

37811-6-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 80859-7

SQUAXIN ISLAND TRIBE,

Appellants,

v.

POLLUTION CONTROL HEARINGS BOARD;
WASHINGTON, DEPARTMENT OF ECOLOGY, AND
MILLER LAND AND TIMBER, LLC

Respondents.

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APPELLANT SQUAXIN ISLAND TRIBE'S REPLY BRIEF

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INTRODUCTION

This case involves the Squaxin Island Tribe's (Tribe) appeal of the Pollution Control Hearing Board's (Board) decision that the Department of Ecology (Ecology) may approve a groundwater withdrawal in the Deschutes River Basin that will seasonally reduce the flows in a stream closed by rule to "further consumptive appropriations," based on a case-by-case determination that the reduction in flows will not result in environmental harm. The Board's decision is contrary to the holding in *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 95, 11 P.3d 726 (2000), that a proposed withdrawal of groundwater must be denied "if it is established factually that the withdrawal will have *any effect* on the flow or level" of closed surface waters.

Respondent Miller Land and Timber, LLC (Miller), continues to defend the Board's erroneous conclusion that groundwater withdrawals in the Deschutes Basin are affected by stream closures only if the withdrawals produce clear adverse effects on environmental values. Miller argues that *Postema* does not control because the stream closures in *Postema* were based on a determination that "no waters are available for further appropriation" whereas stream closures in the Deschutes Basin are based on a determination that "further consumptive appropriations would harmfully impact instream values." Miller Brf. at 26-28. However, there

is no legal basis for treating a stream closure based on harm to instream values any differently than a stream closure based on water availability. The Water Code does not permit Ecology to approve appropriations that harm instream values any more than it allows Ecology to approve appropriations where water is unavailable.

In contrast with Miller, Ecology concedes that it erred in arguing below that stream closure rules for the Deschutes Basin are materially different from those construed in *Postema*. Ecology Brf. at 19-20. Ecology agrees that *Postema* was correctly decided and that if an unmitigated “withdrawal of ground water will have *any effect* on flows in a closed stream, the withdrawal must be denied.” *Id.* at 14-15 (emphasis added). Ecology further agrees that “[s]tream closures embody Ecology’s determination that water in the streams is not available for further appropriation without impacting the values protected under the [Water Resources Act]” *Id.* at 20-21.

Nevertheless, Ecology defends the Board’s decision on the basis that Ecology has the discretion under RCW 90.44.055 to approve a *mitigated* groundwater withdrawal that seasonally reduces flows if the total amount of mitigation, if spread out over the entire year, would be sufficient to offset the total effects of groundwater pumping on the stream and the proposed mitigation measures would enhance environmental

values. Ecology Brf. at 20. This argument was not presented to the Board or the Superior Court and is made for the first time on appeal.

Ecology's new argument is not supported by the proof as it is inconsistent with the Board's unchallenged findings that the mitigation offered in this case did *not* fully offset the effects of the proposed groundwater pumping on stream flows. Furthermore, as a matter of law, mitigation must fully offset the impacts of a groundwater withdrawal such that *each* requirement of the Water Code's four-part test for approval of a water right application is met. Because stream closures embody Ecology's determination that water is unavailable for further consumptive appropriation, Ecology cannot conclude that water is available for appropriation over an entire year based on a mitigation plan that makes new water available only on a seasonal basis.

ARGUMENT

I. **Under *Postema*, a Proposed Withdrawal of Groundwater in Hydraulic Continuity with a Closed Stream Must Be Denied if the Withdrawal Will Have Any Effect on the Flow of the Stream.**

Postema squarely rejected the premise that denial of a groundwater application on account of a stream closure must be based on either a "direct and measurable" or "significant measurable" effect on the flow or level of the stream. 142 Wn.2d at 94. Because stream closures "embody

Ecology's determination that water is not available for further appropriations," a proposed withdrawal of groundwater in hydraulic continuity with a closed stream "*must be denied* if it is established factually that the withdrawal will have *any effect* on the flow or level of the surface water." *Id.* at 95 (emphasis added). The Board's conclusion that an adverse effect on flows in a closed stream is sufficient to justify denial of a groundwater withdrawal only when it would result in adverse environmental impacts is flatly at odds with *Postema* and cannot be justified by any differences between the rules at issue in the two cases. See Tribe's Opening Brf. at 12-18.

