NO. 97684-8

Court of Appeals No. 51439-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Petitioner,

v.

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

Respondents.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S PETITION FOR REVIEW

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I. INTRODUCTION

This case involves the scope of the Department of Ecology's authority to adopt water management rules to protect rivers throughout the state of Washington by establishing "minimum instream flows." Three statutes, RCW 90.22, RCW 90.82, and RCW 90.54, provide Ecology with authority to set instream flows in basins throughout the state. For decades, Ecology has set minimum instream flows by rule using a scientific and judicially approved methodology based on the needs of fish. This methodology ensures that other uses and values of the river are protected along with fish. The Court of Appeals below, however, concluded otherwise. It overturned Ecology's long standing practice by concluding that Ecology focused "too narrowly" on the needs of fish in establishing "summer flows" for the lower reach of the Spokane River.

The Court of Appeals erred for two fundamental reasons. First, through its use of the word "or" in RCW 90.22.010, Ecology's primary statutory instream flow rulemaking statue, the Legislature provided the agency with the discretion to determine the purposes for which the agency establishes minimum instream flows by rule. The Court of Appeals ignored the plain language of this statute because the Legislature has expressly authorized the agency to focus on fish when it sets minimum flows by rule. Second, the Court of Appeals erroneously imposed a mandate on Ecology

to consider the listed values listed in RCW 90.54.020(3)(a) to the "fullest extent possible." This ambiguous and newly pronounced standard directly conflicts with the language of that statute to instead preserve and protect "base flows" for the listed values.

Each of these errors warrants this Court's review because the errors conflict with a decision of this Court and a more recent decision of the Court of Appeals. *See Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cty.*, 121 Wn.2d 179, 849 P.2d 646 (1993), *aff'd* 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (*Elkhorn*)[1]; *see also Bassett v. Dep't of Ecology*, 8 Wn. App. 2d 284, 303, 438 P.3d 563 (2019). RAP 13.4(b)(1), (2). The decision of the Court of Appeals also raises issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). Namely, the Court of Appeal's invalidation of the Spokane Instream Flow Rule (Rule) leaves the river unprotected during the summer months from future disputes over the river with Idaho, and from future appropriations of water and transfers of water rights. If the Court of Appeals' decision stands, it will likely invite challenges to other instream flow rules throughout the state and potentially lead to invalidation of those rules as well for reasons not supported by the law. The Court should grant review to protect Ecology's

[1] This case is often referred to as the "Elkhorn" decision. "Elkhorn" was the name of the proposed hydroelectric project at issue in the case. *Elkhorn*, 121 Wn.2d at 184.

statewide efforts to manage scarce water resources for the people of our state, while also seeking to preserve and protect instream resources, including fish.

II. IDENTITY OF PETITIONER AND DECISION BELOW

The State of Washington, Department of Ecology petitions for discretionary review of the Published Opinion of Division II of the Court of Appeals, *Center for Environmental Policy*, *et. al*., v. *Dep't of Ecology*, *et. al*., No. 51439-7 (Wash. Ct. App. Aug. 20, 2019) (Slip Op.). A copy of that decision is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Did Ecology properly exercise its authority in adopting the Rule when it based the Rule on the scientifically determined needs for fish, which also accounts for the base flow needs of other instream values protected by law?

2. Did the Court of Appeals wrongly conclude that the Rule is arbitrary and capricious when it is based on the scientifically determined needs of fish and also accounts for all the other instream values that must be protected by law?

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IV. STATEMENT OF THE CASE

A. Ecology's Statutory Rulemaking Authority

Ecology has exclusive authority for setting minimum instream flows by rule. RCW 90.03.247. Once established, minimum instream flow rules have the status of water rights. RCW 90.03.345. Ecology derives its instream flow rulemaking authority from statutory provisions in RCW 90.22, the Minimum Water Flows and Levels Act, RCW 90.82, the Watershed Planning Act, and RCW 90.54, the Water Resources Act. RCW 90.22 first provides:

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

RCW 90.22.010. RCW 90.22.020 then provides in relevant part, "[f]lows or levels authorized for establishment under RCW 90.22.010 . . . shall be provided for through the adoption of rules."

Ecology also has the authority to adopt minimum flow rules under the Watershed Planning Act, RCW 90.82. Under RCW 90.82, the Legislature recognizes that "local development of watershed plans for managing water resources and for protecting existing water rights is vital to both state and local interests . . . ." RCW 90.82.010. If a watershed planning

unit reaches consensus on instream flow levels during the watershed planning process, then Ecology must adopt those flows by rule. RCW 90.82.080(1)(b). If a planning unit does not reach consensus on flows, then Ecology may initiate rulemaking under the Administrative Procedure Act (APA) to adopt flows. RCW 90.82.080(1)(c).

Next, the Water Resources Act of 1971, RCW 90.54, provides the agency with general rulemaking authority. Specifically, RCW 90.54.040 authorizes Ecology, through the adoption of rules, to ensure as a matter of high priority "that the waters of the state are utilized for the best interests of the people, to develop and implement in accordance with the policies of this chapter a comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use."

In turn, RCW 90.54.020 provides a "[g]eneral declaration of fundamentals for utilization and management of water resources in the state." This statute includes multiple competing policy objectives, including the retention of "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values" for perennial rivers and streams. RCW 90.54.020(3)(a). Other competing policy declarations in this statute include "allocating water among potential uses in a way that secures 'the maximum net benefits for the people of the state,' developing multipurpose

water storage facilities, preserving adequate supplies of water in potable condition, developing regional water supply systems, and encouraging water conservation practices. RCW 90.54.020(2).” Slip op. at 14.

B. The Spokane River and Ecology’s Instream Rule

The Spokane River originates at the outlet of Lake Coeur d’Alene in Idaho and flows west for approximately 111 miles to the Columbia River in Eastern Washington. AR 8062. Adopting regulatory water management rules such as the Rule at issue in this case for a resource like the Spokane River is no small task, as the goal of any water management rule is to balance many competing instream and out-of-stream needs and uses. *See*, e.g., AR 100 (Ecology approaches instream flow rules differently in each watershed because each rule area has unique needs). *See also*, WAC 173-557-010 (Authority and Purpose).

Ecology’s efforts to adopt instream flow protections for the Spokane River thus go back to 1998, when Ecology commenced working with watershed planning groups to develop instream flow protection for the Spokane River. AR 2984. Development of the Rule was important for a number of reasons, including to protect Washington’s interest in the water in the river should an interstate dispute occur with Idaho over the resource. AR 63, 72, 3383, 3390. The watershed planning group could not reach consensus on what regulatory flow levels should be adopted (AR 2985), and

so rulemaking defaulted to Ecology to implement its expertise to determine what minimum flow levels to set for the Spokane River. RCW 90.82.080(1)(c).

Ecology formally commenced rulemaking in January 2014. AR 72. The Rule record is extensive and shows that Ecology received flow proposals for the summer period (from June 16 to September 30) ranging from a low of 565 cfs (City of Spokane) to a high of 1350 cfs (Environmental and Recreational Communities). *See, e.g.*, AR 3703. An important consideration for Ecology in its Rule adoption process here was that flows on the River are regulated by Avista Corporation (Avista), which operates five hydroelectric facilities on the Spokane River, including the Post Falls Hydroelectric Project. AR 8063. Avista uses its Post Falls project to regulate flows in the river in accordance with minimum flow requirements in its federal license, issued by the Federal Energy Regulatory Commission (FERC). AR 8067.

During the rulemaking process, Ecology communicated that its Rule does not regulate how much water flows in the river, and that to change flows in the river one would effectively need to seek a change in Avista's federal license. *See*, e.g. AR 3016. In other words, if the challengers to the Rule actually wanted to increase flows in the river, they would have had to challenge Avista's federal license to force additional releases from

Post Falls to satisfy their recreational ambitions. Ecology's Rule cannot do that. Instead, the Rule simply establishes a protectable water right in the flow of the river once that flow level is established by rule. RCW 90.03.345.

On January 27, 2015, Ecology adopted WAC 173-557, the Water Resources Management Program for the Spokane River. Ecology ultimately set regulatory minimum flows at flows at 850 cfs following a deliberative process and by relying on four scientifically based fish studies, including a study that relied upon the Instream Flow Incremental Methodology (IFIM).[2] AR 3832. Ecology consulted with Dr. Hal Beecher, the Department of Fish and Wildlife's lead fish biologist, who concluded that a minimum flow of 850 cfs was necessary to maximize habitat for redband trout and mountain whitefish, the species of concern in the river. AR 3834. Ecology thoroughly and thoughtfully considered all competing values on the river, including, of primary interest to the challengers to the Rule here, whitewater rafting.[3]

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[2] The purpose of an IFIM study is to determine what flows are minimally necessary to support multiple fish species of concern in a water source at multiple life stages. AR 1144–1168

[3] For example, Ecology considered a whitewater boating study for the river and how that was one of just many uses of the river. AR 3031–3033. The record notes how the individuals queried for that study produced a range of opinions regarding flows for rafting, and how flows are dependent on releases from Post Falls. AR 3033. The record also includes photographic evidence of individuals recreating in a variety of watercraft, from tubes to kayaks to a pontoon boat, at flows of just 770 cfs, which is below the 850 cfs level set by the Rule. AR 11590, 11594, 11595. In short, recreation is available and widespread on the river even when flows occur below the 850 cfs established by the Rule.

