

COURT OF APPEALS
DIVISION II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SWINOMISH INDIAN TRIBAL COMMUNITY, a Federally Recognized
Indian Tribe,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

**DEPARTMENT OF ECOLOGY'S RESPONSE TO APPELLANT'S
OPENING BRIEF**

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I. INTRODUCTION

This case involves a challenge to water management rules that were crafted and adopted by the Respondent, the Department of Ecology (Ecology), to strike a balance between environmental protection and community and economic development by allowing some limited new water uses in parts of the Skagit River Basin. The Appellant, the Swinomish Indian Tribal Community (Tribe), is but one of numerous stakeholders in the Skagit River Basin, and alleges that Ecology violated the law in allowing limited new uses of water for domestic, commercial, industrial, and agricultural purposes. However, the comprehensive administrative record in this case demonstrates that Ecology fully complied with applicable laws in establishing rules for prudent and balanced management of a vital resource that is important to all the citizens in the Skagit River Basin.

Ecology's decision to allow limited new uses of water in the basin through adoption of the Skagit River Basin Instream Flow Rule Amendment (Amended Rule) is well-grounded in statute and a proper exercise of its discretion. Ecology applied a statutory exception to the general rule preventing new uses of water in areas like the Skagit River Basin. Through that statutory exception, the Legislature authorized Ecology to allow new uses of water which could diminish river and stream flows when such impacts are justified by "overriding considerations of the public interest." RCW 90.54.020(3)(a).

At the core of this case is the interpretation of this statute. The Court is being asked to consider the range of Ecology's discretion under RCW 90.54.020(3)(a) to craft water management policy that balances environmental protection and conservation of fish populations with the need to provide water for residential, commercial, and agricultural development, in the Skagit River Basin, and throughout the state.

The Tribe objects to the Amended Rule because Ecology applied the "overriding considerations of the public interest" exception to create limited reservations (allocations) of water allowing a total of 25 cubic feet per second (cfs) of withdrawals of water for new uses in the Skagit River Basin, where the River's average flow is 16,560 cfs. RA002992-2996, RA000431. Ecology's application of "overriding considerations of the public interest" to allow the relatively very small reservations of water in the Amended Rule is amply justified by (1) the significant benefit to the public in providing small amounts of needed water supply for homes, businesses, industries, agriculture, and stock watering, and (2) determinations by Ecology and Washington Department of Fish and Wildlife biologists that uses of these small amounts will not adversely affect the health or sustainability of fish populations.

In essence, the Tribe is requesting this Court to hold that the "overriding considerations of the public interest" provision is so limited in the context of water management rule-making that it could virtually never be applied. The Court should reject this request. In applying the

“overriding considerations of the public interest” provision, Ecology plainly did not exceed its statutory authority.

The Tribe also mistakenly contends that it was arbitrary and capricious for Ecology to include certain provisions in the Amended Rule to account for water uses from the reservations to ensure that the reserved quantities are not exceeded. To the contrary, there is ample factual support in the agency record for Ecology’s selection of 350 gallons per day (gpd) as a standard debit figure for permit-exempt water use by single residences. It also was not arbitrary and capricious for Ecology to decide to rely on that figure for water accounting purposes, instead of requiring homeowners to go to the expense and trouble of installing meters and reporting their water use data based on metering records to Ecology.

Accordingly, the Thurston County Superior Court’s decision in favor of Ecology to uphold the validity of the Amended Rule should be affirmed by this Court.

II. COUNTERSTATEMENT OF ISSUES

1. By statute, Ecology may allow new water uses that affect otherwise-protected stream and river flows if those uses are justified by “overriding considerations of the public interest.” Did Ecology exceed its authority where it allowed limited new water uses for domestic, industrial, and agricultural purposes that it found would significantly serve the public interest, and where Ecology determined that the impact on fish populations caused by such new uses would be very minimal?

2. Was it arbitrary and capricious for Ecology to include provisions in the Amended Rule to account for water use that do not require the metering of wells associated with single family homes, and estimate that each new single domestic water user will use 350 gpd, based on data showing water use trends in the area?

III. COUNTERSTATEMENT OF THE CASE

A. Statement Of Facts

1. History of Skagit River Basin water management

The Skagit River and its tributaries comprise the third largest river system in the western United States. More than 3,000 rivers and streams flow into the Skagit River system, accounting for one-quarter of all of the fresh water flowing into Puget Sound. *Swinomish Indian Tribal Cmty. v. Skagit Cy.*, 138 Wn. App. 771, 773, 158 P.3d (2007).

In 1996, Ecology, the Tribe, Skagit County (the County), and other stakeholders entered into a Memorandum of Agreement (MOA) relating to water management in the Skagit River Basin. RA004701-4685.¹ In the MOA, Ecology committed to promulgate a water management rule to, among other things, establish minimum instream flows in the Skagit River Basin. RA004696. Ecology is authorized to establish, by rule, minimum instream flows or levels to protect fish, wildlife, and recreational and

¹ “RA” refers to the certified agency record filed by Ecology in this case.

aesthetic values. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 82, 11 P.3d 726 (2000).²

On March 15, 2001, Ecology adopted the Skagit River Basin Instream Flow Rule, WAC 173-503 (Rule). The Rule established minimum instream flow requirements and other regulations relating to the management of water resources in the Skagit River Basin.

The Rule did not allocate any water for new uses that would not be subject to interruption (being shut off), when the flows fall below the required minimum levels, which occurs frequently during the period from August to October. RA002985, RA002987. Significantly, the prohibition on new water uses during the low-flow periods precluded permit-exempt groundwater uses through the pumping of so-called "exempt wells." Under the Groundwater Code, certain uses of groundwater for stock watering, non-commercial lawn and garden irrigation, domestic, and industrial purposes are exempt from water right permitting requirements. RCW 90.44.050.

Although public water suppliers in the Skagit River Basin have water rights and capacity to serve growth, available public water supplies are concentrated in urban areas of the County. RA013649, RA053083. Thus, vast areas of rural lands in Skagit County³ do not have existing

² Once established, a minimum instream flow constitutes an appropriation of water with a priority date as of the effective date of the rule establishing the minimum instream flow. Thus, a minimum flow set by rule is an existing water right which may not be impaired by subsequent uses of water. *Postema*, 142 Wn.2d at 81.

³ The Skagit River Basin, Water Resources Inventory (WRIA) 3, also contains a very small portion of Snohomish County. WAC 173-503-040.

public water supplies, and property owners typically have to provide their own water supply to develop their property, either through water right permits or certificates, or much more commonly, through the construction and pumping of permit-exempt wells.

The County and many organizations and citizens strongly opposed the Rule. They asserted that the interruption of new water uses during low flow periods would prevent development of new homes, businesses, farms, and industries that require a year-round water supply in areas of the County where water is not available from a public water supplier. RA002987, RA002864-66.

2. Development of amendments to the Skagit River Basin instream flow rule

In April 2003, the County filed a Petition for Declaratory and Injunctive Relief against Ecology in Thurston County Superior Court to challenge the Rule pursuant to the Administrative Procedure Act (APA). Thurston County Cause No. 03-2-00668-5. As a result of that lawsuit, multi-party negotiations ensued during the following three years in an effort to reach agreement on an amendment to the Rule that would be acceptable to multiple stakeholders in the Skagit River Basin. Ecology worked with several key stakeholders, including the Tribe and the County, to try to reach a consensus solution to establish a small amount of water that could be used without interruption while maintaining the instream flow protections established in the Rule.