A. Ecology Agrees that the *Postema* Rule Applies to Groundwater Withdrawals in the Deschutes Basin.

Ecology agrees that *Postema* was correctly decided and applies fully to groundwater withdrawals in the Deschutes Basin. Ecology Brf. at 14-15. As Ecology acknowledges, "the slight difference in language between the Green-Duwamish stream closure rule at issue in *Postema* and the Deschutes River Basin Rule at issue in this case is not sufficient to reach a different result for a proposal to make an unmitigated withdrawal from a closed stream." *Id.* at 19.

Although Ecology and the Tribe disagree on the application of the *Postema* decision to cases where mitigation is proposed to offset the

effects of a groundwater withdrawal, the parties agree on the fundamental principle that under the Deschutes Basin rule “if an unmitigated withdrawal of groundwater will have any effect on flows in a closed stream, the withdrawal must be denied.” Ecology Brf. at 14-15. This principle is squarely at odds with the Board’s ruling that withdrawals in the Deschutes Basin are affected by stream closures only if “the withdrawals produce any effects which adversely impact the [environmental] values identified in WAC 173-513-020.” CP 928-29 (Order on Motions at 15-16 (¶¶28-29)).

Ecology’s position, while new to this litigation, is nevertheless consistent with its longstanding, official interpretation of the Water Code and the Deschutes Basin rule as expressed in the 1980 narrative document, its original decision on Miller’s applications, and the position taken by the agency in *Postema*. See Tribe’s Opening Brf. at 25-26 (citing CP 1857 (Exh. 25 at 13), CP 1656 (Exh. 7 at 5)) and *Postema*, 142 Wn.2d at 94. Because Ecology’s position on this issue is consistent with long-standing agency policies and practice, it is entitled to deference. *Silverstreak, Inc. v. Dep’t of Labor and Indus.*, 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). Accordingly, as Ecology points out, the Board’s

decision cannot and should not be upheld based on the reasoning in the Board's rulings. *See Ecology Brf. at 27.*

B. The Applicant Fails to Demonstrate that the *Postema* Rule Does Not Apply in the Deschutes Basin.

Miller alone continues to argue in favor of the Board's interpretation of the Deschutes Basin rule. Miller first contends that WAC 173-513-040(1) cannot be interpreted to close the entire Deschutes Basin to new groundwater appropriations because such an interpretation would render WAC 173-513-050 superfluous. Miller Brf. at 19-21. Miller's argument is based on a distortion of the Tribe's position. The Tribe does not contend that the Deschutes Basin rule *automatically* closes *any* portion of the Deschutes Basin to further groundwater appropriations. Rather, the Tribe contends that groundwater in the Deschutes Basin is unavailable for appropriation where the best available science shows that a proposed groundwater withdrawal will reduce water levels or flows in a stream that is closed to "further consumptive appropriation" under WAC 173-513-040(1). Under the Tribe's interpretation of the rule, WAC 173-513-050 is not superfluous, but instead functions to *allow* new groundwater withdrawals where the evidence does not support a finding that the withdrawal would reduce flows in a closed stream.

Miller next argues that the Deschutes Basin stream closures are less ironclad than those at issue in *Postema* because the stream closures in *Postema* were based on a determination that “there are no waters available for further appropriation through the establishment of rights to use water consumptively,” WAC 173-509-040(1), whereas the Deschutes Basin stream closures are based on a determination that “further consumptive appropriations would harmfully impact instream values,” WAC 173-513-040(1). Miller Brf. at 26-28.

Miller is splitting hairs. Although stream closures in the Deschutes Basin rule are based on a determination that “further consumptive appropriations would harmfully impact instream values,” the stream closures nevertheless “embody Ecology’s determination that water is not available for further appropriations.” *Postema*, 142 Wn.2d at 95. As a matter of law, water is not “available for further appropriation” where further consumptive appropriations would harm instream values. The Water Resources Act provides that rivers and streams “shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values” and that “[w]ithdrawals of water which would conflict” with these environmental values “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). Thus, as the Board concluded in this case, a determination that further consumptive appropriations will harm instream values is simply another way of stating that water is unavailable for appropriation.¹ See CP 1273 (Final Order at 48 (¶ 109)) (“The Board finds that the protections provided in RCW 90.54.020(3) must also be considered under the “availability” prong of this same four-part test, and therefore water is not ‘available’ either under RCW 90.03.290 or WAC 173-153-040.”).