WAC 173-557-010(2) states the multifaceted purpose of the Rule:

> (a) Establish instream flow levels necessary to protect wildlife, fish, scenic, aesthetic, recreation, water quality and other environmental values, navigational values, and stock watering requirements;
> (b) Meet water resource management objectives of the Spokane area watershed plans adopted under chapter 90.82 RCW;
> (c) Protect existing water rights; and
> (d) Establish and protect Washington state interests in the water resources of the Spokane River.

WAC 173-557-010 (2)(a)–(d).

C. Procedural History

On May 27, 2016, the Center for Environmental Law and Policy, American Whitewater, and the Sierra Club sued under the APA to challenge Ecology's decision to set summer flows in the Spokane River at 850 cfs, as measured at the Spokane gauge in downtown Spokane. WAC 173-557-050. The Superior Court denied the challenge and affirmed the Rule. The challengers unsuccessfully sought direct review in this Court, which transferred the case back to the Court of Appeals.[4]

On June 26, 2019, the Court of Appeals issued a published decision invalidating the Rule, finding that Ecology focused too narrowly on setting flows to support fish habitat and did not give enough consideration to other

[4] At the time, Ecology argued against direct review because the agency had prevailed and did not believe the case satisfied the criteria for direct review. Now that the Court of Appeals has invalidated the summer flows, as explained in this Petition, discretionary review is warranted.

instream values, specifically recreation. In particular, the Court found that setting the instream flow at 850 cfs during the summer months exceeded the agency's statutory authority, and was arbitrary and capricious. Slip Op. at 27. Ecology filed a motion for reconsideration seeking to clarify the scope of the Court of Appeals' invalidation of the Rule. On August 20, 2019 the Court of Appeals granted Ecology's motion and clarified that its opinion applies only to invalidate that part of WAC 173-557-050 that establishes flows from June 16 to September 30 for the lower reach of the Spokane River. *Id*.

V. REASONS WHY REVIEW SHOULD BE GRANTED

This Court's review is warranted under RAP 13.4(b)(1), (2) and (4) because the decision of the Court of Appeals conflicts with a decision of this Court and a recently published decision of the Court of Appeals, and because the case involves issues of substantial public interest that should be determined by this Court.

A. The Court of Appeals' Decision Conflicts with This Court's Decision in *Elkhorn*

This Court long-ago held that the IFIM is an appropriate methodology for establishing minimum, and not optimal, flows for fish. *Elkhorn*, 121 Wn.2d at 202–203. In *Elkhorn*, Ecology used the IFIM to impose a minimum flow condition on the water quality certificate for a

proposed hydroelectri*c* project based upon the needs of resident fish. *Elkhorn*, 121 Wn.2d at 189. The Court expressly affirmed Ecology's use of the IFIM to establish minimum flow levels for rivers based on the needs of fish, stating "Ecology's streamflow conditions were necessary to ensure compliance with RCW 90.54.020(3)(a)." *Id*.

This Court's affirmation of Ecology's use of the IFIM in *Elkhorn* to establish minimum flows based on the scientific needs of fish is a cornerstone of Ecology's rationale when Ecology adopts minimum instream flows by rule. The rationale also squares with the plain language of RCW 90.22.010. In that statute, the Legislature provided Ecology with the express authority to determine the purposes for which Ecology establishes minimum instream flows by rule through its use of the disjunctive word "or."[5]

The Court of Appeals below, however, without mention of *Elkhorn* and this Court's affirmation of Ecology's use of the IFIM to "ensure compliance with RCW 90.54.020(3)(a)," found Ecology exceeded its authority and violated this same statute because the agency focused "too

[5] RCW 90.22.010 reads, "The department of ecology may establish **minimum water flows or levels** for streams, lakes or other public waters for the purposes of protecting fish, game, birds **or** other wildlife resources, **or** recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." (emphasis added). "As a default rule, the word 'or' does not mean 'and' unless legislative intent clearly indicates to the contrary." *Tesoro Ref. & Mktg. Co. v. Dep't of Rev.*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008).

narrowly" on fish in setting the summer flows. Slip Op. at 16–17. The Court of Appeals also found the summer flows to be arbitrary and capricious for the same reasons, Slip Op. at 17, 27.

The Court of Appeals decision directly conflicts with this Court's decision in *Elkhorn*, which affirms that Ecology may focus on fish when it sets minimum flows, and that doing so ensures statutory compliance with RCW 90.54.020(3)(a). Further, the Court of Appeals conclusion that Ecology's focus on fish was arbitrary and capricious conflicts with well-established case law that an agency action is not arbitrary and capricious unless it is "willful and unreasoning and taken without regard to the attending facts and circumstances." *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). Here, Ecology's decision to focus on the scientific needs of fish when it sets minimum flows by rule is well-rooted in *Elkhorn* and the statutory language of RCW 90.22.010. Ecology's decision was not arbitrary or capricious, even if the Court of Appeals disagreed with the agency's rationale. *See Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wn.2d 568, 589, 90 P.3d 659 (2004) ("Where there is room for two opinions, and the agency acted honestly and upon due consideration, [courts] should not find that an action was arbitrary and capricious, even though [the] court may have reached the opposite conclusion.").

The Court of Appeals fundamentally misunderstood Ecology's rationale for focusing on fish when it establishes minimum instream flows by rule—that doing so is a necessary baseline that also serves to preserve and protect other important values, including those listed in RCW 90.54.020(3)(a). After all, if a river is not healthy for fish it is unlikely to support any other instream values. The Legislature through multiple acts has also stressed the importance of maintaining healthy fish populations.[6]

Ecology's rulemaking file shows careful consideration of the values of concern to the challengers below, notably whitewater rafting, and how that particular value, one of many, was also thoroughly considered during the Avista relicensing process and even the watershed planning process. *See* e.g., AR 8063-066; AR 3484-485; AR 2985. Even though "recreation" is not a value that is listed in RCW 90.54.020(3)(a), the record contains documentation of a wide range of preferred flows for different recreational activities on the river. *See* e.g. AR 11590, 11594, 11595 (photographs of

[6] *See*, *e.g.*, (1) RCW 90.54.005, wherein the Legislature recognizes that productive fish populations are one of three critically important water resource objectives; (2) RCW 77.57.020, which states that it is "the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state;" (3) RCW 90.22.060, which calls for establishing a statewide list of priorities for evaluation of instream flows: "[i]n establishing these priorities, the department shall consider the achievement of wild salmonid production as its primary goal."; and (4) RCW 90.82.070, part of the Watershed Planning Act, which calls for an assessment that includes "data necessary to evaluate necessary flows for fish," and strategies "to supply water in sufficient quantities to satisfy the minimum instream flows for fish . . . ."

tubers, kayakers, and a pontoon boat navigating the river at flows of just 770 cfs). Nothing in the record suggests that base flows do not exist for the values listed in RCW 90.54.020(3)(a), or that one cannot recreate or even float the river at this level in several varieties of watercraft, and yet the Court of Appeals still invalidated the summer flows.

In sum, the Court must grant review to re-affirm that Ecology may continue to focus on fish needs when it sets minimum flows by rule and that doing so is indeed sufficient to satisfy the agency's obligations to protect base flows for the values listed in RCW 90.54.020(3)(a).

B. The Court of Appeals' Decision Conflicts With the Court of Appeals' Decision in *Bassett v. Ecology*

In *Bassett v. Ecology*, the Court of Appeals rejected a multi-faceted challenge to Ecology's Dungeness River Basin water management rule, WAC 173-518. *Bassett*, 8 Wn. App. 2d at 303. Specifically, Court of Appeals analyzed RCW 90.54.020 to ascertain whether that statute, which is a general declaration of fundamentals for utilization and management of waters of the state, imposes mandatory duties on Ecology because certain sections of the statute use the word "shall." The Court found that it did not. Instead, the Court appropriately recognized that the statute is a general policy statute that does not give rise to enforceable rights and duties:

"'[S]tatutory policy statements as a general rule do not give rise to enforceable rights and duties.'" *Bassett*, 8 Wn. App. 2d at 303 (quoting *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 139, 588 P.2d 185 (1978)). In particular, the *Bassett* Court noted that RCW 90.54 contains 22 "shalls," and that "[i]f the legislature's use of the word 'shall imposed a formal test on [Ecology] before it allocated any amount of water, [Ecology] would be overwhelmed with countless conflicting tests and unable to perform its water management duties. We reject this argument because it leads to an absurd result." *Id*. at 304.