Despite considerable time and resources devoted to finding a solution acceptable to all stakeholders, a consensus solution could not be reached. Subsequently, Ecology decided to move forward with an agency proposal for amendment of WAC 173-503 building on all of the stakeholders' concerns and ideas, and certain water management concepts discussed during the collaborative process. Before issuing a proposed rule amendment, Ecology shared drafts and underlying technical information with stakeholders, and met with them several times. *See* RA007254-7270, RA007271-7324. After issuing the proposed rule amendment, Ecology made numerous changes to the proposal based on comments from a variety of stakeholders (including the Tribe and the County). *See, e.g.*, RA003108, RA003119. Ecology's Responsiveness Summary and Concise Explanatory Statement for the Amended Rule shows that Ecology carefully considered numerous comments and made changes based on comments only where the changes were consistent with law and agency policy. *See* RA003032-3380.

During the rule-making process, Ecology was approached by the County with a settlement proposal on the challenge to the existing Rule in Thurston County Superior Court. RA033339-33342. At that time, Ecology and the County had been in litigation for three years in the County's challenge to the Rule under the APA. The settlement proposal requested Ecology to include eight items in the rule amendment in exchange for the County's dismissal of its lawsuit and cooperation in future implementation of the Rule. Six of the requested revisions were in

the public review draft of the rule amendment or were already in the process of being made by Ecology. *See* RA041193-RA041218. For the remaining two requested revisions, Ecology rejected one request, and agreed to one: to not require metering and reporting of water use volume for single home residential wells, a change that Ecology agreed would actually facilitate more effective implementation of the Rule. RA003042.

On May 15, 2006, Ecology and the County entered into a settlement agreement in the Rule challenge case. A Stipulation and Settlement Agreement and Agreed Order of Dismissal was entered in Thurston County Superior Court on May 19, 2006. RA031654-86.

3. The amended Skagit River Basin instream flow rule

Also on May 15, 2006, Ecology issued the Amended Rule. The Amended Rule establishes reservations of specific quantities of water in certain areas of the Skagit River Basin for specific out-of-stream water uses. These uses are not subject to the minimum instream flow requirements established under the Rule.

The reservations provide allocations of water from different sources of water within the Skagit River Basin, for certain specified types of uses. Because they are not subject to the minimum flow requirements, such uses are not subject to being shut off during the low flow periods where the minimum flow levels are not met, typically during the period between August and October.

The reservations of water are for domestic, municipal, commercial/industrial, agricultural irrigation, and stock water uses.

WAC 173-503-073, -075. Depending on the conditions related to the specific reservation, the withdrawals may be made directly from surface water and/or from groundwater through wells, and are subject to other numerous requirements.

As noted above, the Skagit River Basin is one of the largest in the western United States. Average flow in the Skagit River Basin is 16,560 cfs, although stream flow usually drops to 5,970 cfs in early fall. RA000431. The Amended Rule reserves approximately 25 cfs for future water uses in the Skagit Basin, all but 1.21 cfs of which are from the mainstem Skagit River (and not the tributaries to the River).⁴ WAC 173-503-073 to -075. To provide a sense of the scale of 25 cfs of water withdrawals from the Skagit River system, a flow reduction of 25 cfs represents less than 0.5 percent of flows during low flow conditions for the mainstem Skagit River, well below the amount of reduction that Ecology and Washington Department of Fish and Wildlife biologists found could have significant impacts on fish populations in the river system. RA002992-94.

⁴ For purposes of this discussion, the “mainstem” should be distinguished from “tributaries.” The mainstem is the Skagit River itself. The streams and rivers that flow into the Skagit River are the tributaries. The mainstem is divided into three segments: the lower, middle, and upper Skagit Subbasins. Tributaries that flow into any one of those mainstem segments are sometimes designated by those segments, namely, lower tributaries, middle tributaries, and upper tributaries. Reservations from the mainstem provide for water to be taken directly or primarily from the Skagit River. Reservations from tributaries provide for water to be taken directly or primarily from specific tributaries but only by groundwater withdrawals (from wells). All flows on the Skagit mainstem are gauged at Mount Vernon, in the lower Skagit Subbasin, where the average flows during August, September, and October are approximately 11,610 cfs, 9,380 cfs, and 12,410 cfs. RA000431. The average flow during these three months is approximately 11,000 cfs.

As discussed extensively below in Section IV.B.2. below, Ecology applied the “overriding considerations of the public interest” exception, RCW 90.54.020(3)(a), to establish the reservations of water. Ecology applied the “overriding considerations of the public interest” provision to establish the reservations because uses of the reserved water would conflict with the minimum instream flows that were established earlier through adoption of the 2001 Rule.

In making its determination under RCW 90.54.020(3)(a) that it was “clear that overriding considerations of the public interest will be served” by the limited new water uses, Ecology performed a three-step test to (1) determine whether and to what extent important public interests would be served by the proposed reservations; (2) assess whether and to what extent the proposed reservations would harm any public interests; and (3) determine whether the public interests served (as determined in step 1) clearly overrode any harm to public interests (as determined in step 2). RA02987.

In applying this test, Ecology concluded that “overriding considerations of the public interest” existed to support the creation of the reservations. RA002988. Ecology’s conclusion was supported by three determinations. First, Ecology determined that important public interests would be significantly advanced by the proposed reservations of water. Without the reservations, new withdrawals for domestic, municipal, industrial, agricultural, and stock watering uses would be subject to interruption during the summer and fall. Sources of water other than new

withdrawals, such as public water supply, are as a practical matter unavailable through most of the basin. RA013649, RA006342-6345, RA006368-6371. Ecology's economists estimated the gained economic productivity in the Skagit River Basin from the Amended Rule would be \$32.9 million to \$55.9 million over a 20-year time horizon. RA002987; RA002863-64; RA002872.

Second, Ecology determined that the impact to aquatic resources and recreational uses would be very small. Ecology limited the maximum sizes of the reservations to just two percent of the historic summertime low flow. Biologists for Ecology and the Washington Department of Fish and Wildlife found that this threshold would not cause significant harm to fish and wildlife.⁵ RA002988, RA002992-2993. Ecology estimated the monetary value of any resulting small loss to fisheries over 20 years as \$5.3 million. RA002988. Third, in comparing the above benefits to the impacts on the resources, Ecology determined that the significant benefits to the well-being of the Skagit River Basin clearly overrode the small potential harm to the aquatic

⁵ Ecology and Washington Department of Fish and Wildlife biologists determined that a reduction in stream flows of 2 percent or less during the historic summer low flow period would not impact the long-term sustainability of the fish populations and is protective of fish. RA038792-387933, RA000881, RA033346. The biologists reasoned that since stream flows are generally most important during the summer low flow events, if the effect of a reduction during those low flow events was small, the effect would be even smaller at other times. RA036713. The biologists based this percentage standard on a number of factors, including knowledge of fish life-stages and their dependence on stream flows, and the projected consequence on these life-stages of a small depletion in stream flow. RA036712.

resources and the economic interests that depend upon those resources.
RA002988.

Through the Amended Rule, Ecology created, in total, 27 separate reservations, as follows:

1. Three reservations totaling 13.3 cfs are from the Skagit River mainstem (lower 8.13 cfs, middle 2.16 cfs, and upper, 3.0 cfs) for year-round future domestic, municipal, and commercial/industrial (DMCI) uses;⁶
2. One reservation of 10 cfs for agricultural irrigation from the Skagit River mainstem;
3. One reservation of 0.5 cfs for stock watering purposes from the Skagit River mainstem; and
4. Twenty-two reservations totaling 1.21 cfs from the Skagit River tributaries for year-round future DMCI uses. To protect these streams from direct surface water impacts, these reservations restrict withdrawals to groundwater, and, thus, surface water cannot be pumped directly from the tributaries.

