

37811-6-II

NO. 80859-7

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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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**ECOLOGY'S RESPONSE BRIEF**

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RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 APR -7 P 3:44  
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## I. INTRODUCTION

This is an Administrative Procedure Act (“APA”) judicial review of a Pollution Control Hearings Board (“PCHB”) decision made in the context of water right permit decisions. Although the Appellant Squaxin Island Tribe (“Tribe”) prevailed on the merits of its challenge after a full evidentiary hearing, the Tribe nonetheless attempts to obtain appellate review of a legal ruling made by the PCHB. The legal ruling, which was made first in denying the Tribe’s motion for summary judgment and later affirmed in the PCHB’s Modified Findings of Fact, Conclusions of Law and Order (“Final Order”), confirmed as a matter of law that the Department of Ecology (“Ecology”) can grant new ground water rights that would otherwise impact a closed stream if mitigation for the impacts is provided by adding water to the stream.

In so ruling, the PCHB agreed that Ecology could apply a mitigation statute to its rule that closed the stream to further appropriations of water, including ground water in continuity with the stream, to support a determination that with mitigation the permit applicant, Miller Land and Timber LLC (“Miller”), could meet the four-part test for a new ground water withdrawal permit by adding water to an otherwise closed stream. The PCHB, and the Thurston County Superior Court in affirming the

PCHB, properly determined as a matter of law that mitigation could be considered in determining whether the four-part test could be met.

The Tribe argues that this Court's decision in *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000) controls this case. Ecology disagrees on the basis that *Postema* did not address applications for water rights supported by mitigation designed to address projected stream impacts.

Ecology applied the Water Resources Act of 1971 ("WRA") and determined that the environmental quality of the closed stream would best be protected and enhanced if all mitigation is concentrated in the summer months. Contrary to the position of the Tribe, the water resources statutes provide authority and discretion to Ecology to determine how and when mitigation should best be implemented. Ecology's authority to approve seasonal mitigation to support a permit for ground water that would otherwise impact a closed stream should thus be upheld.

This appeal is unusual because notwithstanding the above legal issue, the permit decisions in this case were vacated on other grounds by the PCHB. The PCHB's ruling vacating the permit decisions was affirmed by the Thurston County Superior Court and is not under appeal. As stated in Ecology's pending Motion to Dismiss, the Tribe is now asking this Court for an advisory opinion regarding potential future

decisions involving mitigation requirements for proposed ground water withdrawals when a stream is closed by rule. Ecology urges this Court to grant Ecology's Motion to Dismiss on the basis that the Tribe does not have standing to appeal as an "aggrieved party." If the Court reaches the merits of the legal issue presented in the Tribe's Appellant's Opening Brief, the Court should affirm the PCHB and Superior Court.

## **II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. When an applicant for a new ground water withdrawal proposes mitigation in an amount sufficient to offset its impact on a stream otherwise closed by rule, does the Department of Ecology have the authority under RCW 90.44.055 and 90.54.020(3) and WAC 173-513-050 to approve the mitigated withdrawal?

2. If Ecology concludes that proposed mitigation offsets all impacts to a stream, do the above-referenced statutes and rule authorize Ecology to choose to concentrate the mitigation at a time of year when the stream's environment will receive the maximum benefit?

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

### **A. The Deschutes River Basin Rule**

Ecology adopts the Squaxin Island Tribe's Statement of the Case concerning the Deschutes River Basin Rule. Appellant's Opening Brief at 1-3.

**B. Ecology's Review Of The Ground Water Applications**

First in 2004 and then again in 2005, Ecology considered two applications filed by Miller for ground water permits to serve two new housing developments just outside the City of Lacey's urban growth boundary. In 2004, Miller sought a combined total of 58.2 acre feet per year ("AFY")<sup>1</sup> of ground water for use by the housing developments. At that time, the applications included no proposal for mitigation to offset any impacts to Woodland Creek from the proposed pumping of ground water. Under the Deschutes River Basin Rule, WAC 173-513, Woodland Creek is closed to most new appropriations of surface water, and is also closed to new appropriations of ground water under certain conditions.<sup>2</sup>

On August 10, 2004, Ecology denied Miller's applications because Miller's proposed withdrawals of ground water would deplete the base flow of Woodland Creek and its unnamed tributaries, and thus would "clearly have an adverse impact upon Woodland Creek and its tributaries," which is "not allowed under WAC 173-513-050." CP at 411; 427; 1230. Ecology noted that "even a very small impact on the creeks was sufficient to deny the initial applications." CP at 1246, ¶ 44.

