) (citing Ecology’s definition of “base flow” as “flow sustained in a stream during extended periods without precipitation or, that component of

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<sup>2</sup> The statute does not define “base flow” and the term does not appear in any other provision following the Fundamentals quoted above.

stream flow normally derived from groundwater effluent”).

In contrast, the Legislature uses “minimum flows” to refer to flows set by rule under the Minimum Flows Act, RCW 90.22.010. It is a “fundamental rule of statutory construction . . . that the Legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). The Water Resources Act passed just two years after the Minimum Flows Act; if the Legislature intended “base flows” to be synonymous with “minimum flows” it would have used the same term as two years earlier. It did not.

The plain language of these statutes make clear that the “minimum water flows or levels” that Ecology may set by rule under RCW 90.22.010 are distinct from the “base flows” described as an inherent property of all perennial streams and rivers in RCW 90.54.020. *Accord Water Appeals*, 1996 WL 514630 at \*4 (describing Ecology’s authority to protect “necessary base flows” in basins where it has not issued an instream flow rule and its separate authority to protect minimum flows set by rule).<sup>3</sup> The

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<sup>3</sup> Commentators also conclude that “base flows” and “minimum flows” set by rule have different definitions. “Base flow” refers to “sustained or fair weather stream flow—the discharge that is sustained in a stream channel during the dry season . . . .” “Minimum flows” are “[w]ater flows or levels that may be established under RCW 90.22 for the protection of [environmental and other values].” Melisa Snoeberger, *A Compiled History and Analysis of the Instream Flow Protection Program in Washington State*, University of Washington Daniel J. Evans School of Public Affairs, at 10 (2011) (quoting Osborn et al., *A Summary of Quantity, Quality and Economic Methodology for Establishing Minimum Flows* 4 (State of Washington Water Research Center (1973))).

OCPI exception applies only to base flows and does not grant Ecology authority to allow junior water rights to impair minimum flows set by rule.

This distinction between base flows and minimum flows is also consistent with the placement of the OCPI language in the base flows section of the Water Resource Act. An OCPI use plainly refers to an emergency-type use or situation where the Legislature anticipates natural flows may be interrupted to, for example, fight a forest fire or address an emergency need for potable water at a school or hospital. *See also* Part II.B. *infra* where Ecology has interpreted and applied the OCPI in that manner over an extended period. It is rational to read the OCPI exception as allowing Ecology to interrupt natural flows for a limited time to address an emergency, but not to impair a fully-established prior in-stream flow right with permanent water rights that are more junior in time.

Finally, the Washington Supreme Court has stated the Water Resources Act is not “meant to override minimum flow rights once established by rule.” *Postema*, 142 Wn.2d at 82-83. Neither the Water Resources Act nor any other statute grants Ecology authority to weigh economic or other interests to justify impairment of minimum flows. *Id.* Instead, the *Postema* Court made clear that RCW 90.54 cannot provide such authority, consistent with the precepts that (1) vested water rights may not be lawfully impaired by junior users, and (2) minimum flows set

by rule are vested water rights.<sup>4</sup>

Ecology's contention that the OCPI exception allows it to authorize junior rights to impair senior minimum flows set by rule rests entirely on its own history of inconsistently applying the water resource statutes. While Ecology has used these terms incorrectly and inconsistently, *see, e.g.*, Ecology, A Guide to Instream Flow Setting in Washington State, at 4 (March 2003), [available at http://www.ecy.wa.gov/pubs/0311007.pdf](http://www.ecy.wa.gov/pubs/0311007.pdf) (visited 8/11/11) ("the term 'instream flow' is considered to be the same as the terms 'minimum instream flow' and 'base flow'"), the agency's confusion does not and cannot alter the plain language of the relevant statutes. *See Cowiche*, 118 Wn.2d at 815 (holding that Ecology's interpretation of the Shoreline Management Act was not entitled to deference where it conflicted with the statute). It is for the Court to interpret the plain language and it need not defer to Ecology's muddling of statutory terms.

In sum, nothing in the Water Resources Act, its OCPI exception, or its Declaration of Fundamentals creates an "exception" authorizing broad classes of new uses to impair instream flows established by rule. Ecology

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<sup>4</sup> In *dicta*, the *Postema* Court suggested the OCPI exception might apply to waters for which Ecology has issued an instream flow rule, *Postema*, 142 Wn.2d at 81 (conflating "base" and "minimum" flows), but the scope of the OCPI exception was not before the Court in *Postema* and the Court did not consider the distinction between base and minimum flows set by rule beyond quoting the statute. Ecology agrees that *Postema* did not involve or address the OCPI exception. Ecology Br. at 24.

makes a decidedly incorrect leap in its interpretation by grafting the OCPI exception onto the agency's authority to establish protected minimum flows under chapter 90.22 RCW. Under the plain language of these two statutes, Ecology lacks authority to authorize new water rights that impair the minimum flow established in the Rule.