The Amended Rule also includes provisions specifying that once Skagit River Basin reservations of water are fully allocated for use, the reservations will be closed to new water uses. Thus, Ecology is required to track new withdrawals from each reservation area and determine when the water under that reservation is fully used. WAC 173-503-073(5). These provisions set forth a process for the “accounting” of water use to ensure that uses do not exceed the quantities of water that are reserved. This involves technical determinations of how much water is to be “debited” from a reservation due to new homes and other new users of water, and how much water is “credited” due to the return of water into

⁶ For ease of reference, we abbreviate the reservations that provide water for “domestic, municipal, and commercial/industrial” uses as “DMCI” reservations.

the aquifer and the river system through the recharge of water from septic systems. WAC 173-503-073(7).

The Amended Rule does not require new water users tapping water from permit-exempt wells to serve a single residence to install meters to measure their water use to determine precisely how much water should be debited from the total allowed under a reservation. WAC 173-503-060(5); WAC 173-503-073(3)(d). Instead, the reservation accounting formula specifies that each new home tapping water from a permit-exempt well requires a debit of 350 gallons of water per day. WAC 173-503-073(7)(b). As explained below in Section IV.C., Ecology selected 350 gpd as a reasonable estimate of the maximum average daily use of water for a single-family residence, based on data showing water use trends in areas of Skagit County and other parts of western Washington. Further, the accounting formula specifies that each septic system associated with new domestic water use affords a 50 percent credit to amount of water allowed under the reservation (i.e. 175 gpd in association with each new permit-exempt well). WAC 173-503-073(7)(c).

The Amended Rule requires Ecology to publish notices in local newspapers to inform the public of the status of the reservations and the amounts of water that remain available for new uses. WAC 173-503-073(5). Further, when no water remains available for new uses under a reservation, new water uses are prohibited, unless a prospective water

user can demonstrate that they can provide suitable mitigation to offset any impacts on stream flows. *Id.*

B. Procedure Below

The Tribe filed its initial Petition for Judicial Review of the Amended Rule in Thurston County Superior Court, in June 2008. CP 4-36. In October 2008, the Tribe filed its First Amended Petition for Judicial Review. CP 37-52.

On November 9, 2010, the superior court issued a Letter Opinion, which ruled in favor of Ecology and upheld the Amended Rule. CP 300-306. The superior court concluded “that Ecology’s amended rule does not exceed its statutory authority, and is not arbitrary and capricious.” CP 306. With respect to the Tribe’s allegation that Ecology exceeded its statutory authority by establishing the reservations of water for limited new uses under the Amended Rule, the Letter Opinion states:

Although the Tribe asserts that any withdrawal in conflict with the base flow must be determined on a case-by-case basis for each specific use authorized, this Court determines that it is permissible to analyze the withdrawals by classes of use. . . . A private benefit is not the same as a public interest, nor does a private benefit preclude serving a public interest. Ecology properly considered the benefits of making water available to classes of individual users. There is statutory authority to support Ecology’s argument that the reservations at issue in the amended rule supporting domestic, municipal, agricultural, industrial, and stockwater uses are beneficial uses of the waters of the state. RCW 90.54.020(1). And there is support in the record for this argument as well. RA002987, RA002863-74. It is not for this Court to second-guess Ecology’s

determination that overriding considerations of the public interest are served by the withdrawals at issue.

CP 303. In regard to the Tribe's allegation that Ecology's use of 350 gpd as the measure of daily water use for a single family residence in the accounting regime for the reservations is arbitrary and capricious, the Letter Opinion states that:

Although the Tribe disagrees with Ecology's use of the 350 gallons per day figure, the Tribe has not met its burden to show that use of the figure is arbitrary and capricious. Use of 350 gallons per day is supported by the record. RA00724, RA040587-89, RA040593. The parties here simply disagree as to the conclusions reached based on the record. While Ecology notes that it has previously used the very same figure as an estimate of the average annual day, which it acknowledges is different than maximum average consumptive daily use (which measures use of water during the highest period of use), the record shows that Ecology referred to actual data rather than estimates to reach the 350 figure.

CP 305.

On December 3, 2010, the superior court issued its Order Denying Petition for Review, which was based on and incorporated the Letter Opinion. CP 307-316. Subsequently, the Tribe filed its Notice of Appeal.

IV. ARGUMENT

A. Standard Of Review

This case involves judicial review of an agency rule. Under the APA, the Tribe bears the burden to prove that the Amended Rule is invalid. RCW 34.05.570(1)(a). The Court may declare the rule invalid

“only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.” RCW 34.05.570(2)(c). The Tribe asserts in its petition only that the rule exceeds Ecology’s statutory authority and was arbitrary and capricious.

In considering whether a rule “exceeds the statutory authority of the agency,” a duly enacted rule will be upheld if it is reasonably consistent with the statute that it implements. *See Wash. Pub. Ports Ass’n v. Dep’t of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003); *St. Francis Extended Health Care v. Dep’t of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990).

Where the Legislature specifically delegates the power to make regulations to an administrative agency, those regulations are presumed to be valid. The burden is on the party attacking the validity of the rule to present compelling reasons why the rule is in conflict with the intent and purpose of the statute being implemented. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986). The wisdom or desirability of a rule is not a question for the reviewing court. *St. Francis Extended Health Care*, 115 Wn.2d at 702. Where an ambiguous statute is within an administrative agency’s special expertise, “the agency’s interpretation is accorded great weight.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (quoting *Postema*, 142 Wn.2d at 77).

Agency action is “arbitrary and capricious” if it is “willful and unreasoning and taken without regard to the attending facts and circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Util. & Trans. Comm.*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). This standard accords a great degree of deference to agency decision-making and requires courts to uphold a rule that the court deems erroneous as long as the rule was enacted with due consideration. *Id.* at 904. Thus, the arbitrary and capricious standard allows for differences of opinion; a rule will not be invalidated as arbitrary and capricious simply because different decision-makers could reach different conclusions based on the evidence. *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002). If there is room for two opinions, an action taken after due consideration is not arbitrary and capricious. *Wash. Fed’n of State Employees v. State of Wash.*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009) (citing *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). When a rule is challenged as arbitrary and capricious, the reviewing court must consider the relevant portions of the rule-making file and the agency’s explanations for adopting the rule as part of its review in order to determine whether the agency’s action was willful and unreasoning and taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 906. The Court may affirm the validity of the rule on any ground supported by the record. *Wash. Fed’n of State Employees*, 152 Wn. App. at 378 (citing *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986)).

B. Ecology Acted Within Its Statutory Authority In Amending The Skagit River Instream Flow Rule To Establish Reservations Of Water Allowing Limited New Uses Of Water

Ecology acted within its statutory authority in establishing reservations of water in the Skagit River Basin because in doing so it relied upon the following provision of the Water Resources Act:

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

...

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

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

RCW 90.54.020(3) (emphasis added).

The “overriding considerations of the public interest” (OCPI) provision provides an exception to the general rule that Ecology cannot authorize new uses of water that would conflict with “base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” This statutory exception provides Ecology with discretion to allow new water uses that will conflict with “base flows” for rivers and streams when the agency

deems that “it is clear that overriding considerations of the public interest will be served.”

The plain language of this statute in the context of the facts of this case supports Ecology’s decision to establish the reservations. The Tribe has not met its burden to present compelling reasons why the Amended Rule conflicts with the intent and purpose of RCW 90.54.020(3), and the Water Resources Act, RCW 90.54, in its entirety. *Hi-Starr*, 106 Wn.2d at 459.

1. The OCPI Provision is not as limited as the Tribe asserts.

The Tribe seeks to severely limit the OCPI exception to the point where it could virtually never be applied by arguing that the water resources statutes stress the protection of stream and river flows to support fish populations above all other public values and objectives. This argument fails because the water resources statutes also were enacted to advance other important values and objectives, including the supply of water for people and farms.