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<sup>1</sup> An acre foot of water is a volume measurement of water. One acre foot of water is the amount of water needed to apply one foot of water evenly on a one acre area. An acre foot equals about 325,000 gallons.

<sup>2</sup> Although the Tribe and the Washington Department of Fish and Wildlife ("WDFW") received notice of Miller's applications, neither entity commented on or objected to the applications.

Miller appealed the denials to the PCHB. Miller and Ecology were the only parties before the PCHB. Miller and Ecology entered into settlement negotiations, and in 2005 reached a settlement where Miller voluntarily withdrew its PCHB appeals and amended the applications to request less water: a reduced combined total of 50.8 AFY, of which 25.6 AFY would be for use by the housing developments and 25.2 AFY would be pumped from the well and discharged into Woodland Creek to provide flow augmentation.<sup>3</sup>

Ecology processed the amended applications. It projected that the impact of the new ground water withdrawals on Woodland Creek would be in the total amount of 1.6 gallons per minute (“gpm”) on a year-round basis, or 0.8 gpm for each of the two housing developments. CP at 414; 430. Ecology and Miller initially negotiated mitigation in a 10-to-1 ratio of actual mitigation to projected impact, to be supplied on a year-round basis to a pond feeding into Woodland Creek, thus adding 16 gpm throughout the year. Ms. Tammy Hall, an Ecology hydrologist, testified that 10-to-1 mitigation was higher than usual. Testimony Tammy Hall, Tr. 5/26/06, at 882-883 ll. 14-4. The 10-to-1 ratio was chosen in order to

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<sup>3</sup> Although the Tribe refers in its Opening Brief at 5 to Miller’s appropriating “another” 25.2 AFY of water for mitigation, Miller applied for no additional water when it agreed to use some water for mitigation. There has never been any question that, within the quantity of water originally applied for, Miller could amend its applications to apply part of the water to mitigation and the rest of the water for use by the proposed housing developments.

account for uncertainty in projecting the impact of Miller's proposed withdrawals on Woodland Creek. CP at 1254, ¶ 65.

On its own initiative, Ecology determined that fish stocks in Woodland Creek would be benefitted more by scheduling the entire mitigation pumping in the summer months, rather than spreading the mitigation pumping evenly throughout the year. Brad Caldwell, an Ecology fish biologist, determined that the fish stocks in the affected creeks would increase by 20 percent from their current populations if Miller's mitigation pumping were concentrated in the summer, but would increase by only 10 percent if the mitigation were spread evenly throughout the year. CP at 1262, ¶ 83; 1263, ¶ 85; Testimony Brad Caldwell, Tr. 5/23/06, at 51, 55-56. The ultimate settlement negotiated by Ecology and Miller thus resulted in amended applications with mitigation pumping of 32 gpm in the summer months, June through November, and none in the winter months. Ecology concluded that this seasonal mitigation would result in "zero impact to surface water." CP at 1236, ¶ 21.

On September 15, 2005, Ecology issued Reports of Examination ("permit decisions") approving water permits for Miller's proposed housing developments, with conditions requiring seasonal mitigation

through pumping ground water and discharging it into Woodland Creek to augment stream flows.<sup>4</sup>

### **C. Pollution Control Hearings Board Proceedings**

The Tribe appealed the permit approvals to the PCHB. On February 10, 2006, the Tribe brought a Motion for Summary Judgment on several issues, including “issue number 8” from the pre-hearing order: “Whether Ecology has the authority under chapter 90.03 RCW or chapter 90.44 RCW to grant a permit for ground water consumption based on a mitigation proposal where it would otherwise be denied because of its adverse impact on surface water?” CP at 281-283. The Tribe argued that the seasonal mitigation required in Ecology’s permit decisions was contrary to WAC 173-513-050. Specifically, the Tribe argued that under

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<sup>4</sup> Both WDFW and the Tribe commented on Ecology’s proposed decisions. However, contrary to the Tribe’s implication in its Opening Brief at 6-7, WDFW did not seek year-round stream augmentation except in the context of establishing and meeting minimum instream flows. CP 1233-1234, ¶¶ 13-15. Ecology considered WDFW’s comments, but concluded that no minimum instream flow needed to be set, because with mitigation pumping at a ratio of 20-to-1 in the summer, there would be no impact on the resource. Caldwell, Tr. 5/23/06, at 78. The PCHB concluded that Ecology need not set an instream flow before deciding whether to approve the applications at issue. CP at 1279, ¶122. The Tribe did not appeal that conclusion.

Ecology did incorporate some of WDFW’s suggestions for permit conditions into the Reports of Examination approving the permits. CP at 1234-1235, ¶ 17.

