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SUPREME COURT  
OF THE STATE OF WASHINGTON

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SQUAXIN ISLAND TRIBE, Appellant,

v.

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

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BRIEF OF RESPONDENT  
MILLER LAND AND TIMBER LLC

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## I. INTRODUCTION

This appeal involves an attempt by the Squaxin Island Tribe to reverse a Pollution Control Hearings Board decision upholding the Department of Ecology's interpretation of the Deschutes River Basin Rule. This rule sets forth Ecology's designation of surface water flow limitations and stream closures for the Deschutes River Basin, with the stated purpose of protecting fish, wildlife, and other environmental values. WAC 173-513-050, the provision of the regulations applicable to groundwater appropriations, states that the Basin Rule's surface water restrictions do not apply to groundwater appropriations unless Ecology verifies that such groundwater withdrawal "would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter." WAC 173-513-050.

Ecology applied this standard in approving applications by Miller Land and Timber LLC for groundwater appropriations mitigated by direct streamflow augmentation during periods of low flow. Ecology determined that during periods of high flows (December 1 to May 31) the proposed groundwater withdrawals would cause some reduction in surface water flow, but this reduction in flow would result in no harm to fish habitat and no other adverse impact to the environmental values articulated in the Deschutes Basin Rule. The Pollution Control Hearings Board upheld the standard used by Ecology, and concluded that neither diminishment in flows during the winter months nor the lack of stream augmentation during this time period will adversely impact fish.

The Tribe does not dispute the Board's determination that diminution of wintertime streamflows resulting from Miller's groundwater withdrawals would not adversely impact any environmental values protected by the Deschutes Basin Rule. Instead, the Tribe argues that the Board applied the incorrect standard in reviewing Ecology's decisions. Despite the plain language of WAC 173-513-050 and the clearly-stated purpose of the regulation to protect environmental values, the Tribe argues that Ecology is prohibited from considering whether the groundwater withdrawals would cause any harm to the environment.

The Tribe asserts that regardless of whether a groundwater withdrawal would cause harm to fish or other environmental values, Ecology's designation of a stream closure in the Deschutes River Basin constitutes a blanket determination that water is unavailable for appropriation and requires denial of groundwater applications whenever the groundwater withdrawal will have "any effect" on a closed stream. The Tribe fashions this argument by (1) viewing in isolation WAC 173-513-040, the section of the Deschutes River Basin Rule designating stream closures, (2) relying upon this Court's interpretation of different basin regulations in *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000); and (3) ignoring the fact that Ecology's stream closures in the Deschutes River Basin are not based on a determination that water is unavailable.

The Tribe would have this Court generalize from the stream closures in the Snohomish Basin rule and the Green-Duwamish Basin rule

– which were explicitly based on a determination of lack of availability – to apply the so-called “any effect” standard as a uniform rule applicable to stream closures throughout the state. The Tribe’s reliance on the Court’s statement in *Postema* that a stream closure is equivalent to a determination of unavailability is misplaced. That holding is properly limited to the Snohomish and Green-Duwamish basin rules addressed by the Court, in which stream closures are predicated upon an explicit determination that water is unavailable. No such determination of unavailability is found in the Deschutes Basin Rule. *Postema* cannot be read as broadly as the Tribe asserts, because Ecology has promulgated separate rules in different basins, with various justifications for stream closures. Some stream closures are based upon a determination of lack of availability; others – like the Deschutes Basin stream closures in WAC 173-513-040 – are not.

The Tribe’s arguments should be rejected by this Court. It is against long-standing principles of statutory and regulatory interpretation to look at one section of the Deschutes Basin Rule in isolation. In focusing solely on WAC 173-513-040 and its list of stream closures, the Tribe ignores and would render superfluous WAC 173-513-050, the section of the regulation which applies specifically to groundwater and explicitly references the underlying purpose of the Basin Rule.

In addition, although the Tribe rests its argument in favor of a uniform and generalized standard largely on this Court’s decision in *Postema*, in that case this Court specifically rejected the notion that Ecology should adopt a uniform reading of particular regulations across all

basins. Instead, the Court in *Postema* held that Ecology should apply the rules specific to the basins in which appropriations are sought. The Tribe is incorrect in asserting that Ecology is foreclosed from making a case-by-case evaluation of the impact of Miller's proposed groundwater withdrawals. The Board correctly ruled that such an individualized evaluation is mandated by the governing statutes and the Deschutes Basin Rule.

## **II. COUNTER-STATEMENT OF ISSUE ON APPEAL**

Did the Pollution Control Hearings Board correctly conclude that, pursuant to the groundwater provision of the Deschutes River Basin Rule, a permit for a groundwater appropriation may be approved where the groundwater withdrawal would not clearly have an adverse impact upon the surface water system contrary to the rules' stated purpose of protecting wildlife, fish, scenic values, aesthetic values, environmental values, recreation, navigation, and water quality?

## **III. STATEMENT OF THE CASE**

### **A. Statutory and Regulatory Background.**

#### **1. The Department of Ecology's Statutory Authority.**

The Legislature has delegated responsibility to the Department of Ecology ("Ecology") to review and act upon water right applications. RCW 90.03.290; RCW 90.44.060. Along with this delegation of responsibility, the legislature set out a four-part test that Ecology must use in reviewing such applications. *Id.* Each water right application must be evaluated to determine whether: (1) the water will be applied to beneficial

use; (2) water is available for appropriation; (3) the proposed appropriation will not impair existing rights; and (4) the proposed appropriation will not be detrimental to the public interest. RCW 90.03.290; RCW 90.44.060; *Postema*, 142 Wn.2d at 79.

The Legislature further directed that in utilizing and managing the waters of the state, Ecology must protect the quality of the natural environment, and retain base flows in rivers and streams “necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values . . . .” RCW 90.54.020. To that end, Ecology may establish minimum water flows or levels for streams, lakes, or other public waters. RCW 90.22.010. Ecology also has authority to close streams to further appropriation. *Postema*, 142 Wn.2d at 94-95 (citing RCW 43.21A.064(9); RCW 43.27A.090(7), (11); RCW 90.54.040; and RCW 90.03.247).

Ecology implemented these statutes by developing water management regulations in regional segments, dividing the state into 62 Water Resource Inventory Areas (“WRIAs”). WRIA regulations usually follow a similar format, and may include, among other things, minimum instream flows, preferences for particular categories of water use, identification of streams which are closed to future appropriation, and a provision concerning groundwater. *Postema*, 142 Wn.2d at 84; *see* RCW chapter 90.54; RCW chapter 90.22; WAC chapters 173-500 through WAC 173-564.

## 2. The Deschutes Basin Rule.

In the Deschutes River Basin (WRIA 13), Ecology regulations establish both minimum instream flows and stream closures. WAC chapter 173-513 (attached hereto as Appendix A). This basin rule was promulgated pursuant to RCW chapter 90.54 and RCW chapter 90.22. WAC 173-513-010. The Deschutes Basin Rule begins with the following statement of purpose:

The purpose of this chapter is to retain perennial rivers, streams and lakes in the Deschutes River Basin with instream flows and levels necessary to provide protection for wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation and water quality.

WAC 173-513-020.

The next section of the Deschutes Basin Rule establishes minimum instream flows. WAC 173-513-030.

Following that, in a section titled "Surface Water Source Limitations to Further Consumptive Appropriations," the rule sets forth a list of streams and lakes closed to further consumptive appropriation during specified periods. WAC 173-513-040(1). This list includes Woodland Creek and its tributaries -- the surface water source at issue in this appeal. This list of stream closures is prefaced by the following determination: "The department of ecology, having determined that further consumptive appropriations would harmfully impact instream values, closes the following streams and lakes to further consumptive appropriation for the periods indicated." WAC 173-513-040(1). Woodland Creek is listed as closed all year. *Id.*

Immediately following the stream closure section, the Deschutes Basin Rule sets forth a separate provision addressing the applicability of the minimum flow regulations and stream closures to groundwater appropriations:

GROUNDWATER. Future groundwater withdrawal proposals *will not be affected by this chapter unless* it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter.