The primary objective of statutory interpretation is to carry out the intent of the Legislature. *Bowie v. Dep’t of Rev.*, 171 Wn.2d 1, 248 P.3d 504 (2011). Where statutory language is plain and ambiguous, a statute’s meaning must be derived from the wording of the statute itself. *Id.* The plain meaning of a statute is not derived from reading a statute in isolation. Rather, plain meaning is “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision

is found, related provisions, and the statutory scheme as a whole”
State v. Hirschfelder, 170 Wn.2d 536, 543, 242 P.3d 876 (2010); *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). Generally, exceptions to statutory provisions are narrowly construed. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999).

In its attempt to persuade the Court to adopt an interpretation of the OCPI exception that would severely limit its application, the Tribe emphasizes the provisions of Washington water law that promote protection of instream flows and preservation of the natural environment. Appellant’s Opening Br. at 26-29. The Tribe is correct that such statutes call for the maintenance of instream flows in order to preserve fish and wildlife, and aesthetic values. But the Tribe is incorrect when it implies that preservation of fish, wildlife, and aesthetic values is the sole priority focus of the water resources statutes. Rather, Washington water law embodies and balances numerous, diverse policy objectives.

Numerous other provisions of the water statutes stress other values related to the management of our state’s water resources. The Water Code, which was enacted in 1917 and is the Act that serves as the foundation for Washington’s water resources management statutes, provides that:

It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from *both* diversionary uses of the state’s public waters and the retention of waters within

streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.

RCW 90.03.005 (emphasis added).⁷

In 1971, the Legislature enacted the Water Resources Act, which includes the OCPI provision at issue in this case. The purposes section of this statute states that “[p]roper utilization of the water resources of this state is necessary to the promotion of public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values.” RCW 90.54.010. In addition, this Act states that “[t]he legislature recognizes the critical importance of providing and securing sufficient water to meet the needs of people, farms, and fish.” RCW 90.54.005.

The Water Resources Act declares that “utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals” and then proceeds to set forth eleven applicable “fundamentals.” In addition to the fundamental calling for the maintenance of “base flows” in the state’s streams, which includes the OCPI provision, the statute includes the following additional fundamentals:

- (1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and

⁷ Moreover, RCW 90.14.010, a provision in the chapter that establishes the water rights claims registration system and provisions concerning relinquishment (forfeiture) of water rights, pronounces that “[t]he future growth and development of the state is dependent upon effective management and efficient use of the state's water resources.”

enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

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

. . . .

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

RCW 90.54.020(1), (2), (5).

These provisions show the Legislature's intent, through enactment of RCW 90.54 and the other water statutes, to establish a state water resources policy that finds a balance between "the promotion of public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values." *See, e.g.*, RCW 90.54.010.

Under this statutory scheme, the OCPI exception is not as limited as the Tribe argues. Rather, OCPI reflects the Legislature's policy choice that, in limited circumstances, instream flows can be appropriated for other water uses that serve the public interest. The OCPI provision is an exception that provides discretion to Ecology to consider a range of values, including public health and economic well-being, to allow water uses that may conflict with stream flows when the public benefits of such uses "clearly override" the benefits from protecting the flows.

The cases discussed by the Tribe in the “Statutory Context” and “Prior Administrative Practice” sections of its brief do not contradict Ecology’s position that OCPI affords discretion to the agency to consider multiple factors and allow water uses that would conflict with minimum stream flows in certain circumstances. The Tribe’s reliance on *Postema* to support its argument that the OCPI exception is severely narrow is misplaced for two reasons. Appellants’ Br. at 29-31. First, the *Postema* Court did not consider or interpret the OCPI provision at issue in this case. Second, *Postema* addressed individual applications for new water right permits, and was not a challenge to a water management rule adopted by Ecology for a particular watershed as a whole.

Postema involved several consolidated cases where applicants for groundwater right permits challenged Ecology’s decisions to deny their applications. Ecology found that the aquifers that the applicants proposed to pump water from were connected to rivers that were subject to minimum instream flow rules. Ecology found that the minimum flow levels for the rivers were not being met. Therefore the agency denied the applications on the grounds that water was not available for appropriation, and that the proposed uses would impair the instream flows contrary to the requirements of the water permitting statute, RCW 90.03.290.⁸ *Postema*, 142 Wn.2d at 73-74. Thus, in *Postema*, the

⁸ Under RCW 90.03.290, Ecology cannot approve an application for a water right permit unless the agency affirmatively finds that (1) water is available for appropriation, and that the proposed water use would be (2) beneficial, and would (3) not

Supreme Court considered whether it was lawful for Ecology to deny certain water right permit applications that would impair instream flows, but did not consider whether the OCPI exception would or could allow Ecology to approve the proposed new uses notwithstanding the conflicts with the minimum flow levels. However, in ruling that Ecology properly denied the applications because the new proposed water uses would violate the minimum flow rules for certain river basins, without interpreting RCW 90.54.020(3)(a), the Court recognized that OCPI provides an exception to the general rule on which it based its decision to uphold Ecology's decisions to deny the permit applications. *Postema*, 142 Wn.2d at 81.

The *Postema* Court's observation that it was aware of "no statute which requires any further weighing of interests once minimum flows have been established, and none requiring that economic considerations influence permitting decisions once minimum flows are set" does not support the proposition that Ecology cannot consider economic values when it applies the OCPI exception. Appellant's Opening Br. at 30-31 (quoting *Postema*, 142 Wn.2d at 82). After all, the *Postema* Court did not consider OCPI because the exception was not at issue in that case. The *Postema* Court did not consider what factors Ecology may consider in applying OCPI, and how the agency should balance such factors in its analysis. Moreover, while *Postema* provides precedent in the context of

impair other water rights, or (4) be detrimental to the public welfare. *Postema*, 142 Wn.2d at 79.

Ecology's decision-making on individual water right permit applications, it did not involve a challenge to Ecology's adoption of any water management rule setting instream flows, and does not provide guidance on how OCPI should be applied by Ecology in the context of rule-making.

The Pollution Control Hearings Board (PCHB) decisions discussed by the Tribe similarly do not provide controlling authority in this case for three reasons. *See* Appellant's Opening Br. at 32-34 (citing *Black Diamond Associates v. Dep't of Ecology*, 1996 WL 755426 (Dec. 13, 1996) and *Auburn Sch. Dist. No. 408 v. Dep't of Ecology*, 1996 WL 752665 (Dec. 20, 1996)). First, decisions of the PCHB are not precedents entitled to *stare decisis* in this Court. *R.D. Merrill Co.*, 137 Wn.2d at 142 n.9; *Postema*, 142 Wn.2d at 90. Second, these decisions, like *Postema*, involved challenges to Ecology's decisions on individual water right permit applications, rather than challenges to water management rules where Ecology applied OCPI to establish reservations of water for multiple potential water users in a specific watershed. Third, while those decisions were issued by the PCHB in the mid-1990s, based on positions taken by Ecology during that period, the practices of administrative agencies are not set in stone and can be modified over time based on policy considerations, so long as they do not conflict with the authorizing statutes. *See Postema*, 142 Wn.2d at 91 (citing *American Trucking Ass'n v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416, 87 S. Ct. 1608, 18 L. Ed. 2d 847 (1967) (administrative agencies are "neither required nor

supposed to regulate the present and the future within the inflexible limits of yesterday”)). The question before the Court in this case is whether Ecology’s application of OCPI in the context of the Amended Rule it adopted in 2006 was reasonably consistent with the statute, and not whether Ecology was bound at that time by PCHB decisions that were issued 10 years earlier, and were not further reviewed by appellate courts.