*Postema*, no new withdrawals can be approved from a closed stream if there is any impact on the stream.<sup>5</sup>

The PCHB denied the Tribe's motion. Applying the standards of summary judgment, the PCHB examined the record and assumed that Ecology could prove that the required seasonal mitigation, if spread year-round, would be sufficient to compensate for any withdrawals from the stream. CP at 414, 416-417; 430, 432-433. Based on this assumption, the PCHB ruled, as a matter of law, that Ecology's Deschutes River Basin Rule did not prohibit withdrawals of ground water that would impact the closed stream unless there was proof of a clearly adverse impact on the stream. CP at 928-929, ¶ 29.

In May 2006, the PCHB conducted a five-day evidentiary hearing. Ecology presented the testimony of Mr. Caldwell and Ms. Hall, summarized above. Following the hearing, the Tribe requested that the PCHB reconsider its pretrial ruling that WAC 173-513-050 requires proof

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<sup>5</sup> The Deschutes River Basin rule includes WAC 173-513-050, which states as to ground water appropriations:

Future ground water withdrawals 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.

The purpose of the chapter is stated in WAC 173-513-020:

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.

of an adverse effect on the environmental values cited in WAC 173-513-020. CP at 675-677. Ecology argued that mitigation at greater rates in the summer would be more beneficial than mitigation year-round. CP at 787-788. In its Final Order, the PCHB refused to amend its earlier ruling. CP at 1269, ¶ 100.

The PCHB's Final Order, however, ruled for the Tribe on other grounds. The Board determined that the Tribe had prevailed in showing, as a factual matter, that the applications could not meet two of the four criteria for new permits under RCW 90.03.290 because water was not available for appropriation and the withdrawals would be contrary to the public interest.<sup>6</sup> CP at 1271-1272, ¶ 106; 1274, ¶ 112. On this basis, the PCHB vacated Ecology's permit decisions. Despite rejecting the permit decisions, the PCHB noted with favor Mr. Caldwell's testimony that seasonal mitigation would provide more benefit to fish than year-round mitigation. CP at 1263, ¶ 86. The PCHB also found that the Tribe failed to prove adverse effects on the stream during the winter months when there would be no mitigation pumping. CP at 1275, ¶ 113; 1283.

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<sup>6</sup> Miller and Ecology had relied on the Thurston County United States Geological Survey ("USGS") regional hydrologic model in determining that the impact to the stream from new ground water withdrawals would be insignificant, only 1.6 gpm. The PCHB determined the Tribe's site specific model better predicted the impact to the stream, and that about 60 percent of the ground water pumped would be taken from the stream. Thus, the PCHB determined that water was not available for Miller's proposed withdrawals. CP at 1241-1242, ¶ 34; 1271-1272, ¶¶ 104, 106.

On reconsideration, the PCHB clarified that its determination that water was not available was based only on the hydrologic modeling evidence presented at the hearing. The PCHB determined that Ecology could consider granting a preliminary permit to Miller to test the aquifer to determine whether water was available, based on actual pumping data.<sup>7</sup> CP at 1221-1222; 1223, ¶ 124. If Miller resubmits its applications based on this type of newly-developed information, any subsequent decisions by Ecology would be subject to appeal.

**D. Judicial Review**

Both Miller and the Tribe filed petitions for judicial review in Thurston County Superior Court. The Tribe asked the court to affirm the part of the Final Order vacating Ecology's decisions, but to reverse the part of the Final Order denying the Tribe's Motion for Summary Judgment. CP 12-13. The court affirmed the PCHB's decisions and dismissed both petitions for review. CP 100-102. Miller did not appeal the court's decision. As a result, the permit decisions at issue in this case are now vacated.

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<sup>7</sup> Ecology may grant a preliminary permit under RCW 90.03.290(2)(a) and RCW 90.44.060 if an application for a water right does not contain sufficient information for Ecology to make necessary findings. A preliminary permit requires the applicant to obtain the needed information through studies, investigations, and surveys. A preliminary permit does not allow for the beneficial use of water. RCW 90.03.290(2)(a); RCW 90.44.060; *see also PUD No. 1 of Clark Cy. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 151 P.3d 1067 (2007).

On November 6, 2007, the Tribe filed a timely Notice of Appeal seeking direct review. On January 17, 2008, Ecology filed a Motion to Dismiss the Tribe's appeal on the ground that the Tribe lacks standing to appeal. Ecology argues the Tribe is not aggrieved because the PCHB vacated the water permit decisions at issue, a result which is now final. Ecology's Motion to Dismiss remains pending.