WAC 173-513-050 (emphasis added).

Contemporaneously with the promulgation of the Deschutes Basin Rules, Ecology issued a narrative guidance document entitled "Deschutes River Basin Instream Resources Protection Program Including Proposed Administrative Rules." In that narrative guidance document, under the heading "Relationship of Ground Water to Instream Protection Measures," Ecology stated:

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 such 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.*

Administrative Record, Ex. 25 at 13<sup>1</sup> (emphasis added).

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<sup>1</sup> "AR" citations refer to the Administrative Record before the PCHB. "Ex." refers to exhibits admitted at the PCHB hearing. "RP" citations refer to the transcript of the PCHB proceedings. Finally, "CP" citations refer to the Thurston County Superior Court clerk's papers. (In its opening brief, the Tribe apparently uses the "CP" abbreviation to refer to the entire Administrative Record including exhibits.) For the convenience of the Court, this brief cites to the PCHB's Order on Motions and the PCHB's Modified Findings of Fact, Conclusions of Law and Order ("Final

### 3. The Mitigation Statute.

When reviewing water right applications, Ecology is required by statute to consider proposals for resource management techniques that would offset or mitigate the impacts of proposed water appropriations. RCW 90.03.255; RCW 90.44.055. The groundwater mitigation statute provides:

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 ground water that may occur, as a means of making water available or otherwise offsetting the impact of the withdrawal of ground water proposed in the application for the water right or amendment in the same water resource inventory area. Provision for an impoundment or other resource management technique in an application shall be made solely at the discretion of the application and shall not be made by the department as a condition for approving an application that does not include such provision.

RCW 90.44.055. The Water Code includes a virtually identical provision applicable to an application for a surface water right, transfer, or change. RCW 90.03.255.

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Order”) at the locations where they appear in the Clerk’s Papers (CP 14-30 and CP 31-88, respectively).

**B. The Miller Water Right Applications.**

Miller Land and Timber LLC (“Miller”) proposed two residential plats, known as Pleasant Glade and Carpenter Ridge, on two parcels located near Henderson Inlet, within the Deschutes River watershed in unincorporated Thurston County. CP 33. The Pleasant Glade site is approximately 171 acres and the Carpenter Ridge site is approximately 40 acres. CP 34-35. Woodland Creek discharges to Henderson Inlet approximately 1.5 miles north of the Pleasant Glade property. CP 33.

On October 25, 2000, Miller filed Groundwater Application No. G2-29951 with Ecology requesting authorization to withdraw 172 gallons per minute (gpm) and 45.2 acre-feet per year for multiple domestic supply for Pleasant Glade. CP 34. As originally proposed, the Pleasant Glade project consisted of 101 lots or equivalent residential units. *Id.* On August 1, 2003, Miller filed Groundwater Application No. G2-30137 with Ecology requesting authorization to withdraw 63 gpm and 13 acre-feet per year for multiple domestic supply for Carpenter Ridge. CP 35.

In support of its application, Miller provided the results of an evaluation performed by a licensed hydrogeologist, which predicted that the proposed Miller wells would result in minimal impacts to Woodland Creek due to the depth of the wells and their proximity to Puget Sound. The assessment concluded that potential surface water impacts from the groundwater pumping were likely to be negligible and could be offset by mitigation. CP 34-35.

Public notice of the Pleasant Glade water right application was published in 2001. Ex. 7 at 2. No protests were received. *Id.* Public notice of the Carpenter Ridge water right application was published in 2004. Ex. 8 at 2. Again, no protests were received. *Id.* Ecology sent to the Washington Department of Fish & Wildlife (WDFW) copies of the Miller water right applications. RP 1044:18-1045:8. WDFW did not object to the applications, request denial, suggest mitigation measures to protect fish, or comment in any way on either of the two water right applications during their initial review by Ecology. RP 462:1-4; RP 463:9-25.<sup>2</sup>

On August 10, 2004, Ecology issued reports of examination denying Miller's water right applications, based solely upon the Woodland Creek surface water closure in WAC 173-513-040(1). CP 35; RP 861:13-862:23; RP 872:9-873:9; RP 1039:8-17. Ecology concluded in each report of examination that pumping water from the proposed wells would capture water that would otherwise contribute to flows in Woodland Creek. CP 35. The 2004 reports of examination did not include any reference to or discussion of WAC 173-513-050, the groundwater section of the Deschutes Basin Rules. Ex. 7; Ex. 8. Miller appealed the denials to the Pollution Control Hearings Board ("PCHB" or "Board"). CP 36. Miller

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<sup>2</sup> Thurston County conducted environmental review of the Carpenter Ridge plat application, held a public hearing, and approved the Carpenter Ridge project in May 2005. RP 631:17-24. WDFW also received notice of Thurston County's SEPA determination for the Carpenter Ridge project, but did not comment, object on grounds of adverse impacts to fish or fish habitat, request specific conditions to protect fish, or otherwise participate in any way in the County's review process for Carpenter Ridge. RP 472:21-473:3; RP 630:18-631:16; RP 639:8-24.

and Ecology were the only parties before the Board; neither the Squaxin Island Tribe (“Tribe”) nor WDFW intervened as a party in the initial appeal. *Id.*

In an effort to reach settlement, and pursuant to RCW 90.44.055, Miller offered a specific mitigation proposal to Ecology to use some of the groundwater for direct streamflow augmentation to offset the impacts of pumping. CP 36-37. Since the date of Miller’s original water rights applications, changes in applicable Thurston County land use regulations had decreased the maximum possible density within Pleasant Glade from 101 lots to approximately 34 lots. CP 36. Because the original applications contemplated substantially greater density in the Pleasant Glade project, and the amount of water for which Miller had originally applied was more than necessary to supply the current residential demand for both projects, Miller proposed allocating some of the water for direct streamflow augmentation, in order to mitigate the impacts of the pumping on baseflow discharge to Woodland Creek. CP 39-41.

The objective of Miller’s proposed mitigation plan was to have zero impact on baseflow to Woodland Creek as a result of groundwater pumping at Pleasant Glade and Carpenter Ridge. CP 41. Miller proposed mitigating for both projects by diverting a portion of the groundwater pumped at Pleasant Glade, which borders Woodland Creek, and piping the water to feed into Fox Creek, a tributary to Woodland Creek. CP 37.

Ecology accepted this approach to mitigation of impacts from the proposed groundwater pumping, and issued decisions approving the

issuance of new water rights. The approvals were conditioned upon a required streamflow augmentation program during the low flow period of June 1 through November 30. CP 37-40. Although Miller had proposed continuous year-round streamflow augmentation at a rate of 16 gpm, Ecology determined that because the critical low-flow periods in Woodland Creek occur during the summer and fall months, it would provide more benefit to the stream and the environment to concentrate the stream augmentation during the low-flow months. RP 49:14-50:23. Thus, rather than augmenting flows year-round at a maximum rate of 16 gpm, the streamflow augmentation program provided for augmenting flows at a rate of 32 gpm from June 1 to November 30. *Id.*; Exs. 14, 15.

Ecology determined that groundwater pumping for the two projects during the rest of the year (December 1 to May 31) would not clearly have an adverse impact on Woodland Creek or its tributaries, because those months correspond to times when peak streamflows occur. CP 41.<sup>3</sup> Accordingly, Ecology did not require streamflow augmentation during the winter peak flow months. *Id.* Ecology concluded that under WAC 173-513-050 the Miller applications, as mitigated, would not clearly have an

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<sup>3</sup> The required features of the stream augmentation program were developed in consultation with Ecology staff with particularized technical expertise, including fisheries biologist Brad Caldwell. RP 50:17-54:4; 77:23-78:2. Mr. Caldwell testified before the PCHB that impacts from groundwater pumping at Pleasant Glade and Carpenter Ridge would not adversely affect fish during high flow periods, and that wintertime streamflow augmentation at the rate of 16 gpm would not provide any benefit to fish. Mr. Caldwell testified that stream augmentation to Fox Creek at a continuous rate of 32 gpm during the low flow period would definitely improve water quality and fish habitat in Fox Creek, because summertime flows are critical to fish habitat. RP 46:9-49:1; RP 50:17-56:25; RP 59:2-60:2; RP 86:22-88:13.

adverse impact on Woodland Creek or its tributaries and that water was available for appropriation. Exs. 14, 15; RP 1045:19-1048:2.