This difference in decision-making context is especially important here. Ecology’s practice in evaluating and making decisions on permit applications is entirely different than Ecology’s rule-making practice to adopt water management rules which set the parameters for water allocation in a basin as a whole. Rule-making for an entire watershed involves policy considerations that relate to the community as a whole, rather than whether an individual applicant can meet the permit criteria set forth in RCW 90.03.290. Water management rule-making must take into consideration the ramifications of water allocation on all the citizens of a watershed, and must support the well-being of the overall community. Moreover, as discussed in Section IV.B.2 below, weighing the “public interest” in the context of an individual permit application involves different considerations than in determining how water should be managed for a community as a whole. As such, *Black Diamond Associates* and *Auburn School Dist. No. 408* do not undercut Ecology’s position and the superior court’s ruling in this case.⁹

⁹ Similarly, the November 2003 internal Ecology document, and Ecology’s 2004 “guidance document” entitled “Setting Instream Flows and Allocating Water for Future

2. Ecology did not exceed its statutory authority in applying the OCPI exception.

Analysis of the plain language of RCW 90.54.020(3), and an understanding of how Ecology applied the OCPI exception in the present case, contradict the Tribe's argument that Ecology exceeded its statutory authority. To the contrary, Ecology acted fully within its authority in establishing limited reservations of water in the Amended Rule.

Ecology's Amended Rule established 27 reservations of specific quantities of water in certain areas of the Skagit River Basins for specific out-of-stream water uses. Those uses are not subject to the minimum instream flow requirements that were established under the 2001 Rule.

A reservation of water is itself an appropriation of water and creates a water right. RCW 90.03.345. Thus, to establish a reservation, Ecology must determine whether the reservation can satisfy the four-part test for a new water right set forth in RCW 90.03.290:

[B]efore a permit to appropriate [water] may be issued, Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare.

Postema, 142 Wn.2d at 79.

Out-of-Stream Uses," discussed by the Tribe do not provide persuasive authority that supports the Tribe's position. *See* RA035918-035921, RA006955-006977. These do not have the effect of agency rules. The 2004 guidance document is not a rule or even a policy statement or interpretive statement under the APA. *See* RCW 34.05.010(8), RCW 34.05.230. Rather, it is an informal advisory document that Ecology may follow or not at its discretion. The Tribe cites no authority for the proposition that agencies must justify departures from informal guidance. Further, these documents reflect that Ecology's understanding of OCPI in the context of water management rule-making has evolved over time as Ecology has actually engaged in rule-making efforts.

Minimum instream flows established by rule are water rights that are protected from impairment, like other water rights. RCW 90.03.345, RCW 90.03.247. When a proposed water withdrawal would cause flows to fall below the minimum or reduce flows already below the minimum, Ecology must find that the proposed water use impairs the instream flow and that water is unavailable for appropriation, and, thus, fails to meet the first and third elements of the above four-part test. For this reason, Ecology generally may not approve a new appropriation that conflicts with a minimum instream flow. However, RCW 90.54.020(3)(a) provides the OCPI exception for new appropriations that may conflict with a minimum instream flow. In this case, Ecology applied OCPI to determine whether to establish the reservations because uses of reserved water would conflict with the minimum instream flow requirements that were established earlier through adoption of the 2001 Rule.

In making its determination of OCPI under RCW 90.54.020(3)(a) for limited water uses here, Ecology employed a three-step test, as pronounced in the administrative record:

1. Ecology determines whether and to what extent important public interests would be served by the proposed appropriation. The public interests served may include benefits to the community at large, such as providing water for homes, businesses, and farms, as well as environmental benefits such as fish and wildlife habitat, scenic, aesthetic, recreational and navigational values.
2. Ecology assesses whether and to what extent the proposed appropriation would harm any public interests, including economic and environmental benefits.

3. Ecology determines whether the public interests served (as determined in step 1) clearly override any harm to public interests (as determined in step 2).

RA02987.

In applying this test, Ecology determined that OCPI existed to support the creation of the reservations:

Based on Ecology's determination that (1) the important public interest of providing reliable supplies of water for domestic, municipal, agricultural irrigation, commercial/industrial and stock watering needs is significantly served by the reservations, and (2) that the public interest of protecting instream flows is not significantly impacted when use of water under the reservations is limited as here, Ecology therefore finds that there is a clear showing of overriding considerations of public interest under RCW 90.54.020(3)(a).

RA002988.

Ecology's conclusion that there was a clear showing of OCPI to enable establishment of the reservations was supported by three determinations. First, Ecology determined that important public interests would be significantly advanced by the proposed reservations. As discussed above, without the reservations, new withdrawals for domestic, municipal, industrial, agricultural, and stock watering uses would be subject to interruption during the summer and fall. Sources of water other than new withdrawals, such as public water supply, are as a practical matter unavailable through most of the basin. RA013649, RA006342-6345, RA006368-6371. Ecology's economists estimated the gained economic productivity to the Skagit Basin from the Amended

Rule would be \$32.9 to 55.9 million over a 20 year time horizon. RA002987, RA002863-64, RA002872.

Second, Ecology determined that the impact to aquatic resources and recreational uses would be very small. Ecology limited the maximum reservation size to just two percent of the historic summertime low flow. Both Ecology and Washington Department of Fish and Wildlife biologists found that this threshold would not cause significant harm to fish and wildlife. RA002988, RA002992-2993. Ecology estimated the monetary value of any resulting small loss to fisheries over 20 years as \$5.3 million. RA002988. Importantly, the Amended Rule also put in place numerous conditions to mitigate any potential small impacts, including: (i) mandating water use efficiency standards (WAC 173-503-073(3)(c)); (ii) prohibiting new withdrawals where timely and reasonable connection to public water supplies is available (WAC 173-503-073(3)(f)); (iii) closing water-limited basins to all new withdrawals once the reservations are fully used (WAC 173-503-073(5)); (iv) limiting use in smaller tributaries and important salmon tributaries in the Upper Skagit watershed to groundwater sources only unless surface water is the only physically available water source (WAC 173-503-073(3)(b)); and (v) preventing seasonal agricultural irrigation water rights from being converted to another purpose allowing year-round water use (WAC 173-503-073(2)(g)).

Third, in comparing the above benefits to the impacts on the resources, Ecology determined that the significant benefits to the

economic well-being of the Skagit Basin clearly overrode the small potential harm to the aquatic resources and the economic interests that depend upon those resources. RA002988.

a. It was appropriate for Ecology to consider economic impacts in its OCPI analysis.

The Tribe argues that Ecology exceeded its statutory authority through “use of an economic balancing test in which any beneficial use can override instream flows.” Appellant’s Opening Br. at 36-40. This argument fails for two essential reasons. First, nothing in the actual language of the statute limits considerations of the public interest to non-economic factors. Second, the Tribe fails to recognize that Ecology employed more than a mere “economic balancing test” in applying OCPI here, and actually considered a range of factors.

The Tribe improperly relies on the language in *Postema* pronouncing that, in Ecology’s evaluation of applications for water permits, there can be no “weighing of interests” or recognition of “economic considerations” when a proposed water use would cause impairment of instream flows. Appellant’s Opening Br. at 37 (quoting *Postema*, 142 Wn.2d at 82). As explained above, the *Postema* Court recognized that OCPI provides an exception to the general rule that appropriations of water cannot be allowed when they would impair instream flows, and the decision did not provide any guidance on the parameters for OCPI because its application was not at issue in that case.

Further, the Tribe's argument focuses on the statutory provisions related to the establishment and maintenance of instream flows, specifically RCW 90.22.030, 90.03.247, and 90.03.345, without acknowledging provisions that emphasize other equally important community values related to water resources management. *See* discussion in Section IV.B.1, above.