#### IV. SUMMARY OF ARGUMENT

*Postema* does not control the result in this case. *Postema* was decided in the context of proposals for *unmitigated* ground water withdrawals that would have caused impacts on closed streams. Because *Postema* considered neither water permit applications involving mitigation, nor the mitigation statute enacted subsequent to Ecology's decisions that were at issue in that case, *Postema* provides only the starting point for analysis in this case, not the starting and ending points as the Tribe argues.

RCW 90.44.055 grants Ecology the authority to consider and accept mitigation for an appropriation when evaluating an application for a water permit. Ecology applied this mitigation statute to its interpretation of its rule closing Woodland Creek and determined that the proposed mitigation would fully offset any adverse impacts to the stream. After reaching that conclusion, Ecology exercised its discretion to concentrate

the timing of the mitigation to maximize the benefits to the environment by maximizing the potential increase in the fish population.

Ecology's authority to concentrate mitigation during part of the year to maximize environmental benefits is based on both RCW 90.54.020(3), which states that "[t]he quality of the natural environment shall be protected *and, where possible, enhanced . . .*"<sup>8</sup> (emphasis added), and Ecology's inherent authority to fashion permit conditions.

The stream closure rule at issue does not demand a different conclusion. WAC 173-513-050 contemplates that ground water withdrawals will be denied if they would cause an adverse impact on the environmental values that are to be protected pursuant to WAC 173-513-020. If proposed mitigation will avoid such impacts, and concentrating that mitigation at a specific time of the year will enhance the environmental values protected by the rule, Ecology's decisions carry out the provisions of the rule.

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<sup>8</sup> RCW 90.54.020(3) provides:

The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

## V. STANDARD OF REVIEW

This request for judicial review under the APA concerns a question of law: namely, how one of Ecology's rules should be interpreted in the statutory context in which it operates. A court reviews questions of law de novo. RCW 34.05.570(3)(d); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). The Court should give substantial weight to an agency's view of the law, however, if it falls within the agency's expertise. *Schuh v. Dep't of Ecology*, 100 Wn.2d 180, 184, 667 P.2d 64 (1983); *Silverstreak, Inc. v. Dep't. of Labor & Indus.*, 159 Wn.2d 868, 884-885, 154 P.3d 891 (2007).

Although the Court is reviewing a legal question in this case, the facts in which the legal issue arose necessarily inform the legal question. Given the nature of the PCHB's summary judgment and denial of the Tribe's request for reconsideration rulings, this Court should review the facts in the light most favorable to Ecology and Miller, the nonmoving parties. *York v. Wahkiakum Sch. Dist. No. 200*, No. 78946-1, 2008 WL 660091, at \*2 (Wash. Mar. 13, 2008). Thus, the Court should assume the validity of Ecology's conclusions: (1) that any impacts to the stream from ground water withdrawal would be offset fully by the proposed mitigation and (2) that concentrating mitigation during part of the year would lead to "zero effect" on the stream and maximize environmental benefits.

As held by this Court in *Port of Seattle*, Ecology is entitled to deference in its interpretation of both water resources statutes and Ecology's implementing regulations. In *Port of Seattle*, the Court addressed the issue of deference regarding Ecology's interpretation of its own rules:

Finally, deference to an agency's interpretation of its own regulations is also appropriate. Because Ecology is the agency designated by the legislature to regulate the State's water resources, RCW 43.21A.020, this court has held that it is Ecology's interpretation of relevant statutes and regulations that is entitled to great weight.

*Port of Seattle*, 151 Wn.2d at 593 (citations omitted).

Accordingly, Ecology's interpretation of its Deschutes River Basin Rule, in the context of a water permit mitigation proposal, is entitled to great weight.

## VI. ARGUMENT

### A. ***Postema* Did Not Address How Mitigation Proposals Are Considered In The Context Of Ground Water Withdrawals That Would Otherwise Impact A Closed Stream**

The Tribe relies heavily on *Postema*. Ecology agrees that *Postema* was correctly decided and that *Postema* is an important part of determining whether Ecology may approve new applications for ground water withdrawals in basins with closed streams. Under *Postema*, if an *unmitigated* withdrawal of ground water will have any effect on flows in a

closed stream, the withdrawal must be denied. *Postema*, 142 Wn.2d at 95. However, *Postema* did not address the factual context in this case: whether withdrawals that would otherwise affect a closed stream may be approved when adequate offsetting mitigation is provided. Furthermore, *Postema* did not address the legal issue of whether Ecology has the authority and discretion to tailor mitigation to best promote the values protected by the water resources statutes and their implementing regulations. The Tribe's reliance on *Postema* is thus misplaced.