**C. The PCHB Proceedings.**

The Tribe appealed Ecology's approval of Miller's applications to the PCHB on October 12, 2005. AR 407-455. Prior to hearing before the PCHB, the Tribe moved for summary judgment. AR 265-374. Among other things, the Tribe sought a ruling from the PCHB that, despite the plain language of WAC 173-513-050, Ecology may not approve a groundwater withdrawal in a basin with designated stream closures if the withdrawal would have "any effect" on surface water flows. *Id.*

On May 19, 2006, the Board denied the Tribe's summary judgment motion. CP 14-30. The Board held that in accordance with the Deschutes Basin Rule and the stated purposes behind the Rule and the authorizing statutes, "groundwater withdrawals in the Deschutes Basin constitute a clear adverse impact and are subject to the [Deschutes Basin Rule] if the withdrawals produce any effects *which adversely impact the values identified in WAC 173-513-020.*" CP 29 (emphasis added).

Following a four-day evidentiary hearing, the Board reiterated this holding in its Modified Findings of Fact, Conclusions of Law and Order ("Final Order"), issued on November 20, 2006. CP 73-75. The Board specifically found that "neither diminishment in flows during the winter months nor the lack of stream augmentation during this time period will adversely impact fish." CP 80. The Tribe has not assigned error to the

Board's findings.<sup>4</sup> In reiterating its ruling on the Tribe's motion for summary judgment, the PCHB concluded:

A reduction in stream flow does not necessarily equate to harm in the quality of the natural environment. If a reduction in stream flow occurs only during the winter months when there is ample flow in a particular stream, for example, it is difficult to see how the water is not "available" for appropriation or how it is adversely impacting the base flows "necessary to provide protection for wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality" as required by WAC 173-513-020.

CP 74.

The PCHB disagreed with Ecology, however, regarding the adequacy of the mitigation required during the summer months. CP 79. The Board concluded that even with the required stream augmentation, Miller's proposed groundwater withdrawals would likely lower the stream flow of Woodland and Fox Creeks during the low-flow summer months, negatively impacting fish habitat. *Id.* The Board accordingly vacated Ecology's amended Reports of Examination.<sup>5</sup> CP 88.

**D. The Superior Court Proceedings.**

Both the Tribe and Miller petitioned for review of the PCHB's decision under the Administrative Procedure Act (APA). CP 3-88. On

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<sup>4</sup> These findings are, accordingly, verities on appeal. *Postema*, 142 Wn.2d at 100.

<sup>5</sup> However, the Board stated that "the Board's conclusion does not preclude Ecology from issuing a preliminary permit under RCW 90.03.290(2)(a) and allowing Miller to resubmit a water rights application at a later time supported by sufficient study or investigation, including a pumping test, that assesses the actual affect [sic] groundwater withdrawals will have on the surface waters of the Woodland Creek basin. Ecology could then evaluate the information available after such study or investigation and, if merited, use such information to re-evaluate the 'availability' and 'public interest' prongs of the four-part test." CP 85-86.

October 17, 2007, the Thurston County Superior Court dismissed both petitions and affirmed the Board's decision, without issuing a written opinion. CP 100-102. Miller did not appeal the Superior Court decision.

Despite the fact that the Superior Court upheld the PCHB's Final Order vacating Ecology's approvals of Miller's water right applications, the Tribe petitioned this Court for direct review. CP 103-186. The Tribe seeks reversal of the Board's legal ruling that groundwater withdrawals in the Deschutes Basin are subject to the provisions of WAC chapter 173-513 if they produce any impact on surface water which adversely impacts the environmental values the Basin Rule is designed to protect.<sup>6</sup>

#### IV. ARGUMENT

##### A. Standard of Review.

This appeal involves review of the PCHB's interpretation of the Deschutes Basin regulations promulgated by Ecology. Under the APA, this Court reviews the PCHB's conclusions of law *de novo*. *Waste Management of Seattle v. Utilities and Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). Where statutory construction is concerned, the error of law standard applies. *Public Util. Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 789, 51 P.3d 744 (2002); RCW 34.05.570(3)(d).

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<sup>6</sup> Ecology has filed a motion to dismiss the Tribe's appeal on the grounds that the Tribe is not an "aggrieved party" within the meaning of RAP 3.1. Miller has not taken a position on Ecology's motion. The motion was referred to the full court on February 29, 2008 and remains pending.

As the agency designated by the legislature to regulate the state's water resources and administer the state's water rights statutes, "Ecology's interpretation of relevant statutes and regulations . . . is entitled to great weight." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (citing *Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998)). See also *Postema*, 142 Wn.2d at 77.

As this Court recently stated in a case involving the review of a decision by the state Department of Labor and Industries:

This court has made clear that we will 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. . . . We give this high level of deference to an agency's interpretation of its regulations because the agency has expertise and insight gained from administering the regulation that we, as the reviewing court, do not possess.

*Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 884-885, 154 P.3d 891 (2007).<sup>7</sup>

In this case, Ecology interpreted the Deschutes Basin regulations to allow a groundwater withdrawal without mitigation during the wintertime high flow period, because the predicted reduction in streamflows would not adversely affect fish or any other environmental values. The Board

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<sup>7</sup> The Tribe implies that Ecology's interpretation of the Deschutes Basin Rule is not sufficiently "official" to be accorded deference by this Court. Tribe Opening Brief at 11, citing a footnote in *Burton v. Lehman*, 153 Wn.2d 416, 426 n.4, 103 P.3d 1230 (2005). However, none of the cases cited above discuss any requirement regarding the "official" nature of the agency interpretation at issue. Moreover, Ecology's reports of examination approving Miller's applications and setting forth the agency's reasons for doing so certainly constitute official agency action.

adopted this interpretation of the applicable regulation. CP 24-29; CP 73-75.

The cases cited by the Tribe do not support its assertion that this interpretation of Ecology's regulation is not entitled to deference. In *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001), the Columbia River Gorge Commission failed to timely appeal a Skamania County land use decision and then attempted more than a year later to collaterally invalidate the county's final land use decision and order the relocation of a residence built in reliance on that decision. *Id.* at 36, 38-39. This Court held that the Gorge Commission had exceeded the scope of its federal statutory authority and violated the statute's clear 30-day appeals provision. *Id.* at 44-49.

The Court also noted that the question before the court did not concern "a matter within the Gorge Commission's area of expertise", and was "wholly unsupported by its prior administrative practice", since the Gorge Commission had never before sought to collaterally invalidate a final county land use decision. *Id.* at 54-55. In the case at hand, Ecology and the PCHB specifically acted within their area of expertise and the scope of their authority.<sup>8</sup>

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<sup>8</sup> The United States Supreme Court cases cited by the Tribe are also distinguishable. In *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 150 L.Ed.2d 292 (2001), the Court held that tariff classification rulings imposed by the United States Customs Service exceeded on the face of the agency's enabling statute the terms of Congress's delegation of authority to Customs. *Id.* at 231-232. In *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), the Court refused to defer to appellate counsel's justification for the interpretation of wage and hour laws by the Secretary of Health and Human Services. *Id.* at 212-213. The agency itself had never articulated a position on the

**B. The Deschutes River Basin Stream Closure Regulations Apply to Groundwater Only Where Groundwater Withdrawals Would Adversely Impact the Environmental Values Set Forth in the Rule.**

The Tribe would have this Court look at one section of the Deschutes River Basin Rule in isolation, ignoring the remaining sections of the regulation. However, as the Tribe itself notes, statutes and regulations must be read together as a whole. The PCHB correctly held that, reading the Deschutes Basin regulations as a whole and looking at the stated purposes behind the Rule and its authorizing statutes, groundwater withdrawals in the Deschutes Basin are not subject to the stream closure provisions of the basin rules unless the withdrawal will “produce any effects which adversely impact the values identified in WAC 173-513-020.” CP 29.