Below, the Respondents similarly argued that the word "shall" in RCW 90.54.020(3)(a) imposed a mandatory duty on Ecology to establish flows that preserve wildlife, fish, scenic, aesthetic, and environmental and navigational values."[7] Slip Op. at 14. Based upon the decision in *Bassett*, the Court of Appeals concluded that RCW 90.54.020 does not mandate how Ecology is to manage water resources: "the [Water Resources Act's] 'general declaration of fundamentals' are meant to guide Ecology in the exercise of its water management duties. RCW 90.54.020. They do not impose a list of mandatory requirements for every agency rule that Ecology adopts in the exercise of those duties." Slip Op. at 15–16.

[7] RCW 90.54.020(3)(a) reads, in part: "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."

Despite this conclusion, the Court of Appeals then reached the contradictory result that the summer flows exceeded Ecology's statutory authority because the agency focused too narrowly on fish and did not ensure that the Rule preserved and protected the values listed in RCW 90.54.020(3)(a) "to the fullest extent possible." Slip Op. at 16–17.

This ambiguous new standard—to protect the values listed in RCW 90.54.020(3)(a) to the "fullest extent possible" is contrary to the plain language of that statute, which states only that Ecology is to preserve and protect "base flows" for the listed values, and enhance them only "where possible." Notwithstanding that the Court of Appeals failed to defer to Ecology's expertise in implementing its authorities,[8] the holding that Ecology must demonstrate that its rules preserve and protect the values in RCW 90.54.020(3)(a) to the "fullest extent possible" improperly shifts the burden to Ecology to show rule validity. This is contrary to the APA, which places this burden on rule challengers. RCW 34.05.570(1)(a).

The decision of the Court of Appeals is also internally inconsistent and directly conflicts with *Bassett* because it imposes a new mandate on Ecology to protect the values listed in RCW 90.54.020(3)(a) to the "fullest extent possible" when the *Bassett* court held that RCW 90.54.020 does not

[8] Courts "give the agency's interpretation of the law great weight where the statute is within the agency's special expertise." *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015).

mandate how Ecology should exercise its water management duties. This conflict within Division II and the internal inconsistency in the decision below is likely to sow confusion. Discretionary review is therefore warranted.

C. The Court of Appeals' Decision Raises Issues of Substantial Public Interest that Warrant Review

This case raises issues of substantial public interest because Washington's interest in the Spokane River during the summer months is now no longer protected. Further, the instream and out-of-stream values reflected in Ecology's Rule no longer stand, and other similar rules that protect instream and out-of-stream values are now in danger. This Court should grant review to protect these interests.

First, as previously indicated, the Spokane River is an interstate resource shared with the Idaho. AR 8062. When Ecology adopts an instream flow by rule, it has the force and effect of a water right for purposes of the water code. RCW 90.03.345. That means that going forward the flow cannot be impaired by subsequent appropriations or changes or transfers of existing water rights. RCW 90.03.290; RCW 90.03.380. One of the several express stated purposes of the Rule is to "[e]stablish and protect Washington state interests in the water resources of the Spokane River." WAC 173-557-010(2)(d).

Here, because the Court of Appeals declared the summer flows invalid, one of the primary purposes that the Rule was adopted to serve—to protect Washington State's interest in the shared resource that is the Spokane River—no longer stands. The Court of Appeals focused on the narrow interests of the Respondents without giving consideration to all of the other purposes for which Ecology adopted the Rule. As a consequence, one very important interest—protecting Washington's interests in the river no longer stands; and so Washington's standing will be diminished should an interstate dispute ever occur.[9] Additionally, at least during the summer months, the Spokane River is no longer protected from future appropriations of water or from future changes to existing water rights, both of which would otherwise inquire whether there is impairment, or detriment or injury to existing rights such as the instream flow. RCW 90.03.290, .380.

Second, Ecology's explanation for its historic focus on protecting fish is well-reflected in the Rule record. *See*, *e.g.*, AR 1144–168. Ecology has adopted regulatory instream flow rules for numerous watersheds in Washington State. AR 1144–168. To the extent that Ecology has focused

[9] The rule adoption process is lengthy and contentious. While the Respondents may argue that Ecology could simply re-initiate rulemaking to protect summer flows, that disregards the lengthy efforts the agency took to adopt flows here, and the fact that Ecology's resources are limited, and would have to be re-deployed from other current priorities to revisit the Rule. *See*, e.g. *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 747, 312 P.3d 766 (2013) (noting that an agency has "wide discretion" to choose and schedule rulemaking efforts) (citing *Rios v. Dep't of Labor & Indus*., 145 Wn.2d 483, 507, 39 P.3d 961 (2002)).

on fish in the adoption of those rules, any party may now a file rule challenges pursuant to the APA and argue based on the decision below that that focus was "too narrow," and that those other rules should similarly be invalidated. Indeed, because Ecology used the same methodology to establish regulatory flows for other periods of the year, and for the upper reach of the Spokane River in the Rule, WAC 173-557-050, those other portions of the Rule are also vulnerable to challenge and invalidation.

Finally, because the Court of Appeals has pronounced a new standard—that Ecology must show that its flows protect the values listed in RCW 90.54.020(3)(a) to the "fullest extent possible"—any party may challenge other sections of the Rule or other instream flow rules throughout the state and argue that the established flows do not satisfy this amorphous standard. The door is now open for challengers to presumably argue that Ecology did not preserve and protect the listed values in RCW 90.54.020(3)(a) to the "fullest extent possible."

If, like the Spokane summer flows, other instream flow rules are invalidated throughout the state, expectations of water users will be upset and efforts to protect fish and other instream values will quite possibly be upended to the detriment of fish, water right holders, and the people of Washington who value and utilize our rivers and streams for any number of beneficial and often competing purposes. The ramifications of the Court's

decision below thus extend well beyond its holding invalidating the summer flows for the Spokane River.

VI. CONCLUSION

The Court of Appeals erred in invalidating the summer flows in the Rule. For the reasons stated herein, Ecology respectfully requests that the Court grant this Petition to correct this error and protect Washington's rivers.

RESPECTFULLY SUBMITTED this 18th day of September, 2019.

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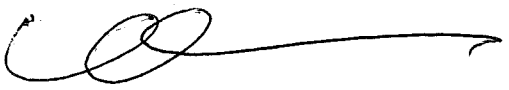
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on September 18, 2019, I caused to be served the State of Washington, Department of Ecology's Motion for Reconsideration in the above-captioned matter upon the parties herein via the Appellate Court Portal Filing system, which will send electronic notifications of such filing to the following:

Dan J. Von Seggern Center For Environmental Law & Policy 911 Western Avenue Suite 305 Seattle, WA 98104	[x] U.S. Mail [ ] Overnight Express [ ] By Fax: [x] By Email: dvonseggern@celp.org

DATED this 18th day of September 2019 at Olympia, Washington.



MEAGHAN KOHLER, Legal Assistant

APPENDIX A

Court of Appeals, Division II No. 51439-7-II

Order Granting Motion for Reconsideration and Order Amending Opinion, dated August 20, 2019; &

Published Opinion, dated June 26, 2019

Filed
Washington State
Court of Appeals
Division Two

August 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, and SIERRA CLUB, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, Respondent.	No. 51439-7-II ORDER GRANTING MOTION FOR RECONSIDERATION, AND ORDER AMENDING OPINION

Respondents, State of Washington Department of Ecology, filed a motion for reconsideration of this court's published opinion filed on June 26, 2019. After review of the motion and the records, it is hereby

ORDERED that the motion for reconsideration is granted.

The court amends the opinion as follows:

On page 2 of the opinion, the following text shall be deleted:

> We hold that the Rule is not reasonably consistent with the WRA, and therefore, it exceeds Ecology's rule-making authority. We also hold that the Rule was adopted without regard to the attending facts and circumstances, and is therefore arbitrary and capricious. However, we reject CELP's challenges based on the public trust doctrine and adequacy of Ecology's rule-making file. Accordingly, we hold that the Rule is invalid.

And the following language shall be inserted in its place:

We hold that the portion of the Rule in WAC 173-557-050(2) that establishes minimum instream flows of 850 cfs at the Spokane gage from June 16 to September 30 is not reasonably consistent with the WRA, and therefore, it exceeds Ecology's rule-making authority. We also hold that the portion of the challenged Rule was adopted without regard to the attending facts and circumstances, and is therefore arbitrary and capricious. However, we reject CELP's challenges based on the public trust doctrine and adequacy of Ecology's rule-making file. Accordingly, we hold that the portion of the Rule in WAC 173-557-050(2) that establishes minimum instream flows of 850 cfs at the Spokane gage from June 16 to September 30 is invalid.