**B. The Mitigation Statute, Read Together With Other Applicable Authorities, Supports A Conclusion That Adequate Mitigation May Allow A Finding Of Water Availability For A Proposed Ground Water Withdrawal That Would Otherwise Impact A Closed Stream**

Although it is not clear from its brief, the Tribe appears to suggest that Ecology may never allow mitigated withdrawals on a case-by-case basis in a closed basin, even in a scenario where mitigation would assure that there would be no effect on stream flows. Contrary to this suggestion, Ecology not only has the authority to allow mitigated withdrawals, but it has an obligation to do so if an applicant proposes adequate mitigation.

The Legislature provided Ecology both the authority and obligation to consider mitigation proposals associated with water permit applications and to approve applications where the proposed mitigation

would offset findings of impairment and non-availability of water.<sup>9</sup>

RCW 90.44.055 states in 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.

The Tribe may not like the “case-by-case” nature of analysis under this statute, but this is precisely what the statute mandates. By expressly requiring Ecology to evaluate mitigation proposals “as a means of making water available or otherwise offsetting the impact” of the withdrawal proposed in *an application*, the Legislature could only have intended Ecology to do so on a case-specific basis.<sup>10</sup>

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<sup>9</sup> When Ecology applies the four part test in review of applications for water permits, Ecology must deny an application if water is not available for appropriation. RCW 90.03.290(3); RCW 90.44.060. The statutory four-part test requires that Ecology evaluate water right applications to determine whether: 1) the water will be applied to a beneficial use; 2) the 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.

<sup>10</sup> The cases cited by the Tribe are inapplicable to the case-by-case nature of mitigation review contemplated by RCW 90.44.050. The Tribe cites to

After the applications at issue in *Postema* were processed, this statute was amended in 1997 to allow mitigation techniques such as augmentation pumping.<sup>11</sup> Therefore, Miller could propose to meet the water availability test of RCW 90.03.290(3) by proposing stream augmentation mitigation measures to offset the potential impacts to Woodland Creek.

The Tribe never discusses RCW 90.44.055 in its Opening Brief. Its narrow view of the analytical framework for determining whether ground water is available in a basin with a closed stream begins and ends with *Postema*, which did not involve mitigation proposals. Because *Postema* did not address mitigation, however, it does not offer any guidance regarding how mitigation proposals should be considered in the context of a closed stream.

The Tribe also offers no argument for why mitigation cannot be considered to support a finding of ground water availability if mitigation can offset projected impacts to a closed stream, resulting in “zero effect” on the stream. In light of the express authority of RCW 90.44.055, this Court should hold as a matter of law that a water permit applicant may

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*Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 356-357, 932 P.2d 158 (1997) and *Inland Foundry Co. v. Spokane Cy. Air Pollution Control Auth.*, 98 Wn. App. 121, 126, 989 P.2d 102 (1999). Appellant’s Opening Brief at 24.

<sup>11</sup> Laws of 1997, Ch. 360.

meet the “availability” test under RCW 90.03.290 by demonstrating that mitigation satisfactorily addresses projected impacts to a closed stream.

**C. WAC 173-513-050 Does Not Preclude Mitigation In A Basin With Closed Streams**

WAC 173-513-050 states the conditions under which new ground water may be withdrawn in the Deschutes River Basin. Nothing in the rule prevents Ecology from approving an application that relies on mitigation to offset the effect of its proposed withdrawal on a closed stream.

The stream closure provisions of WAC 173-513-050 operate to preclude a new ground water withdrawal only if the withdrawal will have an adverse effect on the surface water system in a way which is contrary to the environmental protection objectives of the Deschutes River Basin Rule. Ecology agrees that pursuant to *Postema*, this means a proposal for an unmitigated withdrawal that would affect the stream must be denied. This was the basis for Ecology’s denial of Miller’s original application in 2004.

However, nothing in the rule prevents Ecology from evaluating mitigation proposals, as it must under RCW 90.44.055, to determine whether mitigation will make water available by offsetting impacts which would otherwise occur. Moreover, not only does the rule not prevent

consideration of mitigation, an interpretation suggesting that it does would be entitled to no deference because it would render RCW 90.44.055 without effect. *Cf. Dep't Labor & Indus. v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007) (an agency's interpretation of a rule is not entitled to deference if it conflicts with a statute).