II. EVEN IF THE STATUTORY LANGUAGE IS AMBIGUOUS, ECOLOGY'S INTERPRETATION OF THE OCPI EXCEPTION IS UNSUPPORTABLE.

A. The Legislature Intended for the Water Resources Act to Provide *Additional* Protection for Instream Flows, Not a Broad Exception Authorizing Their Impairment.

Even if the Court finds the language of the water resources statutes ambiguous (which it should not), Ecology's newly-expanded construction of the OCPI exception cannot stand because it finds no basis in legislative history and runs afoul of the Legislature's purpose in passing the Water Resources and Minimum Flows Acts. There is no mention of the OCPI exception or its application to minimum flows in the history of the Water Resources Act, despite the fact the Minimum Flows Act was enacted just two years earlier and addresses similar water management issues.

Importantly, allowing Ecology to modify instream flows with OCPI is contrary to the Legislature's express intent in the Water Resources Act of providing additional protections for water resources and instream values.

*See Stempel v. Dep't of Water Resources*, 82 Wn.2d 109, 119, 508 P.2d 166 (1973). It is inconsistent with this protective purpose to find that the Legislature intended OCPI to eviscerate the minimum flow rules the

Legislature had so recently authorized Ecology to establish.

B. Ecology's New Interpretation of the Scope of the OCPI Exception Is Also Not Entitled to Deference.

Even if the Court finds the relevant statutes ambiguous, it should not defer to Ecology's interpretation of the scope of the OCPI exception because it is inconsistent with longstanding agency practice. *See Dot Foods, Inc. v. Washington Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009); *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995). It is the longstanding and limited interpretation that carries weight. *See Melhaff v. Tacoma School Dist. No. 10*, 92 Wn. App. 982, 987, 966 P.2d 419 (1998).

Until recently, Ecology properly interpreted OCPI as "a test of last resort" invoked only "when all other options are not working." RA 035920. Ecology only recently expanded the OCPI exception to justify impairment of minimum flows set by rule for broad categories of future water uses, as opposed to "last resort", case-by-case emergencies. *See* RA 035920. Specifically, earlier guidance and policy statements provided:

[a] finding of OCPI is not used to reserve water nor is OCPI used to authorize a class of proposed appropriations . . . A blanket or general finding of OCPI to authorize the withdrawal of water in apparent conflict with established instream flows has never been done at a watershed scale and is not appropriate. . . . Rather, a finding of OCPI is triggered by a new water right application . . . and is

applied on a case by case basis and as a matter of last resort.

RA 035919 (emphasis added). Historically, Ecology granted new rights under the OCPI exception only if an individual applicant established that he could not satisfy an emergency need for water by acquiring existing rights and/or mitigating consumption. RA 035919–035920. Invoking the OCPI exception to reserve water for broad categories of new consumptive uses skips this individualized analysis. As Ecology itself has found, the routine demands of new development do not qualify as “*overriding* considerations of the public interest;” and “to say ‘we have growth coming therefore we need new water rights not subject to the instream flow rule’ is not sufficient [to support a finding of OCPI].” RA 035919. Rather, OCPI is only appropriate to support “an emergency use of water or water use to satisfy a public health and safety issue.” RA 035919. The Amendment, in contrast, reserves water for routine growth.

Ecology’s use of OCPI in the Amendment conflates the standard beneficial use test for granting any new water right with the much higher bar for establishing “overriding considerations of the public interest” sufficient to deviate from the fundamental principle of prior appropriation protecting senior water rights. Allowing any future use for routine growth to override minimum flows renders those flows meaningless and leaves no protections in place for the environmental and public values the Legislature explicitly sought to preserve. Ecology’s new, expanded

interpretation is not entitled to deference from this Court.

II. THE PUBLIC TRUST DOCTRINE PROHIBITS ECOLOGY DISPOSING OF THE PUBLIC’S WATER RIGHT IN FAVOR OF PRIVATE WATER USERS THAT ARE LATER IN TIME.

The public trust doctrine protects the public’s interest in instream environmental values and accordingly limits the state’s authority to diminish minimum flows. *Water Appeals*, 1996 WL 514630 at \*8 (“[T]he water code, by recognizing the waters of the state belong to the public and acknowledging the state acts as the trustee for the public in regulating the use of those waters . . . . Therefore, the extent to which the Legislature may restrict instream or base flows is limited by the public trust doctrine”); *see also Weden v. San Juan Cty.*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998) (quoting Ralph W. Johnson, et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)); *Orion Corp. v. State*, 109 Wn.2d 621, 640–41, 747 P.2d 1062 (1987) (Washington courts have recognized new public trust interests in keeping with evolving public need). To that end, the public trust doctrine prohibits the state from ceding control over trust resources to the detriment of the public. *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993).