The court further amends the opinion as follows:

On page 27 of the opinion, the following text shall be deleted:

Because Ecology exceeded its statutory authority in adopting the Rule establishing minimum summer instream flows of 850 cfs, we hold the Rule is invalid.

And the following language shall be inserted in its place:

Because Ecology exceeded its statutory authority in adopting the Rule establishing minimum summer instream flows of 850 cfs, we hold that portion of the Rule is invalid.

IT IS SO ORDERED

PANEL: Jj. Lee, Sutton, JPT Martin

J., A.C.J.
Lee, A.C. J.

We concur:

Sutton, J.

Elizabeth P. Martin, JPT
Martin, J.P.T.

Filed
Washington State
Court of Appeals
Division Two

June 26, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, and SIERRA CLUB, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, Respondent.	No. 51439-7-II PUBLISHED OPINION

LEE, A.C.J. — In 2015, the Department of Ecology (Ecology) promulgated an administrative rule that establishes minimum instream flows of 850 cubic feet per second (cfs)[1] for the lower reach of the Spokane River during summer months (Rule). Ecology's primary basis for establishing a minimum instream flow was to protect and preserve fish habitat within the river.

[1] The legally recognized unit of measurement for flowing water is one cubic foot of water per second of time. RCW 90.03.020.

The Center for Environmental Law & Policy (Center),[2] the Sierra Club,[3] and American Whitewater (collectively CELP) challenge the validity of this Rule, arguing that it exceeds Ecology's statutory authority and is arbitrary and capricious. Specifically, CELP relies on a provision of the Water Resources Act of 1971 (WRA) to argue that Ecology was required to establish a minimum instream flow that protects multiple enumerated instream values, not just fish. CELP also argues that the Rule violates the public trust doctrine and challenges Ecology's exclusion of certain documents containing instream flow recommendations from its rule-making file.

We hold that the Rule is not reasonably consistent with the WRA, and therefore, it exceeds Ecology's rule-making authority. We also hold that the Rule was adopted without regard to the attending facts and circumstances, and is therefore arbitrary and capricious. However, we reject CELP's challenges based on the public trust doctrine and adequacy of Ecology's rule-making file. Accordingly, we hold that the Rule is invalid.

FACTS

A. THE SPOKANE RIVER

The Spokane River is a shared resource between Washington and Idaho. It begins in northwestern Idaho, flows west through the City of Spokane, and eventually connects to the Columbia River in eastern Washington.

[2] The Center is a nonprofit organization whose mission is to protect and promote stewardship of Washington's freshwater resources through public education, advocacy, policy reform, and public interest litigation.

[3] The Sierra Club is a national nonprofit organization whose mission is to protect, explore, and enjoy the planet.

The Spokane River is an important economic, recreational, and cultural attraction in the Spokane area. Spokane residents regularly use the river for boating, tubing, swimming, and fishing. The river also draws regional visitors when its flows are sufficient to support boating opportunities. A number of small businesses depend on the river to provide recreation-based activities, including river rafting, kayaking, tubing, and guided fishing trips. The river is a central feature of the region's identity, and Spokane residents view the river as an integral part of their community.

B. AVISTA CORPORATION'S DAMS

Stream flow[4] on the Spokane River is controlled by a series of dams owned and operated by Avista Corporation. Avista operates its dams under a license issued by the Federal Energy Regulatory Commission (FERC) in 2009. The license requires Avista to maintain specific minimum stream flows in the Spokane River throughout the year. Between June 16 and September 30, Avista must operate its Upper Falls and Monroe Street dams to provide minimum stream flows of 850 cfs.

As part of the relicensing process, Avista conducted several studies to evaluate the potential influence of its operations on the natural resources in its hydroelectric project area. Some of these studies examined the general habitat characteristics and spawning activity of trout and mountain whitefish in the Spokane River. Two studies evaluated the relationship between effective fish spawning and stream flows in various reaches of the river. Avista also conducted a whitewater

[4] Stream flow is the volume of water that flows down a river or stream and is measured in cubic feet per second. Instream flows are the regulatory stream flow thresholds used by Ecology to determine whether there is water to withdraw for new uses while still protecting fish and other instream resources.

paddling instream flow assessment study, which assessed whitewater boating opportunities on the Spokane River at different stream flows. Nearly all whitewater survey participants preferred flows higher than 1,353 cfs to support boating on the lower reach of the river (downstream of the Upper Falls and Monroe Street dams).

C. ECOLOGY RULEMAKING

1. The Spokane Valley-Rathdrum Prairie Aquifer and Municipal Water Supply

The Spokane Valley-Rathdrum Prairie Aquifer underlies the Spokane River. It is the sole source of municipal water supply for the area. The aquifer and the river are highly interactive. Any withdrawal of water from the aquifer has a direct and immediate impact on river flows. Increased groundwater use from the aquifer has led to a decrease in river flows. In the early 1990s, Ecology determined that the river's low flows in late summer were continuing to decline. This prompted Ecology to stop issuing new groundwater rights allowing withdrawals from in the aquifer.

2. Instream Flow Rulemaking

The state Water Code, chapter 90.03 RCW, authorizes Ecology to set minimum stream flows for a river or stream through a collaborative process with watershed planning groups.[5] RCW 90.03.247(2);[6] RCW 90.82.080(1)(a)(ii). Ecology began working with watershed planning groups

[5] A watershed is an area of land where all of the water that falls into it drains into a common outlet. UNITED STATES DEPARTMENT OF THE INTERIOR, THE USGS WATER SCIENCE SCHOOL, https://water.usgs.gov/edu/watershed.html (last visited June 17, 2019). A watershed planning group is comprised of local governments, who convene and collaborate on their desired management practices for the watershed.

in 1998 to develop instream flow protection for the Spokane River. The watershed planning groups were unable to achieve consensus regarding the minimum instream flows that should be adopted for the Spokane River. Because the members of the watershed planning unit were unable to reach consensus, Ecology initiated rulemaking under the Washington Administrative Procedures Act (APA) to establish minimum instream flows. RCW 90.82.080(1)(a)(ii), (c).

Ecology commenced formal rulemaking in January 2014. Ecology's draft Rule proposed a minimum instream flow of 850 cfs for the downriver reach of the Spokane River between June 16 and September 30, as measured at the Spokane gage,[7] which is located downstream of the Monroe Street dam. Ecology based this instream flow on the recommendation of the Washington Department of Fish and Wildlife's (WDFW) instream flow biologist Hal Beecher. Beecher initially recommended a minimum instream flow between 900 and 1,050 cfs from July 1 to September 30, as measured at the Spokane gage. Several years later, in May 2012, Beecher recommended minimum instream flow of 850 cfs between June 16 and September 30, as measured at the Spokane gage. Beecher's 2012 instream flow recommendation was based on the above discussed trout and whitefish spawning studies, which were conducted as part of Avista's dam relicensing process in 2009. Beecher later qualified this recommendation and emphasized that the

[6] RCW 90.03.247 has been amended since the events of this case transpired. However, the amendments do not materially affect the statutory language relied on by this court. Accordingly, we refrain from including the word "former" before RCW 90.03.247.

[7] The U.S. Geological Survey (USGS) (the sole science agency for the Department of the Interior) measures streamflow of rivers through stream gages placed at certain locations in the river. USGS, HOW STREAMFLOW IS MEASURED, https://www.usgs.gov/special-topic/water-science-school/science/how-streamflow-measured?qt-science_center_objects=0#qt-science_center_objects (last visited June 17, 2019).

proposed summer flows were "not perceived by [him] as enhancement, rather as a floor." Administrative Record (AR) at 14233.

During the rulemaking comment period, Ecology received hundreds of public comments critical of the 850 cfs minimum instream flow in its proposed Rule. Many of these comments asked Ecology to conduct additional studies on how the proposed 850 cfs minimum instream flow at the lower reach of the river would impact recreation, aesthetics, navigation, water quality, temperature, and broader ecosystem values. Other commenters asked Ecology to assess climate change and interstate implications of the proposed Rule. Small recreational business owners commented that they would be unable to provide recreational river activities, such as float and canoe trips, at the proposed 850 cfs summer flows.

The Center and the Sierra Club sent Ecology a combined comment letter criticizing the proposed Rule, along with 43 electronic documents covering a range of topics, including the return of anadromous fish to the Columbia River, scenic and aesthetic flows in the Spokane River, climate change, fish studies, interstate water issues, and recreational use of the river. The Center and the Sierra Club also provided Ecology with a photographic inventory of 37 key observational points located on the downriver reach of the Spokane River, obtained at five different summer flows. One of these photos showed researchers floating the river in a hard shell kayak in July 2015 at about 770 cfs. Another photo showed people floating down the river in tubes at 770 cfs. And another photo showed a boat navigating the river at 770 cfs. However, the Center and the Sierra Club cautioned that this 770 cfs flow would be unsuitable for larger commercial rafts. American Whitewater, a nonprofit river conservation organization, also sent Ecology a letter in which it

claimed, based on surveys it conducted, that acceptable flows for kayaking, canoeing, and rafting the Spokane River were between 1,500 cfs and 15,000 cfs, with 5,000 cfs as an optimal flow.