The Tribe argues that Ecology's rule must be interpreted in light of *Postema*. As shown above, neither *Postema* nor the Tribe's argument provides guidance about how Ecology is to consider proposed mitigation in the context of a proposed ground water withdrawal that would otherwise impact a closed stream. As a matter of law, then, this Court should hold that Ecology's basin rules, including WAC 173-513, do not negate the operation of RCW 90.44.055. The statute allows an applicant to show that proposed mitigation will offset any impacts of a new withdrawal from a closed stream. If an applicant makes such a showing, as a matter of law, the four part test is met and the permit must issue.

However, Ecology agrees with the Tribe that the slight difference in language between the Green-Duwamish stream closure rule<sup>12</sup> at issue in *Postema* and the Deschutes River Basin Rule<sup>13</sup> 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. Ecology erred in arguing before the

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<sup>12</sup> WAC 173-509-050.

<sup>13</sup> WAC 173-513-050.

PCHB that the rules construed in *Postema* did not include any with language similar to the Deschutes River Basin Rule.

**D. Ecology Has Authority To Schedule Mitigation On A Seasonal Basis For A Stream Closed Year-Round**

The Tribe also appears to argue that the Board's legal ruling is erroneous because Ecology approved a mitigation plan where the mitigation flows were concentrated over the summer months, rather than scheduled year-round. As a matter of law, Ecology has the authority to schedule offsetting mitigation in a manner that better enhances a stream's environment.

**1. Water Resources Statutes And The Deschutes River Basin Rule**

The WRA requires Ecology to protect surface water flows in order to preserve the natural environment. Specifically, RCW 90.54.020(3) provides that:

The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values...

Ecology's authority to promulgate rules closing streams to further appropriation directly relates to protecting these environmental values. *See Postema*, 142 Wn.2d at 95. Stream closures embody Ecology's

determination that water in the streams is not available for further appropriation without impacting the values protected under the WRA. *Id.*

Without mitigation, any reduction of the quantity of water in a closed stream is a presumptive degradation of the environmental values protected under the WRA. However, maintaining base flows in a closed stream is not an end in itself, but rather the means by which “preservation of wildlife, fish, scenic, aesthetic and other environmental values” is attained. RCW 90.54.020(3). Indeed, the purpose of the Deschutes River Basin Rule at issue in this case is to:

[R]etain 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 (emphasis added). In the ground water section of this rule, ground water withdrawals are denied if “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.

Once mitigation sufficient to offset a reduction in base flows has been offered, it is legally appropriate for Ecology to consider the directive of RCW 90.54.020(3) that “[t]he quality of the natural environment shall be protected *and, where possible, enhanced . . .*” (Emphasis added.)

This means considering how flow mitigation can best be scheduled to protect and, if possible, enhance environmental values.

This is consistent with the manner in which this Court has interpreted Ecology's water appropriation authority. This Court in *Postema* did not look at the four-part test of RCW 90.03.290 in isolation, but reviewed it in the context of the environmental protection provisions of RCW 90.54.020. *Postema*, 142 Wn.2d at 94-95. This Court has also required Ecology to consider the environmental protection provisions of the WRA in applying the four part test of RCW 90.03.290. *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 119, 508 P.2d 166 (1973). See CP at 1272-1273, ¶¶ 108-109. In the context of flow mitigation, the duty to "protect and, where possible, enhance" the natural environment means that considering how such mitigation can best be scheduled furthers the environmental values Ecology must protect.

## **2. Ecology's Discretion**

Furthermore, this Court has long held that Ecology may exercise discretion in deciding whether, and how, to approve an application for a permit to appropriate water:

The DOE's decision is an exercise of discretion. *Peterson v. Department of Ecology*, 92 Wash.2d 306, 314, 596 P.2d 285 (1979). We will not set aside a discretionary decision absent a clear showing of abuse. *Schuh v. Department of Ecology*, 100 Wash.2d 180, 667 P.2d 64 (1983). Review of

administrative decisions is based on the record of the administrative tribunal, and its factual determinations will be affirmed unless clearly erroneous. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wash.2d 317, 325, 646 P.2d 113 (1982).

*Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 112-113, 685 P.2d 1068 (1984). Ecology may require conditions in water permits as part of that exercise of discretion. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 597, 957 P.2d 1241 (1998) (the power to grant or deny an application includes the inherent power to *condition* a decision about such application); *see also State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 899-900, 602 P.2d 1172 (1979). This discretion exists in tandem with the authority to consider mitigation under RCW 90.44.055 and the direction to protect and, where possible, enhance environmental quality under RCW 90.54.020(3).

In this statutory context, it was not legal error for Ecology to concentrate offsetting mitigation seasonally when it can enhance the stream system, rather than spreading it evenly across all 365 days of the year, under a rule allowing ground water withdrawals unless "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.