Basic tenets of Washington water law support application of the public trust doctrine to protect minimum flows.<sup>5</sup> Washington statutes and

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<sup>5</sup> Water law scholars within and beyond Washington have consistently acknowledged that the public trust doctrine protects the public’s interest in

case law make clear that the waters of the state belong to the public unless and until they are validly appropriated. *See* RCW 90.03.010 (“Subject to existing rights all waters within the state belong to the public”); *Lummi Indian Nation v. State*, 170 Wn.2d 247, 251–52, 241 P.3d 1220 (2010). Moreover, minimum flows set by rule constitute vested appropriations held by the state on behalf of the public. *See Water Appeals*, 1996 WL 514630 at \*7 (citing *Wilbour v. Gallagher*, 77 Wn.2d 306, 314–16, 462 P.2d 232 (1969) (holding that “the instream flows, created by Ecology, are public rights, much in the way that the right of the public to navigate in the waters of the state are public rights”)). Ecology’s promulgation of an instream flow rule concretizes the public’s proprietary interest in the protected flow level, and formalizes Ecology’s role as trustee of the public’s vested instream water right.

In the general law of trusts, it is axiomatic that a trustee must manage trust resources for the exclusive interest of the beneficiary. *See Tucker v. Brown*, 20 Wn.2d 740, 768, 150 P.2d 604 (1944); *see also Skamania Cty. v. State*, 102 Wn.2d 127, 134, 685 P.2d 576 (1984) (holding that “when the state enacts laws governing trust assets, its actions will be tested by fiduciary principles”). When a statute places the state in

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maintaining instream flows. *See, e.g.,* Joseph Sax, *The Limits of Private Rights in Public Waters*, 19 *Envtl. L.* 473 (1989); Jan S. Stevens, *The Public Trust and Instream Uses*, 19 *Envtl. L.* 605, 606 (1989) (“There is nothing novel in the applicability of . . . the public trust [doctrine] to prevent the continued destruction of public waters.”).

a trustee role acting for the public benefit, “the state as trustee may not use trust assets to pursue other goals,” “no matter how laudable.” *Skamania Cty.*, 102 Wn.2d at 137, 134. Moreover, it is a basic tenant of trust law that a trustee—whether state or private—has a duty to manage trust resources prudently, always in the interest and for the greatest benefit of the beneficiary. *Id.* at 138.

Consistent with basic trust principles, the public trust doctrine limits the state’s discretion in managing resources held in trust for the public. *See Caminiti v. Boyle*, 107 Wn.2d 662, 669–70, 732 P.2d 989 (1987). The heart of the public trust doctrine is its mandate that the state maintain control of and authority over trust resources. *See Ill. Cent. Ry. Co. v. Ill.*, 146 U.S. 387, 452–53 (1892). Allowing new uses to impair the minimum flows established in the Rule constitutes a cession of trust resources to individual appropriators; once appropriated, the right to use the waters “reserved” under the Amendment will be private property, and the public’s vested right to the minimum flow will be diminished or extinguished. *Cf. Weden*, 135 Wn.2d at 700 (upholding regulation because it did not transfer ownership or control of trust resources into private hands and prohibited activity deemed harmful to waters).

Ecology may not cede trust resources to private benefit and control based on its ever-changing “balancing” of policy values, as it did in the Amendment. *See Ecology Br.* at 28–29 (describing the balancing analysis). Ecology cannot justify impairment of the public’s vested

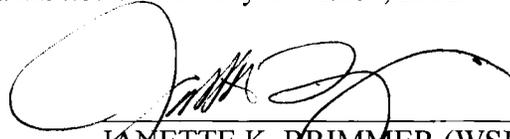
minimum flow right. *See* 1 William H. Rodgers, Jr., *Public Trust Doctrine*, in *Environmental Law* § 2.20 at 166 (1986) (articulating the test for a public trust violation as simply “whether there has been a substantial impairment of public uses. This suggests we should look to damage, not justifications for it, and therefore balancing is to be disregarded if the toll is unacceptably high.”); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 578, 103 P.3d 203 (2004) (Quinn-Brintnall, C.J., concurring in the result) (when considering a public trust challenge, “we do not evaluate the merits of the reasons for the action or the professed needs of those supporting the use or exhaustion of the resources held in the public trust.”). As Ecology has acknowledged, “there is no authority for impairing the public’s right in instream flows to serve a private appropriator’s interest.” RA 035919. Yet that is precisely what Ecology improperly used the OCPI exception to do.

Even if Ecology were allowed to balance public and private interests, Ecology emphasizes only the statutory objectives that support its decision, *see* Ecology Br. at 10–11 (describing valuation of the public interest and instream resources solely in economic terms), to the exclusion of key conservation principles in the water resource statutes. *See Stempel*, 82 Wn.2d at 119 (describing the Water Resources Act as having a robust environmental mandate). Ecology’s reallocation of the public’s vested right to the minimum flow in the Skagit River constitutes a total relinquishment of state control over trust resources, contrary to state law.

CONCLUSION

Ecology's Amendment to the Skagit River Instream Flow Rule is in excess of statutory authority and contrary to governing statutes and common law. Amicus request reversal of the lower court decision and that the Amendment be set aside.

Respectfully submitted this 6<sup>th</sup> day of March, 2012.



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