Ecology claimed that it considered all of these comments and materials it received during the rulemaking process. Specifically, Ecology stated that it "considered the recreational, aesthetic, and navigational values at multiple stages throughout the process of establishing these instream flows for the river." AR at 3283. However, Ecology rejected the recreational flow criteria of the river in establishing instream flows. Ecology "chose[] not to establish instream flow values based on those recreational needs expressed during the FERC process or any other process including this comment period." AR at 2985.

Instead, Ecology "chose to rely on studies of fish habitat to establish instream flow levels." AR at 3283. Ecology made clear throughout rulemaking that its proposed minimum instream flows were "based upon fish habitat studies," and were "needed for fish survival, including both whitefish and redband trout." AR at 79, 66. Ecology summarily concluded that instream flows that protect fish habitat would also protect the recreational and aesthetic values of the river.

Ecology adopted the Rule in January 2015, and it became effective in February 2015. The Rule establishes minimum instream flows of 850 cfs on the lower reach of the Spokane River, as measured at the Spokane gage downstream of the Monroe Street dam.[8] WAC 173-557-050.

[8] The Rule also establishes minimum instream flows for other months of the year. WAC 173-557-050. And it establishes minimum instream flows for the upper reach of the Spokane River, as measured at the Greenacres gage. WAC 173-557-050. However, the only instream flow at issue in this appeal is the instream flow established for the lower reach of the river between June 16 and September 30, as measured at the Spokane gage, which is located downstream of the Monroe Street dam.

A minimum instream flow established by administrative rule, including Ecology's 2015 Rule, is an appropriation of water with a priority date of the rule's effective date. RCW 90.03.345. Water appropriated prior to adoption of the Rule are senior water rights and are not affected by the Rule. However, appropriations after the Rule is established are junior water rights and are interruptible if flow on the Spokane River decreases below the minimum instream flows specified in the Rule. Ecology plans to use the minimum instream flows established by the Rule to manage future water withdrawals from the Spokane River and the aquifer that underlies it. The Rule also establishes Washington's legal interests in the water of the river and aquifer in the event of interstate conflict.

D. PETITION TO AMEND THE RULE

In February 2016, CELP submitted a joint petition asking Ecology to amend the Rule and increase the 850 cfs summer minimum instream flows as measured at the Spokane gage.[9] Ecology denied the petition in April.

In May, CELP brought suit against Ecology, challenging the validity of the instream flow Rule under the APACELP claimed that the portion of the Rule setting minimum summer instream flows at 850 cfs exceeded Ecology's statutory authority and was arbitrary and capricious. CELP also argued that Ecology had failed to fulfill its responsibilities under the Public Trust Doctrine in adopting the Rule.

CELP also filed a motion to supplement the record before the superior court with three documents related to the Avista dam relicensing process and watershed resource planning

[9] CELP also asked Ecology to amend the minimum summer instream flow established for the Greenacres gage, but that request is not a subject of this appeal.

processes for the region. The specific documents CELP requested be added to the rule-making file were: (1) Ecology's comments to FERC during Avista's dam relicensing, (2) an April 23, 2007, memo in which Beecher noted that habitat rearing at the Spokane gage peaks at 1040 cfs, and (3) a June 30, 2004, document in which Beecher recommended a minimum discharge of 700 cfs at the Post Falls dam. Ecology opposed the motion and submitted declarations in opposition. Three of the agency's rule writers submitted declarations, stating that the documents were not in their custody during the rulemaking process and that they did not consider them when making decisions to set summer minimum instream flows at 850 cfs.

The superior court denied CELP's motion to supplement the record with these three documents. The superior court later denied CELP's petition challenging the validity of the Rule.

CELP petitioned for direct review at the Washington Supreme Court. After briefing was complete, the Supreme Court transferred the case to this court.

ANALYSIS

A. VALIDITY OF THE RULE

CELP argues that the 850 cfs summer minimum instream flow established in Ecology's Rule is invalid because it exceeds Ecology's statutory authority and is arbitrary and capricious. We agree.

1. Legal Principles

A challenge to the validity of an administrative rule is reviewed under the APA. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6 (2013). Under the APA, an agency rule may only be invalidated if it: (1) is unconstitutional, (2) exceeds the agency's statutory authority, (3) was adopted without complying with statutory rule making procedures, or

(4) is arbitrary or capricious. RCW 34.05.570(2)(c). The validity of an agency rule is a question of law, which we review de novo. *Wash. Rest. Ass'n v. State Liquor Control Bd.*, 200 Wn. App. 119, 126, 401 P.3d 428 (2017).

Administrative agencies only possess those powers expressly granted to them by statute or those impliedly authorized by their enabling statutes. *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 404, 377 P.3d 199 (2016). When an agency acts within its rule making authority, the agency's rule is presumed valid, and the burden of demonstrating invalidity rests with the challenger. *Wash. Fed'n of State Employee. v. Dep't of Gen. Admin*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009); RCW 34.05.570(1)(a). The party attacking the validity of a rule must show compelling reasons why the rule conflicts with the legislation's intent and purpose. *Wash. Fed'n of State Employees*, 152 Wn. App. at 386.

"'Administrative [r]ules must be written within the framework and policy of the applicable statutes.'" *Wash. State Hosp. Ass'n v. Dep't of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015) (internal quotation marks omitted) (quoting *Swinomish*, 178 Wn.2d at 580). An agency exceeds its statutory authority if it adopts a rule that is not reasonably consistent with the controlling statutes. *Id.*

2. Ecology Exceeded its Rule Making Authority

Central to this case are issues of statutory interpretation. The parties dispute whether the legislature imposed a mandatory duty upon Ecology, in the exercise of its rule making authority, to establish minimum instream flows that protect multiple instream values, rather than a single value chosen by Ecology. Resolving this dispute informs whether Ecology acted within its rule making authority when it enacted the Rule.

The goal of statutory interpretation "is to ascertain and carry out the legislature's intent." *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). When possible, we must give effect to the plain meaning of the statute as an expression of legislative intent. *Id.* In ascertaining the statute's plain meaning, we consider the statutory context, related statutes, and the entire statutory scheme as a whole. *Swinomish*, 178 Wn.2d at 582.

a. Ecology's authority to establish minimum instream flows

This case implicates several related statutes within the general water code. Ecology's authority to establish minimum instream flows derives from the state Water Code,[10] the Minimum Water Flows and Levels Act,[11] and the Water Resources Act of 1971.[12]

i. Water Code

The Water Code vests Ecology with the exclusive authority to establish minimum instream flows for the state's streams and lakes. RCW 90.03.247(2). In exercising its authority under the Water Code, Ecology must consult with and consider the minimum flow proposals of the WDFW at all stages of rule development. RCW 90.03.247.

ii. Minimum Water Flows and Levels Act

Enacted in 1969, the Minimum Water Flows and Levels Act (MWFLA) authorizes Ecology to establish, by administrative rule, minimum flows or levels for public waters for the purposes of

[10] Chapter 90.03 RCW.

[11] Chapter 90.22 RCW.

[12] Chapter 90.54 RCW.

protecting fish and other wildlife, recreation and aesthetics, or water quality. *Swinomish*, 178 Wn.2d at 592; RCW 90.22.010. The MWFLA provides, in relevant part:

> [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. In addition, [Ecology] shall, when requested by the [WDFW] to protect fish, game or other wildlife resources under the jurisdiction of the requesting state agency, or if [Ecology] finds it necessary to preserve water quality, establish such minimum flows or levels as are required to protect the resource or preserve the water quality described in the request or determination.

RCW 90.22.010.

Minimum instream flows established by rule "shall in no way affect existing water and storage rights." RCW 90.22.030. And Ecology may not grant the right to divert or store public waters "which shall conflict" with the minimum instream flows it establishes. RCW 90.22.030. Stated another way, the minimum instream flows Ecology establishes by rule are appropriative water rights, subject to the longstanding rule that "'as between appropriations, the first in time shall be the first in right.'" *Fox v. Skagit County*, 193 Wn. App. 254, 264, 372 P.3d 784 (2016) (quoting RCW 90.03.010) (emphasis omitted)).

In 1993, the legislature amended chapter 90.22 RCW to require Ecology, in cooperation with Indian Tribes and the WDFW, to establish a statewide list of priorities in evaluating instream flows. RCW 90.22.060. In establishing such list, Ecology "shall consider the achievement of wild salmonid production as its primary goal." RCW 90.22.060. Thus, the legislature plainly "continued to place a high value on maintaining instream flows to support fish." *Swinomish*, 178 Wn.2d at 593, n. 12.

iii. Water Resources Act

Enacted in 1971, the Water Resources Act (WRA) sets forth "'fundamentals of water resource policy for the state to insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington.'" *Swinomish*, 178 Wn.2d at 593 (quoting LAWS OF 1971, 1st Ex. Sess., ch. 225 § 1). It also provides " 'direction to [Ecology] and other state agencies and officials, in carrying out water and related resource programs.' " *Id.* (quoting LAWS OF 1971, 1st Ex. Sess., ch. 225 § 1).