**1. The Plain Language of WAC 173-513-050 Requires a Showing of Harm to the Environmental Values Set Forth in WAC 173-513-020.**

The Deschutes Basin Rule begins with a clear statement of the purpose of the regulation: to retain rivers, streams and lakes in the basin with instream flows and levels “necessary to provide protection for wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality.” WAC 173-513-020.

This statement of purpose mirrors the legislature’s charge to Ecology to protect the quality of the natural environment and retain base

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question at issue. *Id.* at 212. The Tribe’s arguments in favor of giving no deference to the Board or Ecology in this case are without merit. In reality, the Tribe would have this Court decline to accord deference to Ecology simply because it does not agree with the Board’s or Ecology’s interpretation of the Deschutes Basin Rule.

flows in rivers and streams “necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values . . . .” RCW 90.54.020. By statute, Ecology’s establishment of minimum flows or levels for streams, lakes, and other public waters is “. . . for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of such public waters whenever it appears to be in the public interest to establish the same.” RCW 90.22.010.

Following the statement of purpose, the Deschutes Basin Rule sets forth certain minimum instream flows. WAC 173-513-030. Next, the regulation lists streams closed to further consumptive appropriation, including Woodland Creek, based upon Ecology’s determination “that further consumptive appropriations would harmfully impact instream values.” WAC 173-513-040(1). Immediately following those sections, WAC 173-513-050 provides that “[f]uture ground water withdrawal proposals will not be affected by this chapter unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives” of the Basin Rule.

The Tribe points to WAC 173-513-040(1) in isolation, asserting that Ecology’s designation of Woodland Creek as a closed stream on an “all year” basis constitutes a blanket determination that water is not available for either surface or ground water appropriation. Tribe Opening Brief at 14. The Tribe asserts in effect that the stream closure in and of itself is a determination by Ecology that Miller’s groundwater appropriations would, by definition, harmfully impact instream values. *Id.*

The Tribe is incorrect. WAC 173-513-040 cannot logically be read as a blanket determination of groundwater unavailability in the Deschutes River Basin, because the basin rules contain an entirely separate provision, WAC 173-513-050, addressing the applicability of the basin rules to groundwater appropriations:

GROUNDWATER. Future groundwater withdrawal proposals will not be affected by this chapter unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system *contrary to the intent and objectives of this chapter*.

WAC 173-513-050 (emphasis added).

WAC 173-513-050 refers back to the purpose of the rules, set forth in WAC 173-513-020, to protect “wildlife, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality.” Thus, specifically with regard to groundwater, the Deschutes Basin regulations – including all minimum instream flows and stream closures – apply to proposed groundwater appropriations only where the groundwater withdrawals would clearly have an adverse impact on surface water contrary to the purposes articulated in WAC 173-513-020.

**2. The Tribe’s “Any Effect” Standard Would Render WAC 173-513-050 Superfluous.**

Just as with statutes, administrative regulations are to be read together as a whole, so that “no portion of [the regulation] is superfluous, void, or insignificant.” *Hayes v. Yount*, 87 Wn.2d 280, 290, 552 P.2d 1038 (1976); *Conway v. Washington State Dep’t of Social and Health Services*, 131 Wn. App. 406, 417, 120 P.3d 130 (2006). This is

particularly true where – as here – the regulations have been adopted pursuant to express statutory authorization. *Hayes*, 87 Wn.2d at 290. As the Tribe itself notes, administrative rules and regulations must be interpreted as a whole, giving effect to *all* the language and harmonizing *all* provisions to avoid unlikely, strained or absurd results. *See* Tribe Opening Brief at 22, citing *State Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002); *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001).

Although the Tribe claims to be advancing an interpretation of the basin regulations that is consistent with these rules of statutory and regulatory interpretation, it in fact does just the opposite. The Tribe's interpretation of the rules runs afoul of the very caselaw that it cites, because the Tribe ignores the language of WAC 173-513-050 and would render it superfluous. WAC 173-513-050 exempts groundwater from the stream closure rule *unless* there is a showing of adverse impact inconsistent with the stated purpose of the rules set forth in WAC 173-513-020. If – as the Tribe asserts – no showing of such adverse impact is required, then WAC 173-513-050 has neither purpose nor meaning.

The Tribe makes no attempt to harmonize WAC 173-513-050 with its interpretation of the rest of the basin regulations. Instead, the Tribe argues that in requiring a showing of adverse impact contrary to the intent and objectives of the Deschutes Basin Rule it is the *Board* that renders superfluous a section of the basin regulations. Tribe Opening Brief at 23. The Board, however, did not ignore WAC 173-513-040(1). The Board

recognized that, as the section's title provides, WAC 173-513-040 sets forth *surface water* source limitations to further consumptive appropriations. With respect to *groundwater* – the type of appropriation sought by Miller -- the Board appropriately looked to WAC 173-513-050 and the plain language of the rule requiring a showing of adverse impact on environmental values.<sup>9</sup>

C. **The *Postema* Decision Did Not Create a Uniform “Any Effect” Standard Applicable to All Stream Closures.**

The Tribe essentially uses one paragraph from *Postema* – ignoring its context in a discussion of the Snohomish and Green-Duwamish basin regulations – to assert that the standard set forth in WAC 173-513-050 must be ignored and a proposed groundwater appropriation that would have “any effect” whatsoever on a closed stream must be denied. Tribe Opening Brief at 14.

The Tribe argues that the holding in *Postema* that the Snohomish and Green-Duwamish basin stream closures by rule “embody Ecology’s

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<sup>9</sup> The Tribe’s opening brief contains only minimal discussion of WAC 173-513-050, and misquotes the rule in one section of the brief, omitting the final and key words of the section requiring an adverse impact on the surface water system that is “contrary to the intent and objectives of this chapter.” Tribe Opening Brief at 22. The Tribe also mistakenly asserts that the Board conflated the availability inquiry with an analysis of detriment to the public welfare under the four-part test. Tribe Opening Brief at 31. The Board did not “conflate” these two prongs of the four-part test; it simply recognized the purpose of the WRIA 13 stream closures in WAC 173-513-040 and also recognized the prerequisites established under WAC 173-513-050 for applying the basin regulations to groundwater applications. *See, e.g.*, CP 79 (“The Board finds that the proposed additional withdrawals of groundwater 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. This will negatively impact salmon, steelhead, and cutthroat trout and make their survival more difficult. . . Therefore, the Board finds that the proposed withdrawals violate the public interest portion of the four-part test contained in RCW 90.03.290.”)

determination that water is not available” and therefore an application to withdraw groundwater in hydraulic continuity must be denied if it will have “any effect on the flow or level of the surface water” (*Postema*, 142 Wn.2d at 95) should form the basis of a uniform generalized rule applicable to proposed groundwater withdrawals in any WRIA, regardless of the specific provisions contained in individual basin regulations. The Tribe essentially asserts that whenever Ecology closes a stream, it has made a determination that no hydraulically-connected groundwater is available for appropriation, regardless of whether the groundwater appropriation will cause any adverse impact. The Tribe is incorrect. A generalized and uniform interpretation of different regulatory provisions was specifically rejected in *Postema*, and the Court’s discussion equating a stream closure with a determination of unavailability was specific to the Snohomish and Green-Duwamish basin rules at issue in that case – each of which contained an explicit determination of unavailability.

- 1. *Postema* Specifically Rejected the Application of a Uniform and Generalized Interpretation to Basin Regulations That Are Different.**

*Postema* involved consolidated appeals of a number of Ecology decisions to deny applications for groundwater appropriation. *Postema*, 142 Wn.2d at 73. The applications at issue involved the Snohomish (WRIA 7), Green-Duwamish (WRIA 9), and Cedar-Sammamish (WRIA 8) watersheds. Each of these watersheds are subject to basin regulations designating minimum instream flows and stream closures. WAC chs. 173-507; 173-509; 173-508. Ecology had denied the groundwater

appropriation applications on the basis, *inter alia*, that the groundwater sources were in hydraulic continuity with surface water sources that were closed or for which minimum instream flows were not being met.

*Postema*, 142 Wn.2d at 73.