### 3. Protecting Flows Or Enhancing The Environment

The Tribe erroneously suggests that language in *Postema* and in WAC 173-513-040(1) and 173-513-050 supports the conclusion that mitigation for new ground water withdrawals must always be scheduled year-round for streams that are closed year-round, even though no mitigation proposal was at issue in *Postema*, and even though in this case the PCHB specifically found no adverse impact to Woodland Creek from a lack of winter mitigation.<sup>14</sup> Appellant's Opening Brief at 1. This Court should reject the Tribe's interpretation. It would turn WAC 173-513-050 on its head to determine that mitigation must be required year-round even when the values protected by the rule would be better protected, and even enhanced, by concentrating mitigation on a seasonal basis.

In essence, the Tribe argues that the purpose of the stream closure rule at issue is to protect the quantity of the *flow*, rather than to protect the environmental values of the stream. Thus, the Tribe argues that any seasonal reduction in the quantity of the flow is prohibited by the stream

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<sup>14</sup> While the PCHB vacated Ecology's permit decisions on other grounds, the PCHB found both that adding mitigation water in the summer months was more critical than adding it in the winter months, and that there would be no adverse impacts to the stream without mitigation in the winter months. CP at 1263, ¶ 86; 1275, ¶ 113. The Tribe has not appealed these findings (CP at 3-4, ¶ 1) and they are verities on appeal. *Postema*, 142 Wn.2d at 100.

The PCHB entered its finding of no adverse impacts to fish during the winter as a Conclusion of Law. However, the PCHB also entered a Finding of Fact that "[a]ny Conclusion of Law deemed a Finding of Fact is hereby adopted as such." CP at 1265, ¶ 91.

closure rule, even if the amount of reduction in one season is fully offset by mitigation scheduled in a different season to better enhance the overall quality of the stream.

The Tribe's interpretation is not supported by the language of WAC 173-513-050. Nothing in the language of WAC 173-513-050 suggests that it requires Ecology to protect a flow quantity in all seasons instead of protecting environmental values pursuant to the purpose of the rule. WAC 173-513-020. Neither does WAC 173-513-040(1), closing Woodland Creek and its tributaries year-round, require year-round mitigation for proposed withdrawals.

Ecology's interpretation of WAC 173-513-050 does not ignore the provisions of WAC 173-513-040(1), but instead gives full effect to the requirement in WAC 173-513-050 that the values cited in WAC 173-513-020 must be protected. As explained above, the stream closure rule was adopted pursuant to the WRA to protect and enhance the environmental values of the stream, not the quantity of flow *per se*.<sup>15</sup> A rule should be interpreted to give effect to its underlying purpose and intent. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). Mitigation for year-round withdrawals may be accomplished by

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<sup>15</sup> RCW 90.54.020(3)(a) is part of the WRA.

concentrating flow augmentation on a seasonal basis if such an approach will best enhance fish production and other environmental values.

The Tribe concedes that the point of stream closures and other regulations to protect base flows is to protect environmental values as cited in the WRA. Appellant's Opening Brief at 14. However, the Tribe then misses this point completely in seeking a ruling of law that seasonal mitigation can never be allowed when a stream is closed year-round, even when such mitigation best enhances these fish production and other environmental values.

The Tribe attempts to strengthen its legal argument by asserting that it is "uncontested" that no mitigation is provided for withdrawals from December through May. Appellant's Opening Brief at 32. No mitigation proposal is before this Court for review, as Ecology's permit decisions were vacated. However, the Tribe's assertion is not "uncontested."<sup>16</sup> In Ecology's view, mitigation for year-round withdrawals may be concentrated on a seasonal basis if that is what will maximize fish production and other environmental values.

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<sup>16</sup> The facts are clear that Ecology approved an amount of stream augmentation which was intended to be ten times the effect on the stream on a year-round basis. CP at 1232, ¶ 11; 1235-1236, ¶¶ 18, 20; 1277, ¶ 119. That year-round amount of stream augmentation was then scheduled during six months of the year. However, both Ecology and the PCHB at times characterized the winter months as "non-mitigated months." CP at 1236-1237, ¶21. That inaccurate characterization should not disguise what actually happened in this case, when mitigation was exacted for every month of the year but scheduled to occur in months when it would do the most good.

#### **4. Summary**

In summary, the factual context that gave rise to the legal issue presented to the PCHB, first on summary judgment and later in a post-hearing motion for reconsideration, will necessarily inform this Court's understanding of the legal issue. However, no mitigation proposal is on review to this Court because the permit decisions have been vacated. Thus, in considering each of the Tribe's arguments about the effect of seasonal flow augmentation, this Court must assume that the seasonal mitigation would provide more benefit to the environmental values of the stream than year-round mitigation.