The WRA recognizes that water is a critical resource and proper utilization of water is necessary to promote public health, economic well being, natural resources, and the aesthetic values of the state. RCW 90.54.010(1)(a). It contemporaneously acknowledges that the supply and availability of water has become increasingly limited. RCW 90.54.010(1)(a). The legislature enacted the WRA to "ensure that available water supplies are managed to best meet both instream and offstream needs" through a comprehensive planning process. RCW 90.54.010(1)(b). To this end, the WRA authorizes Ecology to establish administrative rules that reserve and set aside waters for beneficial use "whenever it appears necessary to the director in carrying out the [WRA's] policy." RCW 90.54.050.

In 2002, the legislature enacted a new section of the WRA in which it "recognize[d] the critical importance of providing and securing sufficient water to meet the needs of people, farms, and fish." RCW 90.54.005. The WRA enumerates three water resource objectives that should guide water resource strategies at the local watershed level: (1) providing sufficient water to meet residential, commercial, and industrial needs; (2) providing sufficient water to support productive

fish populations; and (3) providing sufficient water to support productive agriculture. RCW 90.54.005(1)-(3).

The WRA also provides that the utilization and management of Washington waters "shall be guided" by a number of general fundamentals. RCW 90.54.020. One fundamental declares beneficial uses of water to include domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, thermal power production, and preservation of environmental and aesthetic values. RCW 90.54.020(1). The WRA does not prioritize between these competing beneficial uses of water. RCW 90.54.020.

The WRA lists a number of other competing declarations of fundamentals, including allocating water among potential uses in a way that secures "the maximum net benefits for the people of the state," developing multipurpose water storage facilities, preserving adequate supplies of water in potable condition, developing regional water supply systems, and encouraging water conservation practices. RCW 90.54.020(2). It also provides that the "quality of the natural environment shall be protected and, where possible, enhanced as follows: … Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a).

b. The WRA requires Ecology to consider all instream values

Relying on the language "shall" in RCW 90.54.020(3)(a), CELP argues that Ecology is obligated to establish minimum instream flows that preserve wildlife, fish, scenic, aesthetic, and environmental and navigational values. Ecology counters that its "primary rulemaking authority"

here stems from MWFLA, and that the legislature's use of the word "or" in the MWFLA (RCW 90.22.020) provides Ecology discretion "to determine the best purposes" for which it sets minimum instream flows. Br. of Resp't at 18. We are not persuaded by either party's interpretation.

At the outset, we note that "[t]he meaning of 'shall' is not gleaned from that word alone because our purpose is to ascertain legislative intent of the statute as a whole." *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The word "shall" in a statute imposes a mandatory requirement "unless a contrary legislative intent is apparent." *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). When possible, we derive legislative intent from the plain language of the statute. *Lenander*, 186 Wn.2d at 403.

Here, in considering the statutory context, related statutes, and the entire statutory scheme of the WRA, we hold that CELP's argument that the rule must preserve all instream values is not persuasive. The language CELP relies upon is one of several enumerated general fundamentals meant to guide water resource use and management. RCW 90.54.020. The WRA's stated purpose is to develop a comprehensive planning process that ensures better water management practices and alleviates conflict among competing water users. RCW 90.54.010(1)(b). It is intended to "ensure that available water supplies are managed to best meet both instream and offstream needs." RCW 90.54.010(1)(b). Consistent with the WRA's overall goals of safeguarding public health and economic well-being, and preserving the state's natural resources and aesthetic values, the WRA authorizes Ecology to develop a "comprehensive state water resources program" that "provide[s] a process for making decisions on future water resource allocation and use." RCW 90.54.040(1). The WRA's "[g]eneral declaration of fundamentals" are meant to guide Ecology in

the exercise of its water management duties. RCW 90.54.020. They do not impose a list of mandatory requirements for every agency rule that Ecology adopts in the exercise of those duties. The use of the word "shall" directs Ecology what values it must consider. *See Bassett v. Dep't of Ecology*, ___ Wn. App.2d ___, 438 P.3d 563 (2019) (holding that the legislature's use of the word "shall" in RCW 90.54.020 did not impose a formal test on Ecology to secure maximum net benefits before it allocated water).

However, Ecology's argument is equally unpersuasive. Ecology argues that the WRA's general declaration of fundamentals has no application when Ecology exercises its rulemaking authority under the MWFLA. But the MWFLA does not operate in a vacuum. As discussed above, Ecology's exclusive authority to establish minimum instream flows stems from several statutory provisions within the Water Code. In enacting the WRA, the legislature recognized that the proper utilization of the state's water resources was "necessary to the promotion of public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values." RCW 90.54.010(1)(a). The WRA prioritizes comprehensive water resource planning as a way to resolve conflict among competing water users and interests. RCW 90.54.010(1)(b). It balances the water needs of the state's growing population with the objective of preserving instream resources so that future generations can continue to enjoy them. RCW 90.54.010(1)(b).

Under the WRA, Ecology may set aside water for beneficial use "whenever it appears necessary to the director in carrying out the [WRA's] policy." RCW 90.54.050. One way for Ecology to do so is by establishing minimum instream flows and levels, which are treated as any other appropriative water right. In the exercise of that authority, Ecology must meaningfully consider the instream values enumerated in RCW 90.54.020(3)(a), and attempt to preserve them

to the fullest extent possible. This gives effect to the legislative intent of the WRA to ensure that water within the state is protected and "fully utilized for the greatest benefit to the people of the state of Washington." RCW 90.54.010(2).

Ecology's interpretation of its rulemaking authority under the MWFLA is inconsistent with the emphasis the legislature has placed on fully utilizing water for its maximum benefit and ensuring that water supplies are managed to best meet both instream and offstream needs. When read together with the WRA, the MWFLA does not grant Ecology the authority to establish a minimum instream flow for the purpose of narrowly protecting only one instream value that Ecology deems "best." Br. of Resp't at 18. Instead, it directs Ecology to meaningfully consider a range of instream values and to consider how an instream flow that protects one value might impact the others.

This is not to say that a rule is invalid simply *because* it fails to preserve and protect each enumerated instream value. The legislature recognized the near impossibility of appropriating water in a way that satisfies every one of its beneficial uses. RCW 90.54.010. Water is an increasingly scarce resource and putting it to one beneficial use necessarily limits its availability for a competing use. Ecology's role in water resource management is to balance the competing beneficial uses of water and ensure that water is fully utilized to the greatest benefit possible. If the minimum instream flow necessary to protect one value is detrimental to another, the legislature has made the choice clear—the one that protects fish prevails. *See* RCW 90.22.060; RCW 90.54.005(2); RCW 90.82.070. However, the high value that the legislature placed on maintaining instream flows supportive of fish does not mean that Ecology can simply disregard other instream values and narrowly focus only on fish.

When viewed under this framework and policy, the Rule challenged here is not reasonably consistent with the statutes it implements. Ecology made clear throughout rulemaking that its proposed minimum instream flows were only "based upon fish habitat studies" and focused only on "fish survival, including both whitefish and redband trout." AR at 79, 66.

Ecology responded to public concern over the proposed minimum instream flow by asserting its position that it may establish a minimum instream flow for the purpose of protecting only one instream value. In its concise explanatory statement, Ecology explained that it had discretion to choose one value for which to set a minimum instream flow. As explained above, this interpretation of Ecology's rule making authority is inconsistent with the framework of the WRA.

Ecology argues that it nonetheless operated within framework of the controlling statutes because it "fully considered" other instream values during multiple stages of its rule making process. Br. of Resp't at 19. However, the record shows that Ecology's consideration involved merely collecting public comments and studies that showed 850 cfs was not sufficient to preserve the recreational and aesthetic values of the river, and then summarily "reject[ing]" these higher instream values. AR at 3283. Such cursory treatment of these other values does not comport with the emphasis the legislature placed on effectively managing water resources to ensure that water is fully utilized to the greatest benefit of the people.

The record does not support Ecology's repeated claim that a minimum instream flow protective of fish would necessarily preserve other instream values. And contrary to Ecology's argument, three photographs showing a boat has not grounded at flows below 850 cfs does not

"plainly show[]" that recreational and navigational uses are "plentiful" at these levels. Br. of Resp't at 24.

Ecology's reliance on Avista's federal license requirements is equally misplaced. Ecology argues that the Rule protects all enumerated instream values because it is "identical" to Avista's federally required flows and "Avista's federal license requires Avista to release flows for recreation." Br. of Resp't at 25. This argument oversimplifies the nature and scope of Avista's license.