On appeal, the PCHB upheld Ecology's denial of the permit applications. *Id.* at 78. The Board held that whenever hydraulic continuity between a groundwater source and surface water was established, by definition any groundwater withdrawals would impair existing rights and thus permit applications must be denied as a matter of law. *Id.* On appeal the King and Snohomish County superior courts reversed the PCHB, rejecting the Board's application of a uniform rule providing that hydraulic continuity alone constitutes impairment of instream flows or other water rights.<sup>10</sup> *Id.* at 79.

In the Supreme Court appeal, Ecology argued that when evaluating groundwater applications in a basin subject to instream flows or stream closures, it should be allowed to apply a uniform approach to groundwater across the state, regardless of the regulations specific to each basin. *Id.* at 84. Ecology argued that a consistent interpretation of all the basin rules should be followed, and suggested the language in the regulations for the Okanogan River Basin. *Id.* The water right applicant appellants agreed that Ecology should utilize a uniform interpretation of various

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<sup>10</sup> On appeal, Ecology did not cross-appeal the superior courts' holdings that hydraulic continuity alone does not equate to impairment. *Id.* at 79.

groundwater provisions, but disagreed with Ecology's interpretation, arguing that the rules should all be interpreted consistent with language contained in the Puyallup River Basin regulations.<sup>11</sup> *Id.*

The Supreme Court explicitly rejected the notion that there should be one uniform and consistent interpretation of the rules across all basins:

[W]hile there is some appeal to the idea that all of the rules should mean the same thing . . . we . . . decline to search for a uniform meaning to rules that simply are not the same.

*Id.* at 87. The Court rejected the positions advocated by both Ecology and the water rights applicants, and also rejected the PCHB's generalized rule that hydraulic continuity was equivalent to a finding of impairment. *Id.* at 84-87; 93. Instead, the Court upheld the approach of the superior courts, which had "applied the rules specific to the basins in which appropriations were sought, rejecting all parties' arguments of a consistent interpretation across all basins." *Id.* at 86-87. The Court then went on to carefully consider each of the groundwater applications at issue in the case and the relative impact of each on surface waters. *Id.* at 100-124.

Despite the *Postema* court's refusal to adopt a uniform interpretation of groundwater regulations, the Tribe asserts that the court nevertheless did enunciate just such a uniform standard with regard to determining the availability of water for groundwater appropriation in a basin with stream closures. The Tribe relies upon a paragraph in *Postema*

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<sup>11</sup> The groundwater applications at issue in *Postema* did not involve either the Okanogan or Puyallup River basins. As this Court noted, each party simply selected the basin rule language that most closely corresponded to its opinion of what the uniform standard should be. *Id.* at 84.

stating that stream closures, by rule, embody Ecology's determination that water is not available for appropriation, and that a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if the withdrawal will have "any effect" on surface water flow. Tribe Opening Brief at 16-17 (citing *Postema*, 142 Wn.2d at 94-95). The Tribe argues that the Court was announcing a uniform rule applicable to all stream closures, rather than interpreting the specific basin regulations at issue.

However, it is illogical to interpret the *Postema* decision as directing Ecology to employ a uniform approach to stream closures, because the Court specifically *rejected* the idea that all groundwater regulations should be interpreted in the same way. *Postema*, 142 Wn.2d at 84, 86-87.

**2. The *Postema* Holding Equating Stream Closure with Unavailability is Limited to the Basin Regulations Before the Court in that Case.**

In addition, the Court's statement in *Postema* equating a stream closure with unavailability addressed "rules closing certain streams *following a determination that water is unavailable* from the surface water source", citing the Snohomish River basin regulation (WAC chapter 173-507) as an example. *Postema*, 142 Wn.2d at 95 (emphasis added).<sup>12</sup> The

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<sup>12</sup> Ecology's brief in *Postema* cited to the Snohomish River basin regulation as its only support for its position that designation of a stream closure should be equated with unavailability. See *Postema*, 142 Wn.2d 68, Brief of Respondent Department of Ecology, 1999 WL 33958852 at 7-9.

Snohomish River basin regulation contains an explicit finding that water is unavailable:

The department *having determined there are no waters available* for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation for the periods indicated. These closures confirm surface water source limitations previously established administratively under the authority of chapter 90.03 RCW and RCW 75.20.050.

WAC 173-507-030(2) (emphasis added). The stream closures under the Green-Duwamish basin rule, also at issue in *Postema*, are predicated upon a virtually identical determination by Ecology that no water is available for further appropriation.<sup>13</sup>

However, unlike the stream closures at issue in *Postema*, the Deschutes River Basin Rule contains no such determination of unavailability in its stream closure provision:

The department of ecology, having determined that further consumptive appropriations would harmfully impact instream values, closes the following streams and lakes to further consumptive appropriation for the periods indicated.

WAC 173-513-040(1).

*Postema* must be read in the context of the particular basin regulations the Court was interpreting in that case, each of which contained an explicit determination of unavailability. The *Postema* court was not making a general pronouncement that a stream closure is

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<sup>13</sup> The Green-Duwamish basin rule states as follows: “The department, *having determined there are no waters available* for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation for the periods indicated.” WAC 173-509-040(1) (emphasis added).

equivalent to unavailability. Rather, the court was recognizing that where Ecology has specifically justified a stream closure on the basis of a determination of unavailability, the stream closure embodies the agency's determination that water is not available. Where – as in the Deschutes River Basin – Ecology has included no such explicit determination of unavailability in its stream closure regulations, a stream closure in and of itself does not constitute a blanket determination that water is unavailable.

The Tribe makes much of the similarity between the groundwater provision of the Green-Duwamish regulations at issue in *Postema* (WAC 173-509-050) and the Deschutes Basin Rule groundwater provision (WAC 173-513-050 at issue here. Tribe Opening Brief at 19-20. The Tribe correctly notes that the groundwater provisions of both rules require the same showing of an adverse impact upon surface water contrary to the intent and objectives of the respective basin regulations.

However, the Tribe fails to acknowledge that, as explained above, the sections of these two basin regulations designating stream closures are *not* the same. The designation of stream closures in the Green-Duwamish basin is premised upon an explicit determination of unavailability. WAC 173-509-040(1). The corresponding stream closure designation in the Deschutes River Basin rules is not. WAC 173-513-040(1).<sup>14</sup> Once again, it is essential to look at the entirety of Ecology's regulations for each

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<sup>14</sup> Nor is the Deschutes River Basin rule anomalous in this regard; various basin regulations set forth stream closures for various reasons, and not all of them are grounded in a determination of unavailability. For a comparison of several determinations supporting stream closures in different WRIA regulations, *see* Appendix B attached hereto.

specific basin rather than “search[ing] for a uniform meaning to rules that simply are not the same.” *Postema*, 142 Wn.2d at 87.<sup>15</sup>

**D. Ecology is Required by Statute and Regulation to Analyze the Impact of Proposed Groundwater Withdrawals on a Case-by-Case Basis.**

The Tribe asserts that Ecology’s designation of stream closures in the Deschutes Basin Rule constitutes a “categorical determination of harm”, a “rule of general applicability” and a “prophylactic rule” foreclosing an individualized evaluation by Ecology of applications for groundwater appropriation. Tribe Opening Brief at 23-24, 30. The Tribe, however, once again ignores the actual language of the Deschutes basin regulations. It also leaves out key portions of the Ecology narrative guidance document to which it points for support, and cites to inapplicable caselaw interpreting statutes which have no relevance here.