The governing statutes authorize Ecology to concentrate mitigation in order to maximize the benefit to the environmental values of the stream. None of the applicable regulations restrict or in any way limit Ecology's discretion to do so. The PCHB's legal ruling should be affirmed.

#### **E. None Of The Tribe's Other Arguments Justify Reversing The PCHB's Ruling**

Because this Court reviews legal questions *de novo*, the Court may consider arguments other than the ones the PCHB found most persuasive. *Port of Seattle*, 151 Wn.2d at 593. Ecology urges this Court to uphold Ecology's interpretation of its rule on the bases argued herein, and not necessarily on the bases found by the PCHB.

Contrary to the Tribe's concerns, a legal ruling that mitigation for year-round withdrawals may be scheduled seasonally will not allow "de minimis" impacts to a closed stream, such that cumulative impacts would be possible. Appellant's Opening Brief at 29-30. Here the mitigation before the PCHB would be at a 10-to-1 ratio if it were year-round.<sup>17</sup> Thus, Ecology does not seek an interpretation of its rule that "makes it more difficult to enforce stream closures in the Deschutes watershed . . . ." Appellant's Opening Brief at 9. Ecology seeks only the flexibility to shape mitigation so that the quality of the natural environment of a stream is enhanced to the maximum extent possible.

Because *Postema* did not consider the effect of mitigation to offset withdrawals from a closed stream, Ecology is not barred by either judicial or collateral estoppel from taking a position different from the position Ecology or this Court took in *Postema*. See Appellant's Opening Brief at 27 n.6. Judicial estoppel applies only if a party takes a position that is

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<sup>17</sup> This appeal is based on a legal interpretation of Ecology's rule. The PCHB entered its Order on Motions without making any findings of fact. The PCHB later determined as a factual matter, after the hearing, that Ecology's estimate of the impact to the stream was too low, so that the mitigation required would not, in fact, be at a ratio of 10-to-1. CP at 1254, ¶ 65. The PCHB noted: "Although the Board disagrees with Ecology regarding the adequacy of mitigation in this case, it is clear that Ecology intended to provide mitigation that enhanced the stream flow." CP at 1277, ¶ 119. However, the PCHB found that mitigation in the summer was more critical than mitigation in the winter months. CP at 1263, ¶ 86. The PCHB also found that the Tribe had proved no adverse impacts to the stream due to lack of mitigation pumping in the winter. CP at 1275, ¶ 113. Those findings were part of the record before the PCHB when it declined to grant the Tribe's request for reconsideration of its Order on Motions. The PCHB was required to view the facts in the light most favorable to Ecology when it made these legal rulings.

clearly inconsistent with its earlier position. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-539, 160 P.3d 13 (2007). Collateral estoppel applies only if the issue is identical. *In Re Det. of Stout*, 159 Wn.2d 357, 378, 150 P.3d 86 (2007). Both the facts and the issue are different in this action than they were in *Postema*.

The PCHB did not mistakenly conflate the water availability test with the public interest test in RCW 90.03.290(3).<sup>18</sup> The Deschutes River Basin Rule, adopted in response to the WRA, closes Woodland Creek in order to protect the environmental values of the stream. A stream closure is a determination that water is no longer available for appropriation. *Postema*, 142 Wn.2d at 95. In determining whether mitigation makes water available pursuant to RCW 90.44.055, it is necessary to look at whether the environmental values will continue to be protected. Thus, while protection of environmental values is, generally, considered under the public interest test, a stream closure to protect environmental values also requires Ecology to consider those values under the water availability test. Further, the PCHB made a conclusion that fish production and tribal fishing opportunities would be considered under the public interest test.

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<sup>18</sup> Because the PCHB found that Ecology had underestimated the actual impact on the stream from Miller's withdrawals, the PCHB concluded that Miller's proposed withdrawals would reduce stream flow in the summer and adversely impact fish production, thus violating the public interest test. CP at 1274, ¶ 112.

CP at 1274, ¶ 112. Thus, there was separation of the availability test from the public interest to the extent allowed by the issues in this case.

## VII. CONCLUSION

Consistent with its earlier-filed Motion to Dismiss, Ecology requests this Court to dismiss the Tribe's appeal on the basis that the Tribe is not an aggrieved party. In the alternative, Ecology requests this Court to affirm the rulings of the Superior Court and the PCHB.

RESPECTFULLY SUBMITTED this 7th day of April, 2008.

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