Avista's federal license governs the operation and maintenance of five hydroelectric project developments located along the Spokane River. The project area spans several counties in Washington and Idaho, and the license dictates flows on the Spokane River from Coeur d'Alene Lake in Idaho through the city and suburbs of Spokane. The FERC license only requires Avista to operate certain hydroelectric developments on the river in a way that enhances recreation at distinct reaches of the river. Notably, the license does not require Avista to operate its Monroe Street and Upper Falls dams (the hydroelectric dams located just upstream of the river reach at issue here) in a way that supports recreation.

Instead, the FERC license requires Avista to operate the Monroe Street and Upper Falls dams to provide minimum summer flows of 850 cfs from June 16 to September 30 in order to "enhance aquatic habitat for rainbow trout and mountain whitefish in the Spokane River." AR at 8074. And it requires Avista to analyze the spawning habitat in response to flow alterations in the Spokane River below the Monroe Street and Upper Falls dams. Thus, Ecology's argument that its summer instream flows preserve recreation simply because they are identical to the summer flows required by Avista's license is unavailing.

Ecology's attempt to bootstrap consideration of other instream values through its review of Avista's studies is also unpersuasive. Cursory review of certain studies Avista conducted as part of its relicensing process does not constitute meaningful review of the instream values enumerated in RCW 90.54.020(3)(a). And this argument ignores Ecology's own statement that it "chose[] not to establish instream flow values based on those recreational needs expressed during the FERC process."[13] AR at 2985.

The record shows that Ecology based the 850 cfs flow on fish habitat studies because it believed it had discretion to establish a minimum instream flow for the purpose of protecting only one instream use. This narrow focus on preserving one instream value is not reasonably consistent with the WRA's purpose of ensuring "that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington." RCW 90.54.010(2). Because the Rule was not written within the framework and policy of the applicable statutes, it exceeds Ecology's authority and is invalid.

3. The Rule is Arbitrary and Capricious

CELP also argues that the Rule is invalid because it is arbitrary and capricious. We agree.

An agency rule is arbitrary and capricious "if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Puget Sound Harvesters Ass'n v. Dep't of*

[13] Ecology also asserts that the only way to achieve flows higher than 850 cfs is by changing Avista's federal license. However, the record shows that flows measured at the Spokane gage routinely exceed 850 cfs in the summertime, even during very dry years. Ecology's further suggestion that the Rule would impact Avista's license is misplaced. Minimum instream flows established by Rule are appropriations of water with a priority date of the rule's effective date. RCW 90.03.345. Ecology plans to use the minimum instream flows established by the Rule to manage future water withdrawals from the Spokane River and aquifer. The Rule has no influence on Avista's federal license.

Fish and Wildlife, 157 Wn. App. 935, 945, 239 P.3d 1140 (2010). As part of our review, we must consider the relevant portions of the agency's rule-making file and the agency's explanations for adopting the challenged rule. *Id.* "Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

As discussed above, review of Ecology's rule-making file and explanations for adopting the Rule shows that Ecology narrowly focused its Rule on only preserving fish habitat. Instead of considering how the 850 cfs would affect other instream values, Ecology summarily concluded that a flow protective of fish also protected other uses of the river. Nothing in the record supports this conclusion. And the evidence before Ecology showed that the proposed flow would not be adequate to support rafting, kayaking, and other recreational uses of the river. Ecology based the 850 cfs minimum instream flow on WDFW's recommendation, but WDFW qualified its recommendation as a "floor" to protect fish habitat, and he "would oppose lower flows, but not higher summer flows." AR at 14232, 13609.

An agency "must not act cursorily in considering the facts and circumstances surrounding its actions." *Puget Sound Harvesters Ass'n*, 157 Wn. App. at 951. Ecology's explanations for establishing minimum instream flows based only on fish habitat studies without regard to how its proposed flow would impact other instream values was arbitrary and capricious. Therefore, the resulting Rule is invalid.

B. PUBLIC TRUST DOCTRINE

CELP also argues that Ecology violated the public trust doctrine by enacting the Rule because the 850 cfs minimum instream flow will degrade the public interest in the lands and water of the state. We disagree.

"The public trust doctrine is an ancient common law doctrine" that recognizes the public need for access to navigable waters. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 259, 413 P.3d 549 (2018). The doctrine has always existed in Washington, and the policy is partially expressed in article 17, section 1 of the Washington Constitution, which reserves state ownership in the beds and shores of the state's navigable waters. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993). The state's ownership of tidelands and shorelands is comprised of two distinct aspects—its ownership interests, historically referred to as the *jus privatum*, and its public authority interest, historically referred to as the *jus publicum*. *Caminiti v. Boyle*, 107 Wn.2d 662, 668, 732 P.2d 989 (1987), *cert. denied*, 484 U.S. 1008 (1988).

As owner, the state has fee simple title to such lands and may convey title in any manner that does not contravene the constitution. *Id.* However, " [t]he state can no more convey or give away this jus publicum interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'" *Id.* at 669 (quoting *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453, 13 S. Ct. 110, 36 L. Ed. 1018 (1892)). Thus, the doctrine precludes the State from disposing of its interest in navigable waters in such a way that substantially impairs the public's right of access. *Rettkowski*, 122 Wn.2d at 232. The *Caminiti* court adopted a two-part inquiry to determine whether a challenged legislation violates the public trust doctrine: (1) whether the state, by the questioned legislation, has relinquished its right of control over the jus

publicum and (2) if so, whether by doing so, the state has promoted the public interests in the jus publicum, or else has not substantially impaired it. 107 Wn.2d at 670.

CELP argues that the test articulated in *Caminiti* informs this court's analysis as to whether the Rule violates the WRA. We hold that it does not.

There are two problems with relying on the framework outlined in *Caminiti* here. First, the *Caminiti* test informs whether the state has relinquished its right of control over the jus publicum through *legislation*, not through a state agency's administrative rulemaking authority. *Id*. "Second, the duty imposed by the public trust doctrine devolves upon the State, not any particular state agency thereof." *Rettkowski*, 122 Wn.2d at 232. Our Supreme Court has repeatedly held that Ecology's enabling statute does not allow it to assume the public trust duties of the state and regulate in order to protect the public. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 99, 11 P.3d 726 (2000); *Rettkowski*, 122 Wn.2d at 232. Because Ecology may not assume the public trust duties of the state, it could not have "give[n] up control" over the jus publicum by enacting the Rule at issue here. Br. of Appellant at 36.

Further, the *Rettkowski* court observed that the issue before it implicated Ecology's regulatory authority under a specific provision of the state water code. 122 Wn.2d at 232-33. The court held that the public trust doctrine "could provide no guidance as to *how* Ecology is to protect those waters" because that guidance "is found only in the Water Code." *Id.* at 233. Our Supreme Court later adhered to this analysis and declined to use the public trust doctrine as an additional canon of construction for interpreting provisions of the state Water Code. *R.D. Merrill Co., v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 134, 969 P.2d 458 (1999).

We similarly reject CELP's claim that the public trust doctrine informs our analysis here. As in *Rettowski* and *R.D. Merrill Co.*, we need not resort to the public trust doctrine as an additional canon of construction in light of the specific provisions at issue and the policies expressed in the state water code.

C. RULEMAKING FILE

Finally, CELP challenges Ecology's failure to include three[14] documents detailing other instream flow recommendations for the Spokane River in its administrative rule-making file. We hold that CELP's challenge fails.

The APA informs what documents must be contained within an agency's rule-making file. RCW 34.05.370. It must contain:

> (a) A list of citations to all notices in the state register with respect to the rule or the proceeding upon which the rule is based;
>
> (b) Copies of any potions of the agency's public rule-making docket containing entries relating to the rule or the proceeding on which the rule is based;
>
> (c) All written petitions, requests, submissions, and comments received by the agency and all other written material regarded by the agency as important to adoption of the rule or the proceeding on which the rule is based;
>
> (d) Any official transcript of oral presentations made in the proceeding on which the rule is based or, if not transcribed, any tape recording or stenographic record of them, and any memorandum prepared by a presiding official summarizing the contents of those presentations;

[14] CELP does not identify the specific documents it believes were improperly excluded from Ecology's rule making file. Instead, it references the third section of its briefing in which it discusses various WDFW memos that were absent from the rule- making file. There, CELP explains that as part of the trial court proceeding, it moved to supplement the administrative record with three documents: (1) Ecology's comments to FERC during Avista's dam relicensing, (2) an April 23, 2007, memo from Beecher noting a peak habitat rearing of 1040 cfs at the Spokane gage, and (3) a June 30, 2004, document in which Beecher recommends a minimum discharge of 700 cfs at the Post Falls Dam.