First, as explained above, Ecology’s closure of Woodland Creek in the Deschutes River Basin regulations does not constitute an explicit

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<sup>15</sup> The Tribe suggests that the Board’s interpretation of the Deschutes Basin Rule is “most consistent” with the reasoning of the dissent in *Postema*. Tribe Opening Brief at 17, citing *Postema*, 142 Wn.2d at 132 (Sanders, J., dissenting). The dissenting opinion focused on RCW 90.54.020(3)(a), positing that “a proper construction of the statute requires a proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity be denied only if it is established factually the withdrawal will have an appreciable and material adverse effect on the minimum flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic, other environmental values, or navigation.” *Id.* at 132. The dissent did not discuss the specific groundwater regulation in the Green-Duwamish basin rule, or the relationship between the Green-Duwamish stream closures and the groundwater regulation. *Id.* at 126-32. Neither did the majority opinion. *Id.* at 103-11. However, the majority opinion did cite the PCHB’s unchallenged findings that decreased flows resulting from Black River Quarry’s proposed withdrawal would cause harm to fish rearing and migration in the Green-Duwamish basin. *Id.* at 103-05. These findings would justify denial under WAC 173-509-050.

determination that water is unavailable, and does not constitute a categorical determination of harm *from groundwater withdrawals*, because groundwater is explicitly exempted from the reach of the basin regulations except in the circumstances identified in WAC 173-513-050. WAC 173-513-050 calls for a case-by-case evaluation of each groundwater application to determine whether the appropriation would cause an adverse impact contrary to the purposes set forth in WAC 173-513-020.

Again, the Tribe's position advocating a categorical rule that would not allow Ecology to evaluate the potential adverse impact of each individual groundwater appropriation would read WAC 173-513-050 entirely out of the basin rules, contrary to principles of statutory construction requiring administrative regulations to be read as a whole so that every section has meaning and purpose.

The 1980 narrative guidance document issued by Ecology contemporaneously with the Deschutes Basin Rules does not compel the result urged by the Tribe. The narrative guidance document in fact *supports* the need for an individualized review by Ecology of each proposed groundwater appropriation. The Tribe quotes one sentence from the narrative guidance document, which states that proposed wells found to be in significant hydraulic continuity with surface water sources will be treated in the same manner as a direct diversion from the surface water source. Tribe Opening Brief at 25, citing Ex. 25 at 13.

However, the Tribe ignores the very next sentence in the document, which states: "This determination will be made on a case-by-

case basis.” Ex. 25 at 13. The remainder of the paragraph lends further support to the necessity of making an individualized evaluation of the potential harm resulting from a proposed groundwater appropriation:

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.

*Id.* (emphasis added). In the narrative guidance document, Ecology also describes groundwater as “an important source of water in the Deschutes River Basin,” and includes a map “indicating the generalized availability of ground water” in the basin. Ex. 25 at 11-13. This approach is consistent with the regulatory exemption for groundwater withdrawals unless they would cause harm to fish or other environmental values. *See* WAC 173-513-050.

Thus, when one looks at the entirety of the narrative guidance document, rather than to just the one sentence cited by the Tribe, the agency’s guidance document supports the Board’s interpretation of the Deschutes Basin Rule to require case-by-case review of each groundwater appropriation to evaluate its potential for adverse impacts to the environmental values protected by the basin rule. *See* 173-513-050; Ex. 25.<sup>16</sup>

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<sup>16</sup> The Board’s interpretation is not inconsistent with Ecology’s original decisions to deny Miller’s groundwater permits. *See* Tribe Opening Brief at 26. Those original decisions did not address or even refer to WAC 173-513-050. Although Miller appealed Ecology’s decisions to the PCHB, Ecology’s settlement of the appeal meant that it was never obliged to explain or defend its decisions. In light of the absence of any discussion of WAC 173-513-050 in the original decisions, and in view of the fact that Ecology was never obliged to defend its decisions, those original decisions should not be viewed as a “longstanding interpretation” of WAC

Finally, the case law cited by the Tribe does not advance its argument in favor of a categorical standard rather than individualized review of groundwater applications by Ecology. *See* Tribe Opening Brief at 24. The holding in *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 356-57, 932 P.2d 158 (1997) was based entirely on an analysis of the legislative history specific to the State Environmental Policy Act (SEPA). 131 Wn.2d at 358-363. This Court held that the specific intent of the rules designating certain types of governmental actions as categorically exempt from SEPA was to avoid individual review of such actions. *Id.* The case involves an entirely different statute, and is specific to the legislative history of that statute. The statute and regulations relevant to the case at hand are the Deschutes Basin Regulations and the governing Water Code provisions, which call for Ecology review of water rights applications on a case-by-case basis.

*Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 989 P.2d 102 (1999) is also inapposite. Like

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173-513-050. In contrast, Ecology's amended reports of examination approving Miller's groundwater applications and proposed mitigation do reference WAC 173-513-050 and make explicit findings that pumping during the non-mitigated winter months will not have a clear adverse impact on streamflows. Exs. 14, 15. Nor is the Board's interpretation at odds with the position taken by Ecology in *Postema*. *See* Tribe Opening Brief at 26-27. Ecology's argument in *Postema* was based on the explicit determination of unavailability contained in the Snohomish River Basin stream closure regulation. *Postema*, 142 Wn.2d 68, Brief of Respondent Department of Ecology, 1999 WL 33958852 at 7-9. Ecology argued that "when it has a rule that water from a particular surface water source is not available and that further reductions in that source would be detrimental to the public welfare, it can rely upon its rule and is not required to prove these facts on a case-by-case basis." *Id.* at 12 n.13. Ecology did not assert that it could rely upon its determination in the Snohomish Basin Rule when acting on a groundwater application in a different WRIA. *Id.*

*Dioxin/Organochlorine, Inland Foundry* involves an entirely different statute – in this case, a statute granting a pollution control authority the authority to classify air contaminant sources. *Id.* at 125-26. Unlike the water code statute and basin regulations at issue here, the statute at issue in *Inland Foundry* specifically did not contemplate case-by-case evaluations by the pollution control authority. *Id.* at 126.

E. **The Tribe’s Interpretation of the Basin Regulations is Inconsistent With the Policies Behind the Water Code Because it Would Direct Ecology to Deny a Groundwater Appropriation Even Where the Appropriation Would Cause No Harm to Environmental Values.**

The practical effect of the Tribe’s interpretation of the Deschutes Basin Rule is also contrary to both the mitigation statute – which the Tribe barely mentions -- and the policies behind this state’s water code. The Tribe asserts that if Miller’s proposed groundwater appropriation will result in *any* diminishment in surface water flows in Woodland Creek or its tributaries, it must be denied, regardless of whether that would cause any actual adverse impact on fish or other environmental values.

The mitigation statute directs Ecology to “take into consideration the benefits and costs, including environmental effects” of mitigation measures when analyzing a proposed water appropriation under the statutory four-part test. RCW 90.44.055; RCW 90.03.255.

Ecology and the Board found that streamflow augmentation during the winter months is not necessary to prevent harm to fish or other environmental values from Miller’s groundwater withdrawals. Ecology

determined that groundwater pumping for the two projects during the winter months would not clearly have an adverse impact, because those months correspond to times when peak streamflows occur.

Ecology and the Board accordingly followed the dictates of WAC 173-513-050 and considered the values set forth in the Deschutes Basin regulations in determining that, during the winter months, Miller's groundwater withdrawals would have no adverse impacts on fish, wildlife, recreation, or other environmental values – even though there would be some reduction in flows in Woodland Creek and its tributary, Fox Creek. CP 80. The Board determined that such a decrease in flows would not adversely impact fish habitat, because the evidence showed strong volumes of stream flow during the winter months. *Id.* This finding of fact is unchallenged on appeal.<sup>17</sup>

If the Tribe is correct and Ecology's evaluation of groundwater appropriations in the Deschutes Basin must be entirely divorced from an analysis of the actual impact of a withdrawal upon the environmental values protected by the basin regulations, the end result would be across-the-board denial of permits – or pointless mitigation – even where groundwater withdrawals would cause no harm whatsoever to the environment.

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<sup>17</sup> The Tribe appears to indirectly challenge the Board's finding by pointing to language in the Board's decision noting some evidence of infrequent periods of winter time low flow occurring during times of drought. Tribe Opening Brief at 30 n. 7. However, the Tribe has not assigned error to the Board's finding that any decrease in flow during the winter months would not cause an adverse impact to fish. Moreover, the Board noted that during such drought periods, mitigation water "would make no real difference to the system." CP 80.