Even assuming for the sake of argument that a stream closure based on a determination that “further consumptive appropriations would harmfully impact instream values” does not *per se* mean that water is unavailable for appropriation, such a determination nevertheless *requires* Ecology to reject any application that would consume water from the closed stream as “detrimental to the public interest.” RCW 90.03.290(3). Under the Water Resources Act, withdrawals that affect flows necessary to support instream values are necessarily contrary to the public interest and cannot be permitted under RCW 90.03.290(3). RCW 90.54.020(3)(a); *Postema*, 142 Wn.2d at 94-95.

¹ The Tribe acknowledges that stream closures in the Deschutes Basin, like other stream closures, are subject to the “overriding considerations of the public interest” exception. RCW 90.54.020(3)(a). No party in this case has ever suggested that Miller’s application to withdraw water for a private residential development could be permitted under the overriding public interest exception. *Postema*, 142 Wn.2d at 102.

Significantly, the Tribe's position on this issue is consistent with Ecology's long-standing interpretation of the law. In its brief, Ecology explains that the Water Resources Act requires it to "protect surface water flows in order to preserve the natural environment" and that the agency's "authority to promulgate rules closing streams to further appropriation directly relates to protecting these environmental values." Ecology's Brief at 20. Ecology reaffirms that in the Deschutes Basin, as elsewhere, "[s]tream closures embody Ecology's determination that water in the streams is not available for further appropriation without impacting the values protected under the [Water Resources Act]." *Id.* at 20-21. This is consistent with Ecology's position in *Postema*, 142 Wn.2d at 94, that "where a proposed withdrawal would reduce the flow in surface water closed to further appropriations, denial is required because water is unavailable and withdrawal would be detrimental to the public welfare."²

As Miller recognizes, the Court must "give great deference to an agency's interpretation of its own properly promulgated regulations, 'absent a compelling indication' that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority."

² Ecology's original decision on Miller's permit application likewise explained that "Ecology *must* deny any proposed groundwater withdrawals that have the potential to impair flows in Woodland Creek" because "[m]aintaining flows in Woodland Creek is necessary to provide protection for wildlife fish, water quality and aesthetic values." CP 1656 (Exh. 7 at 5) (emphasis added).

Miller Brf. at 16 (quoting *Silverstreak, Inc. v. Washington State Dep't of Labor and Indus.*, 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007)). In this case, Miller has failed to provide any compelling justification that would justify a departure from Ecology's longstanding position and the holding in *Postema* that stream closures "embody Ecology's determination that water is not available for further appropriations" and that if an unmitigated "withdrawal of groundwater will have *any effect* on flows in a closed stream, the withdrawal must be denied."³ Ecology Brf. at 14-15.

Miller argues that because the stream closures in the Deschutes Basin are justified by a finding that "further consumptive appropriations would harmfully impact instream values," WAC 173-513-040(1), Ecology may grant permits based on a case-by-case evaluation of whether a particular withdrawal will harm these instream values. Miller Brf. at 29-30. But since WAC 173-513-040(1) already constitutes a categorical determination that "further consumptive appropriations would harmfully impact instream values," where the best available science shows that a proposed groundwater appropriation would "consume" water that would otherwise contribute to flows in a closed stream, it is covered by the

³ As discussed in Part II *infra*, it is the Tribe's position that under RCW 90.44.055, a *mitigated* groundwater withdrawal that affects flows in a closed stream may be allowed only if there is adequate assurance that the mitigation offered will fully offset the likely adverse impacts of the proposed withdrawal on stream flows.

stream closure rule. *See* Tribe's Opening Brf. at 23-24, 30. This is so regardless of whether it can be demonstrated on a case-by-case basis that the reduction of flows is sufficient to cause harm to instream values. *Id.*

Finally, Miller points to Ecology's 1980 narrative report for Deschutes Basin rule to support its position that groundwater appropriations that reduce flows in closed streams may be allowed based on a case-by-case assessment of environmental harm. Miller Brf. at 30-31 (citing CP 1857 (Exh. 25 at 13)). However, the relevant language of the document provides:

It is the intent of this program to insure that surface waters are protected from significant impact with respect to the use of adjacent or nearby groundwater resources that are known to be in continuity with protected surface waters. . . . Proposed wells *found to be in significant hydraulic continuity with [protected] surface sources* would be treated in the same manner as a direct diversion from the surface source. *This determination* will be made on a case-by-case basis.

CP 1857 (Exh. 25 at 13). While the last sentence of the quoted paragraph states that certain "determinations" will be "made on a case-by-case basis," these "determinations" plainly relate to the finding of "significant hydraulic continuity" referred to in the previous sentence, not to a determination of environmental harm.