> (e) All petitions for exceptions to, amendment of, or repeal or suspension of, the rule;
>
> (f) Citations to data, factual information, studies, or reports on which the agency relies in the adoption of the rule, indicating where such data, factual information, studies, or reports are available for review by the public, but this subsection (2)(f) does not require the agency to include in the rule-making file any data, factual information, studies, or reports gathered pursuant to chapter 19.85 RCW or RCW 34.05.328 that can be identified to a particular business;
>
> (g) The concise explanatory statement required by RCW 34.05.325(6); and
>
> (h) Any other material placed in the file by the agency.

RCW 34.05.370(2)(a)-(h).

This document retention requirement is critical because we review the validity of an agency action "at the time it was taken." RCW 34.05.570(1)(b). Without a complete agency rule-making file, we would be unable to examine whether the agency acted within its authority or "without regard to the attending facts and circumstances" in enacting the challenged rule.[15] *Puget Sound Harvesters Ass'n*, 157 Wn. App. at 945.

CELP argues that Ecology's omission of certain documents from its rule-making file undermines a reviewing court's ability to examine whether the Rule was adopted through a process of reason. But we find that the record before us is adequate for review.

[15] Federal courts have emphasized the critical role a comprehensive rule-making record plays in evaluating the propriety of agency action. *See, e.g.*, *Fund for Animals v. Williams*, 391 F.Supp.2d 191, 196 (2005) (noting that fair review of an agency action requires the reviewing court to have no more and no less information than the agency had when it made its decision); *Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.")

We note that the documents at issue are in the record before us through CELP's motion to supplement the administrative record in the clerk's papers. Thus, we are not without knowledge of the information contained within these documents. And in reviewing these documents, we find that they are not directly related to the agency action challenged here.

The three documents CELP contends Ecology should have included in its rule-making file were created as part of Avista's relicensing process, not as part of Ecology's formal rulemaking commenced in January 2014. CELP obtained these documents through a public records act request that it sent to the WDFW, not to Ecology. And Ecology's rule writers submitted declarations stating that they did not have custody of these documents during the rule adoption process, nor did they rely on them in setting minimum instream flows at 850 cfs.

CELP appears to argue that they were nonetheless relevant because it believes that Ecology should have considered them as part of its rule making process. But RCW 34.05.370(2)(f) only requires Ecology to include in its rulemaking file the data, factual information, studies, or reports it relied upon in adopting the Rule. Thus, contrary to CELP's assertion, Ecology was not required to include these documents in its rule-making file.[16]

[16] CELP repeatedly argues that omission of these documents from the rule-making file precludes "effective judicial review." Br. of Appellant at 39. This argument is puzzling because CELP simultaneously asks this court to evaluate the Rule, based on the record before this court, and to hold it invalid.

And even if we agreed that the documents were directly relevant to adoption of the challenged Rule, the remedy CELP seeks is not available. CELP seeks a "remand" of the Rule to Ecology for reconsideration based on a complete record. Br. of Appellant at 46. But this remedy is not applicable. If we conclude that a rule exceeds an agency's statutory authority or is arbitrary and capricious, we invalidate the rule. *See, e.g.*, *Swinomish*, 178 Wn.2d at 602; *Puget Sound Harvesters Ass'n*, 157 Wn. App. at 938.

CONCLUSION

The WRA provides that perennial rivers and streams "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)(a). This statutory language does not allow Ecology to establish minimum instream flows for the narrow purpose of protecting only one instream value chosen by Ecology. Instead, the statute directs Ecology to meaningfully consider a range of instream values and seek to preserve them to the fullest extent possible.

Because Ecology exceeded its statutory authority in adopting the Rule establishing minimum summer instream flows of 850 cfs, we hold the Rule is invalid.

Lee, A.C.J.

We concur:

Sutton, J.

Martin, J.P.T.

APPENDIX B

RCW 90.22.010; RCW 90.22.020; & RCW 90.54.020

RCW 90.22.010

Establishment of minimum water flows or levels—Authorized—Purposes.

The department of ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. In addition, the department of ecology shall, when requested by the department of fish and wildlife to protect fish, game or other wildlife resources under the jurisdiction of the requesting state agency, or if the department of ecology finds it necessary to preserve water quality, establish such minimum flows or levels as are required to protect the resource or preserve the water quality described in the request or determination. Any request submitted by the department of fish and wildlife shall include a statement setting forth the need for establishing a minimum flow or level. When the department acts to preserve water quality, it shall include a similar statement with the proposed rule filed with the code reviser. This section shall not apply to waters artificially stored in reservoirs, provided that in the granting of storage permits by the department of ecology in the future, full recognition shall be given to downstream minimum flows, if any there may be, which have theretofore been established hereunder.

[**1997 c 32 § 4; 1994 c 264 § 86; 1988 c 47 § 6.** Prior: **1987 c 506 § 96; 1987 c 109 § 103; 1969 ex.s. c 284 § 3.**]

NOTES:

Application—Severability—1988 c 47: See notes following RCW **43.83B.300**.

Legislative findings and intent—1987 c 506: See note following RCW **77.04.020**.

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW **43.21B.001**.

Severability—1969 ex.s. c 284: See note following RCW **90.48.290**.

RCW 90.22.020

Establishment of minimum water flows or levels—Hearings—Notice—Rules.

Flows or levels authorized for establishment under RCW **90.22.010**, or subsequent modification thereof by the department shall be provided for through the adoption of rules. Before the establishment or modification of a water flow or level for any stream or lake or other public water, the department shall hold a public hearing in the county in which the stream, lake, or other public water is located. If it is located in more than one county the department shall determine the location or locations therein and the number of hearings to be conducted. Notice of the hearings shall be given by publication in a newspaper of general circulation in the county or counties in which the stream, lake, or other public waters is located, once a week for two consecutive weeks before the hearing. The notice shall include the following:

(1) The name of each stream, lake, or other water source under consideration;

(2) The place and time of the hearing;

(3) A statement that any person, including any private citizen or public official, may present his or her views either orally or in writing.

Notice of the hearing shall also be served upon the administrators of the departments of social and health services, natural resources, fish and wildlife, and transportation.

[**1994 c 264 § 87; 1987 c 506 § 97; 1985 c 196 § 1; 1984 c 7 § 384; 1969 ex.s. c 284 § 4.**]

NOTES:

Legislative findings and intent—1987 c 506: See note following RCW **77.04.020**.

Severability—1969 ex.s. c 284: See note following RCW **90.48.290**.

RCW 90.54.020

General declaration of fundamentals for utilization and management of waters of the state.

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) 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. 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.

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. Technology-based effluent limitations or standards for discharges for municipal water treatment plants located on the Chehalis, Columbia, Cowlitz, Lewis, or Skagit river shall be adjusted to reflect credit for substances removed from the plant intake water if:

(i) The municipality demonstrates that the intake water is drawn from the same body of water into which the discharge is made; and

(ii) The municipality demonstrates that no violation of receiving water quality standards or appreciable environmental degradation will result.

(4) The development of multipurpose water storage facilities shall be a high priority for programs of water allocation, planning, management, and efficiency. The department, other state agencies, local governments, and planning units formed under *section 107 or 108 of this act shall evaluate the potential for the development of new storage projects and the benefits and effects of storage in reducing damage to stream banks and property, increasing the use of land, providing water for municipal, industrial, agricultural, power generation, and other beneficial uses, and improving streamflow regimes for fisheries and other instream uses.

(5) Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.

(6) Multiple-purpose impoundment structures are to be preferred over single-purpose structures. Due regard shall be given to means and methods for protection of fishery resources in the planning for and construction of water impoundment structures and other artificial obstructions.

(7) Federal, state, and local governments, individuals, corporations, groups and other entities shall be encouraged to carry out practices of conservation as they relate to the use of the waters of

the state. In addition to traditional development approaches, improved water use efficiency, conservation, and use of reclaimed water shall be emphasized in the management of the state's water resources and in some cases will be a potential new source of water with which to meet future needs throughout the state. Use of reclaimed water shall be encouraged through state and local planning and programs with incentives for state financial assistance recognizing programs and plans that encourage the use of conservation and reclaimed water use, and state agencies shall continue to review and reduce regulatory barriers and streamline permitting for the use of reclaimed water where appropriate.

(8) Development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public.

(9) Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters.

(10) Expressions of the public interest will be sought at all stages of water planning and allocation discussions.

(11) Water management programs, including but not limited to, water quality, flood control, drainage, erosion control and storm runoff are deemed to be in the public interest.

[**2007 c 445 § 8; 1997 c 442 § 201; 1989 c 348 § 1; 1987 c 399 § 2; 1971 ex.s. c 225 § 2.**]

NOTES:

***Reviser's note:** Sections 107 and 108 of this act were vetoed by the governor.

Findings—Intent—2007 c 445: See note following RCW **90.46.005**.

Severability—1989 c 348: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1989 c 348 § 13.**]

Rights not impaired—1989 c 348: See RCW **90.54.920**.

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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