Such a result would not only be contrary to the stated purpose of the Deschutes Basin Rule to provide protection for wildlife, fish, and other environmental values. WAC 173-513-020. It would also be directly contrary to Ecology's assurance in the Deschutes Basin Rule that groundwater withdrawals would not be affected by the surface water regulations *unless* the withdrawals would harm wildlife, fish, or other environmental values. WAC 173-513-050.

## V. CONCLUSION

Despite the stated purpose of Ecology's Deschutes River Basin rules and the governing statutes, the Tribe asks this Court to require denial of a groundwater permit application even where the proposed groundwater withdrawal will cause no harm to the environment. The Tribe virtually ignores the groundwater provision in the Deschutes Basin Rule, and advocates a reading of *Postema* that is contrary to the Court's rejection of the notion of a uniform interpretation of different basin regulations. This Court should reject the Tribe's arguments, defer to the Board's interpretation of the Deschutes Basin rule, and uphold both the Board's decision denying the Tribe's motion for summary judgment and the Board's final order reaffirming that decision.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of March, 2008.

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**APPENDIX A**

**Chapter 173-513 WAC  
Instream Resources Protection Program – Deschutes River Basin**

## Chapter 173-513 WAC

### INSTREAM RESOURCES PROTECTION PROGRAM—DESCHUTES RIVER BASIN, WATER RESOURCE INVENTORY AREA (WRIA) 13

**WAC**

- 173-513-010 General provision.
- 173-513-020 Purpose.
- 173-513-030 Establishment of instream flows.
- 173-513-040 Surface water source limitations to further consumptive appropriations.
- 173-513-050 Ground water.
- 173-513-060 Lakes.
- 173-513-070 Exemptions.
- 173-513-080 Future rights.
- 173-513-090 Enforcement.
- 173-513-095 Appeals.
- 173-513-100 Regulation review.

**WAC 173-513-010 General provision.** These rules apply to waters within the Deschutes River basin, WRIA 13, as defined in WAC 173-500-040. This chapter is promulgated pursuant to chapter 90.54 RCW (Water Resources Act of 1971), chapter 90.22 RCW (minimum water flows and levels), and in accordance with chapter 173-500 WAC (water resources management program).

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-010, filed 6/24/80.]

**WAC 173-513-020 Purpose.** The purpose of this chapter is to retain perennial rivers, streams, and lakes in the Deschutes River basin with instream flows and levels necessary to provide protection for wild-life, fish, scenic, aesthetic, environmental values, recreation, navigation, and water quality.

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-020, filed 6/24/80.]

**WAC 173-513-030 Establishment of instream flows.** (1) Stream management units and associated control stations are established as follows:

Stream Management Unit Information

Control Station No. Stream Management Unit Name	Control Station Location, River Mile and Section, Township and Range	Affected Stream Reach
12.0800-00 Deschutes River	3.4 Sec. 35-18N-2W	From the confluence of the Deschutes River with Capitol Lake upstream to the Deschutes Falls at river mile 41.

(2) Instream flows established for the stream management unit described in WAC 173-513-030(1) are as follows:

INSTREAM FLOWS IN THE DESCHUTES RIVER BASIN  
(in Cubic Feet per Second)

Month	Day	USGS Gage 212-0800-00 Deschutes River
Jan.	1	400
	15	400
Feb.	1	400
	15	400
Mar.	1	400
	15	400
Apr.	1	350
	15	(Closed)

Month	Day	USGS Gage 212-0800-00 Deschutes River
May	1	(Closed)
	15	(Closed)
June	1	(Closed)
	15	(Closed)
July	1	(Closed)
	15	(Closed)
Aug.	1	(Closed)
	15	(Closed)
Sept.	1	(Closed)
	15	(Closed)
Oct.	1	(Closed)
	15	(Closed)
Nov.	1	150
	15	200
Dec.	1	300
	15	400

(3) Instream flow hydrograph, as represented in the document entitled "Deschutes River basin instream resource protection program," shall be used for identification of instream flows on those days not specifically identified in WAC 173-513-030(2).

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-030, filed 6/24/80.]

**WAC 173-513-040 Surface water source limitations to further consumptive appropriations.** (1) The department of ecology, having determined that further consumptive appropriations would harmfully impact instream values, closes the following streams and lakes to further consumptive appropriation for the periods indicated.

New Surface Water Closures

Stream or Lake Section, Township and Range of Mouth or Outlet	Tributary to	Period of Closure
Deschutes River below Deschutes Falls (river mile 41)NW1/4SW1/4 Sec. 26, T. 18N.,R. 2W.	Puget Sound (Budd Inlet)	Apr. 15 to Nov. 1
Deschutes River above Deschutes Falls (river mile 41) and all tributaries of Deschutes River E1/2NE1/4 Sec. 10, T. 15N., R. 3E. (Deschutes Falls)		
McLane Creek and all tributaries SW1/4NW1/4 Sec. 33, T. 18N., R. 2W.	Puget Sound (Eld Inlet)	All year
Woodland Creek and all tributaries SW1/4NW1/4 Sec. 19, T. 19N., R. 1W.	Puget Sound (Henderson Inlet)	All year
Long Lake SE1/4NE1/4 Sec. 22, T. 18N., R. 1W.	Woodland Creek	All year
Patterson Lake SE1/4SW1/4 Sec. 35, T. 18N., R. 1W.	Woodland Creek	All year
Hicks Lake NE1/4SW1/4 Sec. 27, T. 18N., R. 1W.	Woodland Creek	All year

(2) The following stream and lake low flows and closures are adopted confirming surface water source limitations previously established administratively under the authority of chapter 90.03 RCW and RCW 75.20.050.

Existing Low Flow Limitations and Closures

Stream Section, Township and Range of Mouth	Tributary to	Action
Percival Creek SW1/4NE1/4 Sec. 22, T. 18N., R. 2W.	Capital Lake	Closure
Unnamed Stream NW1/4NW1/4 Sec. 33, T. 19N., R. 2W.	Puget Sound (Eld Inlet)	Low Flow (1.5 cfs)
Unnamed Stream NW1/4NW1/4 Sec. 25, T. 19N., R. 2W.	Gull Harbor	Low Flow (1.0 cfs)
Woodward Creek SW1/4NW1/4 Sec. 19, T. 19N., R. 1W.	Woodward Bay	Closure

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-040, filed 6/24/80.]

**WAC 173-513-050 Ground water.** Future ground water withdrawal proposals will not be affected by this chapter unless it is verified that such withdrawal would clearly have an adverse impact upon the surface water system contrary to the intent and objectives of this chapter.

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-050, filed 6/24/80.]

**WAC 173-513-060 Lakes.** In future permitting actions relating to withdrawal of lake waters, 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.

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-060, filed 6/24/80.]

**WAC 173-513-070 Exemptions.** (1) Nothing in this chapter shall affect water rights, riparian, appropriative, or otherwise existing on the effective date of this chapter, nor shall it affect existing rights relating to the operation of any navigation, hydroelectric, or water storage reservoir or related facilities.

(2) Domestic use for a single residence and stock watering, except that use related to feedlots, shall be exempt from the provisions of this chapter if no alternative source is available. If the cumulative effects of numerous single domestic diversions would seriously affect the quantity of water available for instream uses, then only domestic in-house use shall be exempt.

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-070, filed 6/24/80.]

**WAC 173-513-080 Future rights.** No rights to divert or store public surface waters of the Deschutes River basin, WRIA 13, shall hereafter be granted which shall conflict with the purpose of this chapter as stated in WAC 173-513-020.

[Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-080, filed 6/24/80.]

**WAC 173-513-090 Enforcement.** In enforcement of this chapter, the department of ecology may impose such sanctions as appropriate under authorities vested in it, including but not limited to the issuance of regulatory orders under RCW 43.27A.190 and civil penalties under RCW 90.03.600.

[Statutory Authority: Chapters 43.21B, 43.27A, 90.22 and 90.54 RCW. 88-13-037 (Order 88-11), § 173-513-090, filed 6/9/88.  
Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-090, filed 6/24/80.]