RCW 90.54.020(3)(a) states that “[w]ithdrawals of water which would conflict [with instream flows] shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.” The statute does not define the term “public interest” or spell out what “considerations” may be applied. The statute does not preclude economic factors from being included as “considerations of the public interest.” Some measures of the public interest are derived from the interests of individuals and businesses, and economics is the primary tool used to measure those benefits and costs. As such, it was logical and appropriate for Ecology to employ economic factors as part of its balancing test in analyzing OCPI.

It requires no citation to authority to support the proposition that the economic well-being of the community at large is a fundamental public interest and one of the primary reasons for legislation and regulations. References to economic well-being as being an objective in water management are present in several of the water resources statutes.¹⁰

¹⁰ RCW 90.54.010(1)(a) (“Proper utilization of the water resources of this state is necessary to the promotion of public health and the *economic well-being* of the state and the

Washington statutes are replete with references to economic development as a purpose for legislation.¹¹ Ecology did not exceed its statutory authority under RCW 90.54.020(3) in employing a balancing test that considered economic factors in applying OCPI in this case.

Further, economics was not Ecology's only consideration in applying OCPI in this case. The Tribe wrongly asserts that "DOE's balancing test allows senior instream flow rights to be impaired whenever the benefits of any combination of any beneficial uses outweigh the economic cost of impairing instream flows." Appellant's Opening Br. at 40. Ecology actually considered a range of factors that went beyond economic cost-benefit analysis. Allowing limited quantities of water for some modicum of rural development is more than just a matter of economics. Ecology considered the benefits of allowing some limited growth in rural Skagit and Snohomish Counties in accordance with local land use plans and regulations, so that citizens who prefer a rural lifestyle can choose to live and work there. RA003052, RA003054. The Tribe's argument wrongly assumes that there is no public benefit to allowing the

preservation of its natural resources and aesthetic values. . . . Adequate water supplies are essential to meet the needs of the state's growing population and economy. . . ." (emphasis added). RCW 90.82.010 ("The development of [watershed] plans serve the state's vital interests by ensuring that the states resources are used wisely, by protecting existing water rights, by protecting instream flows for fish, and by providing for *the economic well-being* of the state's citizenry and communities.") (emphasis added). RCW 90.82.070(2) ("The objective of these strategies is to supply water in sufficient quantities to satisfy the minimum instream flows for fish and to provide water for *future out of stream uses . . . and to ensure that adequate water supplies are available for agriculture, energy production, and population and economic growth* under the requirements of the state's growth management act, chapter 36.70A RCW.") (emphasis added).

¹¹ See, e.g., RCW 43.160.010, RCW 43.330.005, .050, RCW 43.15.060.

public a choice whether to live or locate homes and businesses in urban or rural areas, where it would be consistent with local growth management plans, development regulations, and zoning.

b. Ecology was not required to allow only one single priority type of water use, and the agency did not exceed its statutory authority by allowing multiple categories of water uses.

The Tribe's contention that Ecology exceeded its statutory authority by establishing reservations providing water for a range of beneficial uses because OCPI is applicable only when there are "overriding considerations" is without merit. Appellant's Opening Br. at 38-40. The Tribe appears to assert that Ecology cannot allow multiple purposes of water use through a reservation, but, instead, must only allow one single type of use that is deemed to be of the highest priority (whatever that may be), because there can only "clearly" be "overriding considerations of the public interest" in such a circumstance.

But the Tribe reads words into the statute that do not exist. There is no language in the statute that precludes Ecology from applying OCPI to establish reservations that allow multiple purposes of use of water that the Legislature has deemed beneficial when it is determined that "it is clear that overriding considerations of the public interest will be served." The Skagit River Basin reservations allocate water for domestic, municipal, agricultural, industrial, and stock watering uses. The Water Resources Act explicitly recognizes that these uses are beneficial uses of waters of the state. RCW 90.54.020(1).

Here, Ecology received numerous public comments from multiple stakeholders asserting that adverse impacts to the basin would be significant if Ecology did not provide an uninterrupted water supply for a broader range of uses than was first proposed. RA003822-25, RA003727-28, RA053075-77, RA053078, RA053079-80, RA053081, RA053082, RA005216-42. Based on such comments, Ecology acted in a fashion that is fully consistent with the statute when it determined that allowing some limited water use for a range of purposes, in amounts that would not cause any harm to fish and other instream values, would clearly serve overriding considerations of the public interest.

The OCPI provision does not require Ecology to limit each reservation that is established through its application to just one type of water use. The reservations allow limited uses of water for domestic, commercial, and agricultural uses. All these beneficial uses support limited growth in rural areas—for homes, businesses, and farms—that otherwise could not occur. This case and the limited uses that the agency has allowed under its discretionary authority, in fact, perfectly demonstrate an appropriate application of OCPI. The OCPI provision does not preclude Ecology from considering the well-being of the community as a whole as a public interest, and, accordingly, the Amended Rule does not conflict with the OCPI provision's intent and purpose.

In a similar vein, the Tribe proceeds to contend in the next section of its brief that Ecology exceeded its statutory authority by authorizing

“new categories of appropriations whose estimated benefits do not clearly outweigh DOE’s own estimates of the economic cost of impairing instream flows.” The Tribe argues that the language of the OCPI provision “precludes the kind of aggregate approach DOE applied here.” Appellant’s Opening Br. at 41.

This argument fails because, as explained above, Ecology’s OCPI analysis did not just employ an economic balancing test. Rather, Ecology considered the benefits of allocating water to allow some limited growth in rural areas in accordance with local land use plans and regulations, so that citizens who prefer a rural lifestyle can choose to live and work there.

Further, the Tribe wrongly asserts that aggregate benefits from multiple purposes of water use cannot be considered because OCPI requires “individualized determinations.” Appellant’s Opening Br. at 42 (quoting *Black Diamond Associates*). Contrary to the Tribe’s argument, the OCPI provision does not require that exceptions allowing water use that would conflict with instream flows must be established on an individualized or case-by-case basis. To begin with, no such restriction exists in the language of the statutory exception. Nowhere does the language in RCW 90.54.020(3)(a) hint that “overriding considerations of the public interest” must be based on the circumstances of individual users rather than on classes of users and aggregate affects. Moreover, such a reading is illogical. In a scenario involving entire classes of users, the public interest may be much greater than in the case of an individual

user, whose individual plans are less likely to rise beyond a private interest to be a public one. Thus, an aggregate use is more likely than an individual use to benefit the public interest sufficiently to override the policy of protecting minimum instream flow levels.

Also, even if the Tribe's proposition that OCPI cannot be applied in any instance when costs related to aquatic resources exceed benefits from out-of-stream water uses was correct (which it is not), the cost-benefit information the Tribe points to in its brief is wrong. The majority of the economic benefits to be derived from the Amended Rule will not solely be derived from domestic use to serve residential development, but also will be derived from municipal and agricultural water uses. The Tribe wrongly argues that the reservation benefits are derived from only a small portion of the DDCMI reservation, mostly concentrated for rural permit-exempt well users. The Tribe's argument fails because it is based solely on the economic analysis that Ecology performed in support of the Amended Rule.

However, the Cost Benefit Analysis prepared for the Amended Rule only evaluated costs and benefits on a 20-year timeframe. During the first 20 years, a majority of the benefits accrue to rural domestic permit-exempt water users, which will be the earliest water users since public water supplies are limited in rural areas (and large water systems have adequate near-term water rights). RA013649, RA002863-002864. However, over time, water demand will shift to large public water systems that will reach the limits of their water rights and need additional

supplies allowed by the DCMI reservation. *See* RA004260-4261. The different time horizons between water planning and economic assessments are based on the two purposes of water planning and economic assessments done for rule-making. Water planning is conducted on a longer time horizon than 20 years, usually up to 50 years. Over the longer time period, more benefits will be derived under the reservations for municipal water uses.

