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SUPREME COURT OF THE STATE OF WASHINGTON

SWINOMISH INDIAN TRIBAL COMMUNITY, a Federally Recognized
Indian Tribe,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

WASHINGTON WATER UTILITIES COUNCIL'S
AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

Amicus curiae Washington Water Utilities Council (“WWUC”) asks the Court to affirm the superior court decision below. Appellant Swinomish Tribal Community (the “Tribe”), eight Indian tribes (“Amicus Tribes”),¹ and the Center for Environmental Law and Policy (“CELP”) misinterpret or ignore key statutory provisions and mischaracterize the Department of Ecology’s (“Ecology”) delegated authority to adopt and amend administrative rules setting minimum instream flows and to apply the exception from those flows for overriding considerations of public interest (“OCPI Exception”). As stated in further detail below, the Court should reject their arguments.

The Legislature has delegated to Ecology authority to manage the state’s water resources consistent with statutory mandates while concurrently addressing the broad goals and multiple values identified in the Water Code. Specifically, the Water Code calls for water resource management that balances among the often competing needs of various interests, including people, farms and fish. Instream flow rules and the OCPI Exception are tools that are available to Ecology to accomplish this task.

Despite the fact that instream flow rules are administrative rules,

¹*Amici* are the Nooksack Tribe, the Lummi Nation, the Squaxin Island Tribe, the Port Gamble S’Klallam Tribe, the Jamestown S’Klallam Tribe, the Tulalip Tribes, the Lower Elwha Klallam Tribe, and the Puyallup Tribe of Indians.

Appellants² seek to freeze those rules in time and unreasonably restrict Ecology from amending the rules or applying the OCPI Exception. While instream flow rules are protected from impairment from new appropriations like traditional water rights, the interpretation advanced by the Appellants is inconsistent with the Water Code. It would put protection of fish above all other interests and would restrict Ecology's efforts to manage the resource in a manner that is consistent with the wide-ranging goals set by the legislature.

II. IDENTITY AND INTEREST OF AMICUS

The WWUC is the state association of Washington water utilities and includes more than 180 cities, water-sewer districts, public utility districts, mutual and cooperative and investor-owned water utilities that together serve over 80 percent of the state's population. A detailed statement of WWUC's interest in this matter is included in WWUC's Motion for Leave to File Amicus Curiae Memorandum filed concurrently with this memorandum and is incorporated herein by reference. In short, the WWUC and its members have a direct interest and a long history of involvement in Washington water law and Ecology's administrative powers. WWUC members own water rights that draw from watersheds that are subject to instream flow restrictions. Significant regional municipal drinking water sources have recently been approved where

² Even though the Tribe is the only Appellant in this matter and Amicus Tribes and CELP are *amicus*, we refer to the Tribe, Amicus Tribes and CELP collectively as "Appellants," for ease of reference.

Ecology applied the OCPI Exception. Accordingly, WWUC members have a direct interest in issues related to the interpretation of instream flow restrictions and the extent to which Ecology can utilize the OCPI Exception.

III. STATEMENT OF THE CASE

WWUC incorporates herein by reference Ecology's statement of the case in Section III of its Response Brief.

IV. ARGUMENT

A. Minimum Instream Flow Levels Established by Ecology Rule Are State-Held Water Rights that Are Subject to Amendment by the Agency.

In their briefs, Appellants mischaracterize the nature of instream flows, portraying them as perfected agency rules that are immutable. While minimum instream flow rules function as water rights and are protected from impairment by junior appropriators, they are agency regulations that are different in key respects from traditional water rights. Notably, they are subject to amendment by the agency. To hold that instream flow rules are frozen in perpetuity, as the Appellants urge, is inconsistent with axiomatic principles of agency law and specific provisions of the Administrative Procedure Act ("APA")³ and the Water Code. The Appellants' interpretation would prohibit Ecology from accomplishing its delegated task of managing the water resource to provide and secure "sufficient water to meet the needs of people, farms,

³ Ch. 34.05 RCW.

and fish.” RCW 90.54.005.

B. Minimum Flows Are Agency Rules.

Minimum instream flow rules are an important regulatory mechanism that helps Ecology protect fish and instream resources, one of the several enumerated interests the water resources program must balance. The task of setting instream flows is a legislative action that the legislature delegated to Ecology for implementation. In 1969, the legislature first authorized Ecology to establish “minimum water flows or levels for streams, lakes or other public waters...” RCW 90.22.010. In 1971, the legislature further refined the authority to set minimum flows when it adopted the Water Resources Act, ch. 90.54 RCW. This chapter includes the disputed OCPI language and confirms that “[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” RCW 90.22.020(3)(a). These statutes authorize Ecology to establish flows to protect instream resources.⁴ In subsequent years, the legislature adopted additional provisions that refer to the protection of “minimum flows” or “instream flows.”⁵

⁴ The Appellants assert that the different statutory references are meant to create different authority, only one of which is subject to the OCPI Exception. As argued in section IV.C.3 below, Appellants’ argument ignores the statutes as a whole and invents distinctions where none were intended.