**WAC 173-513-095 Appeals.** All final written decisions of the department of ecology pertaining to permits, regulatory orders, and related decisions made pursuant to this chapter shall be subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

[Statutory Authority: Chapters 43.21B, 43.27A, 90.22 and 90.54 RCW. 88-13-037 (Order 88-11), § 173-513-095, filed 6/9/88.]

**WAC 173-513-100 Regulation review.** The department of ecology shall initiate a review of the rules established in this chapter whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions.

[Statutory Authority: Chapters 43.21B, 43.27A, 90.22 and 90.54 RCW. 88-13-037 (Order 88-11), § 173-513-100, filed 6/9/88.  
Statutory Authority: Chapters 90.22 and 90.54 RCW. 80-08-019 (Order DE 80-11), § 173-513-100, filed 6/24/80.]

## **APPENDIX B**

### **ECOLOGY STREAM CLOSURE DETERMINATIONS**

**for**

**WRIA 7 (Snohomish)**  
**WRIA 8 (Cedar-Sammamish)**  
**WRIA 9 (Green-Duwamish)**  
**WRIA 10 (Puyallup)**  
**WRIA 11 (Nisqually)**  
**WRIA 12 (Chambers-Clover)**  
**WRIA 13 (Deschutes)**  
**WRIA 14 (Kennedy-Goldsborough)**  
**WRIA 15 (Kitsap)**  
**WRIA 22 and 23 (Chehalis)**  
**WRIA 45 (Wenatchee)**  
**WRIA 48 (Methow)**  
**WRIA 49 (Okanogan)**  
**WRIA 55 (Little Spokane)**

**Snohomish River Basin (WRIA 7):**

**WAC 173-507-030 Surface water source limitations to further consumptive appropriations. . . .** (2) The department, having determined there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation for the periods indicated. These closures confirm surface water source limitations previously established administratively under authority of chapter 90.03 RCW and RCW 75.20.050. . . .

**Cedar-Sammamish Basin (WRIA 8):**

**WAC 173-508-030 Closures and instream flows.** (1) The department of ecology has determined that additional diversions of water from the Lake Washington drainage system would deplete instream flows and lake levels required to support the uses described in WAC 173-508-020. Therefore, lakes and streams contributing to the Lake Washington drainage above the Hiram M. Chittenden Locks, excluding the Cedar River drainage, shall be closed to further consumptive appropriations. Regulation to protect instream flows in the Cedar River and its tributaries shall be undertaken pursuant to WAC 173-508-060. (2) WAC 173-508-040—Table 1, includes specific named and unnamed surface water sources in water resource inventory area 8 with restrictions indicated. All tributaries in the Lake Washington drainage not specifically included in Table 1 are closed.

**Green-Duwamish River Basin (WRIA 9):**

**WAC 173-509-040 Surface water source limitations to further consumptive appropriations.** (1) The department, having determined there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation for the periods indicated. These closures confirm surface water source limitations previously established administratively under authority of chapter 90.03 RCW and RCW 75.20.050. . . .

**Puyallup River Basin (WRIA 10):**

**WAC 173-510-040 Surface water source limitations to further consumptive appropriations. . . .** (3) The department, having determined that further consumptive appropriations would harmfully impact instream values, closes the following streams and lakes in WRIA 10 to further consumptive appropriations. . . .

**Nisqually River Basin (WRIA 11):**

**WAC 173-511-040 Surface water source limitations to further consumptive appropriations.** (1) The department has determined that (a) certain streams exhibit low summer flows or have a potential for going dry thereby inhibiting anadromous fish passage during critical life stages, and (b) historic flow regimes and current uses of certain other streams indicate that no water is available for additional appropriation. Based upon these determinations the following streams and lakes are closed to further appropriation for the periods indicated: . . .

**Chambers-Clover Creeks Basin (WRIA 12):**

**WAC 173-512-030 Surface water closures.** The department of ecology, having determined that further consumptive appropriations would harmfully impact instream values closes the following streams and lakes in Water Resource Inventory Area 12 to further consumptive appropriations: . . .

**Deschutes River Basin (WRIA 13):**

**WAC 173-513-040 Surface water source limitations to further consumptive appropriations.** (1) The department of ecology, having determined that further consumptive appropriations would harmfully impact instream values, closes the following streams and lakes to further consumptive appropriation for the periods indicated. . . .

**Kennedy-Goldsborough (WRIA 14):**

**WAC 173-514-040 Surface water source limitations to further consumptive appropriation.** (1) The department, having determined further consumptive appropriation for all uses would harmfully impact instream values, closes the following streams including tributaries for the period indicated: . . .

**Kitsap (WRIA 15):**

**WAC 173-515-040 Surface water closures.** (1) The department, having determined there are no waters available for further appropriation, closes the following streams to further consumptive appropriation. These closures confirm surface water source limitations previously established administratively under authority of chapter 90.03 RCW and RCW 75.20.050. . . . (2) The department has determined that (a) certain streams exhibit low summer flows and have a potential for drying up or inhibiting anadromous fish passage during critical life stages, and (b) historic flow regimes and current uses of certain other streams indicate that no water is

available for additional appropriation. Based upon these determinations and in accordance with the general intent of RCW 75.20.050, the following streams are closed to further appropriation for the periods indicated: . . . (3) In the Kitsap basin numerous small streams with estimated mean annual flow of 5 cfs or less have been identified as having high instream values for anadromous fish, aesthetics, water quality, and/or recreation. In accordance with the general intent of RCW 75.20.050 the department has determined that the total natural flow of these streams is required for protection and preservation of instream resources, and that no water is available for additional consumptive appropriation. The natural flow, in effect, constitutes the minimum flow for protection of the instream resources. The following streams possess such characteristics and are therefore closed year-round to further consumptive appropriation: . . .

**Chehalis River Basin (WRIA 22 and 23):**

**WAC 173-522-050 Streams closed to further consumptive appropriations.** The department, having determined there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation. An exception is made for domestic and normal stockwatering where there is no alternative source of water supply. . . .

**Wenatchee River Basin (WRIA 45):**

**WAC 173-545-040 Stream closure.** The department has determined that additional diversions of water from Peshastin Creek during the period June 15 to October 15 would deplete instream flows required to protect instream values. Peshastin Creek is, therefore, closed to further consumptive appropriation from June 15 to October 15 each year. During the nonclosed period, minimum instream flows will be controlled and measured from the control station on the Wenatchee River at Monitor.

**Methow River Basin (WRIA 48):**

**WAC 173-548-050 Streams and lakes closed to further consumptive appropriations.** The department, having determined based on existing information that there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the streams and lakes listed in (a) and (b), and ground water hydraulically connected with these surface waters to further consumptive appropriation[.] This includes rights to use water consumptively established through permit procedures and ground water withdrawals otherwise exempted from permit under RCW 90.44.050. Specific

situations in which well construction may be approved are identified. . . .  
(a) stream closures. The following streams are closed all year, including all ground waters hydraulically connected to these streams. . . . (b) lake closures. The following lakes are closed all year, including all ground waters hydraulically connected to these lakes: . . .

**Okanogan River Basin (WRIA 49):**

**WAC 173-549-025 Stream closures.**

- 1) Consistent with the provisions of chapter 90.54 RCW, it is the policy of the department to preserve an appropriate minimum instream flow in all perennial streams and rivers of the Okanogan River Basin for protection of instream values.
- 2) In keeping with this policy, a partial year closure from May 1 to October 1 will be established on all perennial streams in the basin except those with established minimum instream flows as described in WAC 173-549-020.
- 3) The upper Okanogan stream management unit as established in WAC 173-549-020(1) is closed to further consumptive appropriation from June 15 through August 31 with the exception of single-domestic use and stockwatering use, provided that no alternative source of supply is available.
- 4) When a project (as described in WAC 173-549-020(5)) is proposed on a stream that is closed to further appropriations, the department shall deny the water right application unless the project proponent can adequately demonstrate that the project does not conflict with the intent of the closure.

**Little Spokane River Basin (WRIA 55):**

**WAC 173-555-060 Streams and lakes closed to further consumptive appropriations.** The department, having determined there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the following streams to further consumptive appropriation except for domestic and normal stockwatering purposes excluding feedlot operation: . . .