With respect to water uses for irrigation and stock watering, it is true that the monetary value of water for agriculture and stock water is less than the value for domestic or commercial uses. However, agriculture is a large component of the economy and an important part of the culture and lifestyle of the Skagit River Basin, and there was strong support from the community to provide additional agricultural water supply for farmers and stock growers. RA000477-000499, RA003048, RA003172, RA003209, RA003210.

c. Ecology did not exceed its statutory authority by establishing reservations that authorize use of water for private residential development or recreational activities.

The Tribe argues that Ecology violated the OCPI provision because the types of water use allowed under the reservations will allow for private residential development and outdoor watering for lawns and gardens, and may conceivably allow for the irrigation of golf courses, or other forms of public recreation. The Tribe relies again on *Black Diamond Associates* and *Auburn School Dist. No. 408* for this

proposition, because the PCHB held in those cases, in the context of individual permit applications, that uses of water for golf course and recreational sports fields did not qualify for the OCPI exception.

This argument fails because the context for basin rule-making is different than for individual permit applications, and because the OCPI provision does not require individualized determinations of specific water uses when OCPI is applied to establish reservations. As discussed above, the statute does not preclude Ecology from considering the aggregate effects from multiple classes of water uses when it establishes reservations of water by rule.

The OCPI provision plainly does not preclude Ecology from allowing any specific types of water uses when it establishes water reservations. Further, the Tribe provides no factual or policy basis to support its position that the public interest cannot be served by the watering of private lawns and gardens up to one-half acre in size, or by use of water under the reservation allowing stock watering to serve feed lots. Such uses are typical in rural areas, and Ecology's OCPI analysis considered the overall benefits attributable to a range of rural activities.

The Tribe appears to argue that the supply of water for classes of uses which will benefit individuals or private interests cannot serve the "public interest" because ultimately private individuals will benefit. This argument reduces to an absurdity. The same objection holds for water used exclusively for publicly owned facilities, such as municipal stadiums, public power plants, and parks. The ultimate users and

beneficiaries of these public facilities are private individuals. Such a narrow conception of the public interest is untenable. The Tribe cannot meet its burden to show that Ecology did not act in a fashion reasonably consistent with the OCPI provision in establishing reservations for categories of water use such as residential development, lawn and garden watering, and stock watering, that may benefit private individuals.

d. The Tribe wrongfully contends that Ecology exceeded its statutory authority by allowing uses of water that could be met by alternative sources of water.

The Tribe's argument that Ecology exceeded its authority under the OCPI provision by allowing uses of water that could be served by alternative sources of supply suffers from two flaws. First, there is nothing in the language of the OCPI provision itself which mandates that OCPI is not applicable if there may be alternative sources of water available, and the Tribe offers no statutory authority for its argument. Second, the Tribe oversimplifies Ecology's assessment of whether alternative sources of water are actually available to serve some uses that are allowed under the reservations.

Although public water purveyors in the Skagit River Basin have water rights and capacity to serve growth, those supplies are concentrated in urban areas of the County. RA013649, RA053083. Thus, vast areas of rural lands in Skagit County do not have existing public water supplies, and property owners typically have to provide their own water supply to develop their property, either through water right permits or certificates,

or much more commonly, through permit-exempt wells. For instance, public water supplies, through purveyors like the Skagit Public Utility District, are concentrated near urban areas. For property owners in the rural areas, extending public water supplies to many areas in the Skagit River Basin is economically infeasible and would require a burdensome wait for extension of service. RA013649, RA053083. Moreover, where public water service can be provided in a timely and reasonable manner, the Amended Rule requires connection to a public water system to receive water, rather than obtaining water supply through a permit-exempt well that taps water made available through a reservation. WAC 173-503-073(3)(f).

3. Ecology's interpretation is entitled to deference.

The Tribe concludes its OCPI arguments by contending that Ecology's interpretation of the OCPI provision is not entitled to deference because Ecology's "use of the OCPI exception conflicted with the plain meaning of the statute," and Ecology's administrative practice in applying OCPI has been "inconsistent." Appellant's Opening Br. at 44. To the contrary, the Court should afford deference to Ecology in interpretation of the OCPI provision because Ecology's application of the exception in this case did not conflict with the statute's plain meaning, and Ecology's past applications of OCPI did not involve the establishment of reservations through rule-making, but rather involved the agency's decisions on individual permit applications.

As explained in Sections IV.B.1 and IV.B.2.c, above, the PCHB cases involving OCPI, in which Ecology applied and interpreted the statutory exception, involved challenges to Ecology's decisions on individual water right permit applications, rather than challenges to water management rules. By contrast, in the present case Ecology applied OCPI to establish reservations of water for multiple potential water users in a specific watershed. Water management rule-making, which considers the allocation of water over an entire region, is an entirely different context than permitting for individual water uses. The Rule Amendment involves the first time that Ecology applied OCPI in the context of watershed rule-making. Thus, Ecology's application of OCPI in the rule-making context does not reflect any change in Ecology's policy. As the agency charged by the Legislature to administer the state's water management system, Ecology has specialized expertise that should be afforded deference by the Court in this case. *Port of Seattle*, 151 Wn.2d at 593 ("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.").

C. Ecology's Inclusion Of Accounting Provisions That Estimate That Each New Single Domestic Water Use Will Use 350 GPD Was Not Arbitrary And Capricious

The Tribe challenges the superior court's ruling that it was not arbitrary and capricious for Ecology to establish a standard figure of 350 gpd for debiting water used by single family homes from water

reservations under the “accounting” provisions of the Amended Rule. Appellant’s Opening Br. at 45-50. This attack on the 350 gpd standard, and the related provision that precludes single family homes from having to meter and report water use, is without merit. Ecology’s selection of this standard was based on a reasonable estimate of how much water is actually used by single family homes in rural Skagit County; an estimate which is amply supported by the record in this case. As such, the Tribe cannot meet its burden to prove that the inclusion of the 350 gpd accounting standard in the Amended Rule was “willful and unreasoning and taken without regard to the attending facts and circumstances.” *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 905.

The crux of the Tribe’s argument is that “[t]he limited nature of the reservations was an essential part of DOE’s OCPI finding,” and that “despite the critical importance of these limits, the amended Rule allows actual appropriations to exceed them.” Appellant’s Opening Br. at 45-46. The Tribe is correct that the reservations are limited, and that their limited nature was pivotal to Ecology’s finding of OCPI. However, the Tribe errs in asserting that the 350 gpd standard underestimates actual water use and, thus, will cause the reserved water quantities to be exceeded. To the contrary, the record demonstrates that the accounting standards are soundly based on available data, and include safeguards to prevent the use of water exceeding the amounts allowed under the reservations.

As explained in Section III above, the Amended Rule includes provisions specifying that once Skagit River Basin water reservations are

fully allocated and used, the reservations will be closed to new water uses. WAC 173-503-073(5). Ecology is required to track new withdrawals from each reservation area and determine when water under each reservation is fully allocated and no longer available. WAC 173-503-073(7)(a). These provisions set forth a process for “accounting” of water use to ensure that use does not exceed the quantities of water that are reserved. This involves determining how much water is to be deducted (debited) from a reservation due to new homes and other new user of water, and how much water is added (credited) due to the return of water into the aquifer through recharge of water from septic systems. The provision at issue here is WAC 173-503-073(7)(b), which provides that for “permit exempt appropriations, the department will deduct a standard amount of 350 gpd for each domestic or residential service connection in a group domestic water system.” The Amended Rule does not require new water users pumping water from permit-exempt wells to serve single residences to bear the considerable expense of installing meters to measure their water use to determine precisely how much water should be debited. *See also* WAC 173-503-060(5), WAC 173-503-073(3)(d). Instead, the reservation accounting formula specifies that each new home tapping water from a permit-exempt well requires a debit of 350 gpd.