⁵ See RCW 90.03.247 (“Whenever an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the levels or flows.”); RCW 90.03.347 (the establishment

Ecology establishes instream flows through a rulemaking process under the APA.⁶ The rules establish Ecology's "Instream Resources Protection Program" ("IRPP") for each watershed, including the specific flows for particular stream locations and broader management strategies. IRPP rules are deemed appropriations created by the state with "priority dates as of the effective dates of their establishment."⁷ That priority date protects the flows from impairment by other junior water rights. *Id.*

While minimum flows constitute appropriations that are protected from impairment, there are key differences between IRPP rules and traditional water right appropriations issued to water users. First, to the extent that IRPP rules function as water rights, they are rights for the public held by the state and not by any specific individual water right user.⁸ By contrast, a traditional water right is a usufructuary right that "takes the character of personal property, the ownership of which rests in the appropriator."⁹ Additionally, minimum flows are established very differently than traditional water rights. Traditional water rights are

of "minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter"); RCW 90.54.180 (water needs includes "those for instream flows").

⁶ RCW 90.22.020 (flows "shall be provided for through the adoption of rules."). *See also* RCW 90.54.040.

⁷ RCW 90.03.345. *See also Postema v. PCHB*, 142 Wn.2d 68, 81-83, 11 P.3d 726 (2000).

⁸ *Lewis County Utility Corp. v. Ecology*, PCHB No. 96-043, Final Findings of Fact, Conclusions of Law and Order (Apr. 18, 1997) 1997 WL 240790 at *5 ("The rule creating these minimum flows established a right for the public...").

⁹ *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933).

subject to a detailed application process prescribed by statute and are only perfected through the actual beneficial use of the right.¹⁰ By contrast, minimum flows are creatures of the legislature. Finally, and importantly, rules establishing minimum flows can be amended for purposes of water resource management, as described in further detail below. These differences between instream flows established by rule and traditional rights are important in reviewing this case. As state-held “rights”, the IRPP rules remain subject to legislative control.

1. Ecology has clear authority to amend IRPP rules.

Once Ecology has adopted an IRPP Rule, it can amend that rule as Ecology did in this case. Under general principles of agency law, an agency that is authorized to adopt rules is presumed to have the authority to amend and update rules.¹¹ Indeed, under the state’s APA, the definition of “rule” includes the “amendment or repeal of a prior rule.” *See* RCW 34.05.010(16). Several other provisions in the state’s APA reflect this general assumption that agencies can amend and even repeal rules under their general rulemaking authority.¹²

¹⁰ RCW 90.03.250, RCW 90.03.255, RCW 90.03.260 – 290, RCW 90.03.330.

¹¹ Charles H. Koch, Jr., *Administrative Law and Practice* § 4.60[1] (3rd ed. 2010) (“An agency may determine at anytime to amend or repeal one of its rules. Agencies have inherent authority to amend their rules.”).

¹² *See* RCW 34.05.395 (establishing formatting and style requirements for “[r]ules proposed or adopted by an agency pursuant to this chapter that amend existing sections of the administrative code...”). *See also* RCW 34.05.360(3) (Order of adoption must contain “a reference to all rules repealed, amended or suspended by the rule”); RCW 34.05.330(1) (any person may petition an agency requesting adoption, amendment or repeal of a rule); RCW 34.050.328 (includes in the definition of a “procedural rule” and “significant legislative rule” the amendment of a rule).

The Water Code grants express authority to amend IRPP rules. Notably, RCW 90.22.020 discusses the adoption or “modification” of flows, indicating that Ecology can amend flows established by IRPP rules subject to notice and comment requirements:

Flows or levels authorized for establishment under RCW 90.22.010, or subsequent modification thereof by the department shall be provided for through the adoption of rules. Before the establishment or modification of a water flow or level for any stream or lake or other public water, the department shall hold a public hearing in the county in which the stream, lake, or other public water is located.¹³

Similarly, RCW 90.82.040(2)(c) establishes the process by which a watershed planning unit can petition Ecology to “establish or amend instream flows.” Thus, the Water Code specifically confirms Ecology’s general administrative authority to adjust instream flow levels through the rulemaking process.

The ability to amend IRPP rules is critical to the state’s effective management of the water resource. The legislature specifically directs Ecology to review its management and regulatory programs and “modify existing regulations and adopt new regulations, when needed and possible” to ensure the regulations are consistent with state’s water resource policy. RCW 90.54.040(2). Without the ability to amend its regulations the state cannot effectively balance between the competing interests it is directed to weigh, including “people, farms and fish.”