In short, Ecology may issue a groundwater permit in the Deschutes Basin based on a case-by-case determination that a withdrawal would not

reduce flows in a closed stream, but not based on an evaluation of the environmental harm resulting from a reduction in flows.

II. Mitigation for Appropriations Affecting a Closed Stream Must Fully Offset the Effects on Stream Flows.

Although Ecology agrees that under *Postema* an unmitigated withdrawal of groundwater that affects flows in a closed stream must be denied, it contends that this principle does not apply to situations where “mitigation sufficient to offset a reduction in base flows has been offered.” Ecology Brf. at 21. In such situations, Ecology asserts, the Water Code allows the agency to “schedule” mitigation at the time of year when environmental values will receive the maximum benefit, even if the result is that flow reductions in a closed stream will be unmitigated at other times of the year. *Id.* at 20. Ecology’s argument provides no basis to sustain the Board’s decision because the argument was not presented to the Board, the factual premise underlying the argument is contrary to the Board’s findings of fact, and the argument is contrary to the Water Code.

A. The Board Found that the Mitigation Plan Did Not Fully Offset the Effects of the Proposed Withdrawals on Stream Flows.

It is undisputed that Ecology’s “mitigation” argument was not presented to the Board or the Superior Court and played no part in the decision making process below. *See Ecology Brf. at 27* (arguing that the

Court may “consider arguments other than the ones the PCHB found most persuasive”). While the Court may consider new grounds for affirming the Board’s decision, the Court may only sustain the Board’s decision based on a theory that is “established by the pleadings and supported by the proof.” *Mountain Park Homeowners Ass’n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994); *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); *see also* RAP 2.5(a) (party “may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground”).

In this case, however, the Board’s decision may not be sustained based on Ecology’s new “mitigation” argument because it is not “supported by the proof.” *Tydings*, 125 Wn.2d at 344. Put simply, the factual premise for Ecology’s argument – *i.e.* that “mitigation sufficient to offset a reduction in base flows has been offered” – is contrary to the Board’s own findings of fact. Because these findings of fact are “unchallenged,” they are “verities on appeal.” *Postema*, 142 Wn.2d at 100 (citing *Hilltop Terrace Homeowners’ Ass’n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995); *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991)); *see also* Ecology Brf. at 24 n. 14; Miller Brf. at 14 n.4.

In its final decision, the Board found that that the proposed groundwater withdrawals “will likely lower the stream flow of Woodland and Fox Creeks during the summer months *despite the attempt to augment these streams during this time.*” CP 1274 (Final Order at 49 (¶ 112)) (emphasis added). Furthermore, the Board found, “although the proposed stream flow augmentation attempts to provide mitigation for the residential use identified in the ROEs, *the mitigation pumping itself diminishes the levels of Woodland Creek* in violation of the provisions of WAC 173-153-040.” CP 1282 (*Id.* at 53 (¶120)) (emphasis added). Furthermore, the mitigation plan approved by Ecology was insufficient because it failed to establish baseline conditions, include an adequate pumping test, or provide for necessary financial assurances. CP 1279, 1280 and 1282 (*Id.* at 54 (¶ 122), 55 (¶ 124) and 57 (¶ 128)). In short, while *Ecology* found that any impacts to the stream from Miller’s groundwater withdrawal “would be offset fully by the proposed mitigation,” *Ecology’s* Brf. at 13, the *Board* concluded that *Ecology’s* findings concerning the adequacy of the mitigation were “erroneous.” CP 1227, 1271-72 (Final Order at 2, 46-47 (¶¶ 106, 107)).

Ecology argues that the Court should ignore the Board’s findings of fact and instead “review the facts in the light most favorable to *Ecology.*” *Ecology* Brf. at 13. While this principle applies to review of a

summary judgment decision, *York v. Wahkiakum Sch. Dist.*, ___ Wn.2d ___, 178 P.3d 995, 999 (2008), it does not apply here because the Tribe is appealing the Board's *Final Order* which reaffirmed the legal conclusions in the Board's summary judgment decision and applied them to the facts found at the hearing. *See* Tribe's Opening Brf. at 1 (Assignment of Error); CP 1268-70, 1275 (Final Order at 43-45 (¶¶ 97-103) and 50 (¶ 113)); *see also Postema*, 142 Wn.2d at 120. Where the Board has entered findings of fact after a full evidentiary hearing and these findings are unchallenged on appeal, the Court may not accept legal arguments which assume facts that are contrary to the Board's unchallenged findings. *See, e.g., Shoreline Comm. College v. Employment Sec. Dep't*, 120 Wn.2d 394, 404-05, 842 P.2d 938 (1992).