Based on data showing water use trends in areas of Skagit County and other parts of western Washington, Ecology selected 350 gpd as a reasonable estimate of the “maximum average consumptive daily use” for

a single-family residence. “Maximum average consumptive daily use” is defined as the “use of water measured *over the highest period of use* divided by the number of days in that period, less any applicable return flow recharge credit.” WAC 173-503-025 (emphasis added). Ecology relied on information provided in several reports, which are discussed below, to arrive at the standard figure of 350 gpd.

The Tribe wrongly asserts that Ecology acted in an arbitrary and capricious fashion because “the ‘standard accounting figures’ Ecology adopted are less than the consumptive water use rates estimated in the very study on which DOE said it relied.” Appellant’s Opening Br. at 46. This argument fails because Ecology did not rely solely on the study by Economic and Engineering Services, Inc. (EES) in adopting the 350 gpd standard. Ecology actually stated in its Rule-Making Criteria document that it relied upon the EES study and a separate 2004 study by the United States Geological Survey (USGS). RA002998-2999, RA000790, *see also* RA000823-825. Further, the record demonstrates that Ecology also considered, in addition to those studies, information from a variety of water system and watershed planning documents, as well as actual water use metering records. The sources considered by Ecology in adopting this standard included the EES study, the USGS study, the Draft Skagit River Watershed Plan, and the Skagit Coordinated Water System Plan. RA0040591-40596; RA006294, RA006394. Ecology fine-tuned water use figures provided in the planning documents by also considering actual water use data, based on metering records from the Skagit River

Basin and other nearby basins.¹² RA00724, RA040593. Simply put, Ecology considered a great deal of information and was not arbitrary and capricious in how it arrived at the 350 gallon per day standard figure for water use accounting purposes.

The Tribe's focus on water use estimates in the Carpenter-Fisher Subbasin as an illustration to support its position, Appellant's Opening Br. at 46-47, is flawed for two reasons. First, while the Tribe focuses on figures from the EES study in its argument, as explained above, Ecology relied on several sources of information in addition to the EES study in arriving at the 350 gpd figure. Second, the Tribe's analysis relating to the Carpenter-Fisher Subbasin fails to consider the conservative recharge rate adopted by Ecology. The Amended Rule includes a 50 percent credit for recharge to the aquifer for homes with septic systems that obtain water supply from permit-exempt wells. WAC 173-503-073(7)(c). This is a conservative figure, as reflected by a study that estimated such recharge at 51 percent to 72 percent, and numerous comments from stakeholders

¹² For example, data from PUD No. 1 of Skagit County confirms the reasonableness of the 350 gpd figure for average summer use. The data shows an average use per residence in 1993 and 2000 respectively of 184 gpd and 182 gpd, and a maximum day use of 350 gpd and 345 gpd. RA040587-89. The 350 gpd summer average is also consistent with the report of the Washington Department of Health (DOH) that identifies 350 gpd as a reasonable estimate of the *maximum day* for "developments which restrict outside irrigation uses." RA036770. Given that the *maximum day* is significantly higher than the *average summer day*, the report cannot fairly be read to conclude that 350 gpd is not a reasonable estimate of the *average summer* day use at a development if outdoor irrigation were not restricted. It should also be noted that DOH was using the 350 gpd figure as a design criteria for new water systems, which expectedly will have a conservative margin to prevent construction of systems that are unable to serve the expected needs.

that requested Ecology to adopt higher figures of 65 to 90 percent.¹³ This conservative credit figure further ensures that use of the 350 gpd debit figure will not cause reservation water quantities to be exceeded.

The Tribe also errs in asserting that Ecology erroneously used water use information from the Skagit Coordinated Water System Plan as one of the factors leading it to estimate 350 gpd. Appellant's Opening Br. at 48. The only figures available that describe water use trends by sectors of water users are provided in planning documents such as the Skagit Coordinated Water System Plan. The purpose of planning documents such as the Skagit Coordinated Water System Plan is to determine the size of water system infrastructure that will be needed to serve population growth. Such infrastructure must be sized to be able to meet the maximum daily demand, which is the highest water use day of the year. Ecology appropriately arrived at an estimate of maximum daily consumptive use that falls between the average day demand and the maximum daily demand. This represents an appropriate finding of sustained peak water use, such as the water use which occurs during the summer months.

Ecology's analysis based on data from the Samish River Watershed Plan and the Skagit Coordinated Water System Plan is fully

¹³ See RA002999, RA003154 (Well driller comments that "National average says that [recharge credit] number is 70 to 90 percent. Why does the DOE think that the Skagit basin is so different?"), RA003158 ("In the state of Colorado it is at 80%. Why is the DOE so conservative."); RA003182 (attorney for Skagit County comments that the recharge credit should be 65 percent).

supported by the record. The Big Lake Area summer use data for 2002-2004 shows that, from July through September, average summer use per residence was 258 gpd. RA00724. Actual monthly data from the adjacent Samish Basin for 2000 showed a peak month use (which presumably would be greater than the summer average) of 101 gpd per person or 262 gpd per house (assuming 2.6 persons per residence, which is the standard value). RA040591-04593.

The Tribe's argument that Ecology improperly considered the water use metering data from the Big Lake Area because such data "which are for paying, metered customers of public water purveyors, are not representative of and underestimate water use by exempt well users, who do not pay for water and whose use is unmetered" is not well taken. Appellant's Opening Br. at 48. The Tribe provides no factual basis to support its assertion that homes supplied with water from permit-exempt wells use more water than homes served by public water suppliers. Since there is no metering data for homes supplied by permit-exempt wells, the Tribe does not point to any actual data to support its theory.

Finally, the Tribe fails to acknowledge that the Amended Rule includes safeguards to ensure the accuracy of the reservation accounting system over time. Ecology reserved discretion under the amendments to apply a greater standard debit amount than 350 gpd if new information from studies or other sources shows that actual water use by homes supplied by permit-exempt wells may be higher than that figure. WAC 173-503-073(7)(c). Further, the Amended Rule reserves Ecology's

discretion to require residential users of permit-exempt wells to meter their water use if water supply situations warrant such monitoring. WAC 173-503-060(5).

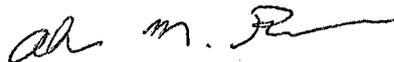
Based on the entire rule-making record, and in light of the overall accounting scheme established in the Amended Rule, it plainly was not arbitrary and capricious for Ecology to select 350 gpd as a standard debit figure for permit-exempt water use. It also was not arbitrary and capricious for Ecology to decide to rely on that figure for water accounting purposes, instead of requiring homeowners to go to the expense and trouble of installing a meter and reporting metering data to Ecology.

V. CONCLUSION

For the foregoing reasons, the Tribe has not met its burden to demonstrate that Ecology acted in a fashion that either exceeded its statutory authority or was arbitrary and capricious in adopting the provisions of the Skagit River Basin Instream Flow Rule Amendment. Ecology respectfully requests the Court to affirm the superior court's decision and uphold the validity of the Amended Rule.

RESPECTFULLY SUBMITTED this 8th day of July, 2011.

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY cm
DEPUTY

SWINOMISH INDIAN TRIBAL
COMMUNITY, a Federally Recognized
Indian Tribe,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Respondent.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 8th day of July
2011, I caused to be served Respondent Department of Ecology's
Response to Appellant's Opening Brief in the above-captioned matter
upon the parties herein as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of July 2011, in Olympia, Washington.

Handwritten signature of Liz Smith in cursive script.

LIZ SMITH
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