In short, the Board's decision cannot be upheld based on reasoning that is contrary to the Board's unchallenged findings. Because the Board disagreed with Ecology's premise that "mitigation sufficient to offset a reduction in base flows has been offered," the Board's decision cannot be upheld on this basis.

B. As a Matter of Law, the Mitigation Plan Fails to Offset the Effects of the Proposed Withdrawals Because Mitigation is Required for Only Half the Year.

Because Ecology's new "mitigation" argument relies on factual assumptions that are contrary to the Board's findings, the Court need not

reach the legal merits of the argument. If the Court does reach the legal merits, it should find Ecology's position to be contrary to the clear requirements of the Water Code.

Ecology's new argument is based on RCW 90.44.055, which provides Ecology with the authority to consider proposals for the use of water impoundments and other resource management techniques that offset the impacts of groundwater withdrawals. The statute reads in pertinent part:

The department shall, when evaluating an application for a water right or an amendment filed pursuant to RCW 90.44.050 or 90.44.100 that includes provision for any water impoundment or other resource management technique, take into consideration the benefits and costs, including environmental effects, of any water impoundment or other resource management technique that is included as a component of the application. The department's consideration shall extend to any increased water supply that results from the impoundment or other resource management technique, including but not limited to any recharge of groundwater that may occur, *as a means of making water available or otherwise offsetting the impact of the withdrawal of groundwater proposed in the application for the water right or amendment* in the same water resource inventory area.

RCW 90.44.055 (emphasis added).

The Tribe agrees with Ecology that this statute "allows an applicant to show that proposed mitigation will offset any impacts of a new withdrawal from a closed stream." See Ecology Brf. at 19.

Furthermore, the statute provides the agency with the authority to make a finding of groundwater availability, “if mitigation can offset projected impacts to a closed stream, resulting in ‘zero effect’ on the stream.” *See id.* at 17. The Tribe also does not dispute that mitigation proposals must be analyzed on a case-by-case basis to determine whether the proposed mitigation will fully and permanently offset the impacts of the proposed groundwater withdrawal.⁴ *See id.* at 16.

However, the Tribe disagrees with the contention that the law allows Ecology to “schedule offsetting mitigation” in a manner that leaves some impacts on the stream entirely unmitigated. *See Ecology Brf.* at 20. As Ecology concedes, all new groundwater withdrawals, mitigated or not, must still meet the four part test of RCW 90.03.290(3). *See Ecology Brf.* at 19. That test requires Ecology to find that: (1) the water will be applied to a beneficial use; (2) water is available for appropriation; (3) the proposed use will not impair existing rights; and (4) the proposed use will not be detrimental to the public interest. RCW 90.03.290(3); *Postema*, 142 Wn.2d at 79. Mitigation proposed under RCW 90.44.055 may be considered as a means of *meeting* this four-part test, but regardless of the

⁴ As held by the Board in this case, this analysis must be based on realistic hydrologic modeling of the impacts of the proposed withdrawals and the effects of the proposed mitigation. In addition, mitigation measures must include monitoring and other provisions which ensure that the impacts of the groundwater withdrawal will remain offset over time.

asserted environmental benefits of proposed mitigation measures, an application cannot be approved unless *each* element of the four-part test has been met. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997); *see also Postema*, 142 Wn.2d at 106.

In this case, the groundwater application approved by Ecology did not satisfy each element of the four-part test. WAC 173-513-040(1) declares that “further consumptive appropriations would harmfully impact instream values” and closes Woodland Creek year-round to consumptive appropriations. Under this provision, water is unavailable for appropriation from Woodland Creek at any time of the year. *Postema*, 142 Wn.2d at 95; *see also* CP 1273 (Final Order at 48 (¶109)). It is undisputed that the proposed groundwater withdrawals will “consume” water on a year-round basis that would otherwise contribute to base flows in Woodland Creek. CP 1236 (Final Order at 11 (¶21)); CP 1717 (Ecology’s Report of Examination at 7). Under RCW 90.03.290(3), a “further consumptive appropriation” from Woodland Creek cannot be approved unless new water is made available for appropriation through a resource management technique approved under RCW 90.44.055.

Under the proposal approved by Ecology, however, new water will be added to the stream only for six months out of the year. No new water will be made available to offset impacts occurring from December through

May. Indeed, Ecology's own decision refers to these months as the "non-mitigated months." CP 1236 (Final Order at 11 (¶21)); CP 1717 (Ecology's Report of Examination at 7). Because water is not available for appropriation in these "non-mitigated" months, "further consumptive appropriations" cannot be allowed during these months under the Water Code's four-part test. The fact that supposedly "extra" water is provided from June through November cannot make up for the failure to meet Water Code requirements from December through May.⁵

The timing of mitigation cannot be dismissed as unimportant. "Universally recognized as part of the law of waters in the western states is the rule that a water right may be measured by time as well as volume." *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999); *Neubert v. Yakima-Tieton Irr. Dist.*, 117 Wn.2d 232, 238, 814 P.2d 199 (1991). In *R.D. Merrill*, 137 Wn.2d at 127-28, the Court held that approval of a change in the time of use should be denied or conditioned to protect other water rights holders by, for example, limiting the use for new purposes to the same season as the historical use. Contrary to the holding of *R.D. Merrill*, Ecology's reading of the

⁵ Assuming (contrary to the Board's findings) that the total amount of stream augmentation is 10 times the effect on the stream on a year-round basis, Ecology could structure stream augmentation to require 19-for-1 mitigation during the six low-flow months as long as it requires 1-for-1 mitigation during the six high-flow months.

mitigation statute would allow the agency to ignore adverse seasonal effects based on a case-by-case assessment that the environment is better off if mitigation is concentrated during another season. While RCW 90.44.055 allows Ecology to grant a groundwater application “if mitigation can offset projected impacts to a closed stream, resulting in ‘zero effect’ on the stream,” Ecology Brf. at 20, because *all* of the mitigation in this case is “concentrated” into a six-month window, it simply does not make new water available for appropriation during the non-mitigated months.

Ecology argues that its interpretation is supported by WAC 173-513-050 “because the stream closure rule was adopted . . . to protect and enhance the environmental values of the stream, not the quantity of flow *per se*.” Ecology Brf. at 25. However, Ecology simply ignores its own determination that “further consumptive appropriations” at any time of year will “harmfully impact instream values” in Woodland Creek. WAC 173-513-040(1). Essentially, Ecology is arguing that it may authorize “consumptive appropriations” that harm instream values during part of the year, if these harms are offset by greater environmental benefits at other times of the year.

While the Legislature could have written a statute that provides authority for such a trade-off, such authority cannot be found in RCW

90.44.055. The statute merely authorizes Ecology to consider mitigation “as a means of making water available or *otherwise offsetting the impact of the withdrawal of groundwater* proposed in the application for the water right or amendment.” *Id.* (emphasis added). It does not allow Ecology to approve groundwater withdrawals based on mitigation measures that do not make new water available or otherwise fully offset the impact of the proposed withdrawal.⁶

Although the environmental impacts from the wintertime withdrawals in this case may appear minor, the discretionary authority asserted by Ecology is extremely broad and will have consequences beyond the facts in this case. Ecology effectively asserts that it can approve an application that fails to comply with one or more elements of the four-part test if it determines that mitigation measures as a whole will enhance the environment. Ecology’s reasoning would allow the agency to approve a water right application that would result in unmitigated impacts in one part of a stream based on mitigation measures that enhance stream flows somewhere else. Under Ecology’s reasoning, the agency might

⁶ The statute does require Ecology to “take into consideration the benefits and costs, including environmental effects, of any water impoundment or other resource management technique.” RCW 90.44.050. However, this provision merely allows Ecology to reject a proposal that otherwise complies with the four-part test due to unacceptable costs or environmental effects. It does not allow Ecology to approve an application that fails to meet the four-part test based on a finding of environmental benefits.

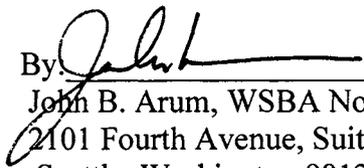
even be able to approve a groundwater application that would impair an existing water right, based on a case-by-case finding that mitigation measures would enhance stream flows or other environmental values. While the Tribe does not contest Ecology's discretionary authority to consider creative mitigation proposals included in water rights applications, at the end of the day an application must still comply with the Water Code's four-part test and applicable basin rules. The present application simply did not comply with these requirements. The Board's decision upholding Ecology's failure to require mitigation for withdrawals occurring from December through May should be reversed.

CONCLUSION

For the reasons set forth herein, the Court should reverse the Board's decision holding that Ecology may approve Miller's proposed groundwater withdrawals without mitigation to offset the predicted effects on flows in Woodland Creek from December through May.

Dated: May 7, 2008.

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