¹³ RCW 90.22.020 (emphasis added).

2. Neither the “first in time” principle of the prior appropriation doctrine nor *Postema* precludes amendment of IRPP rules.

The Tribe and CELP argue that it is unlawful to amend IRPP rules adopted by rulemaking pursuant to the APA. Specifically, the Appellants assert that amendment of an instream flow rule violates the “first in time, first in right” principle of the doctrine of prior appropriation¹⁴ because the amendment to a rule in this case impairs the flows adopted by the original rule.¹⁵ Appellants characterize the amendment of a rule (in this case, the amendment Ecology adopted in 2006) as a new water right that is junior to and has impaired the pre-amendment rule (in this case, the 2001 IRPP rule for the Skagit River). Extending Appellants’ theory, the prior appropriation doctrine would preclude *any* amendment to *any* rule that reduces flow levels because the amendment would always “impair” the original underlying rule. The Court should reject Appellants’ misguided theory.¹⁶

First, Appellants’ interpretation directly contradicts the basic

¹⁴ Under the doctrine of prior appropriation upon which the Water Code is based, priority between water rights is determined by seniority such that the first in time is first in right. Thus prior appropriation apportions water based on the status of a right as either junior or senior to other rights to appropriate water.

¹⁵ Tribe’s Reply Brief at 1, 11.

¹⁶ Although IRPP rules function as water appropriations, the legislature declined to afford them perpetual status akin to vested water rights held by other entities and the rules remain subject to modification. It is well established that “[n]o one has a vested right in any general rule of law or policy of legislation which gives an entitlement to insist that it remain unchanged for one’s own benefit.” *Johnson v. Cont’l W., Inc.*, 99 Wn.2d 555, 563, 663 P.2d 482 (1983).

administrative agency law principles, the APA, and the Water Code, all of which authorize Ecology to amend its rules. If Ecology were legally precluded from amending instream flows, these sections of the APA and the Water Code would be rendered meaningless.

Second, Appellants distort the statutory protection from impairment afforded to IRPP rules in RCW 90.03.345. That statute is designed to assign priority dates to instream flows and provide protection from impairment by later out-of-stream appropriations. For example, in *Postema*, the Court protected instream flows from impairment by subsequent appropriators.¹⁷ However, the statute is not designed to freeze the flows established by IRPP rules in perpetuity and restrict Ecology from ever amending the rule. As described above, instream flows established by the rule are state-created water rights that the state, in fulfilling its directive to manage the water resource, is empowered to amend.¹⁸ Appellants' theory mischaracterizes the relationship between the

¹⁷ With respect to applications for new groundwater rights, the Court confirmed that instream flows were not "limited" as to those subsequent groundwater applications and held that the "minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights and RCW 90.03.290 mandates denial of an application where existing rights would be impaired." *Postema*, 142 Wn.2d at 82. However, the principle articulated in RCW 90.03.345 and *Postema* simply does not apply to the present situation or preclude Ecology from amending its rules.

¹⁸ Indeed, the Tribe's interpretation is inconsistent with the text of the Rule, itself, which anticipates periodic review and modification. *See* WAC 173-503-140. This provision was included in the original 2001 rule. RA 041213. Thus, even if the Tribe were correct that the law generally protects the 2001 instream flow rule from impairment by its subsequent amendment, this express recognition in the original rule that Ecology can amend it is a fundamental limitation on the underlying right that expressly authorizes its own amendment. Especially with this provision in place, an amendment cannot be said to have impaired the original 2001 rule. An amendment simply implements one of the rule's express terms.

original rule and its amendment. An amendment to a rule cannot be said to have “impaired” the original, pre-amendment rule in the same way that a junior appropriation to a water right user impairs the flows. Put simply, the prior appropriation doctrine does not protect an IRPP rule from impairment by the rule’s subsequent amendment.¹⁹

The Appellants’ interpretation would prevent the State from effectively managing water resources consistent with chapter 90.54.040 RCW by precluding Ecology from amending its own instream flow rules as necessary to fulfill its statutory obligations. Appellants’ position would preclude Ecology from changing its approach to incorporate new scientific information or to choose a different policy direction with respect to balancing the needs of people, fish and farms. The Court in *Postema* rejected the general notion that Ecology cannot change its approach to incorporate new information when making decisions on water rights applications. The Court observed that precluding Ecology from relying on new information when making water resource decisions related to IRPP rules “would effectively freeze Ecology’s ability to implement the statutes, requiring it to rely on scientific knowledge which is now outdated.”²⁰ Just as the Court in *Postema* concluded that Ecology should be allowed to

¹⁹ WWUC agrees that the amendment of an IRPP rule cannot impair senior water rights. For example, Ecology cannot amend a rule where the amendment increases flows to the detriment of senior appropriations including appropriations whose priority dates are between the adoption of the original rule and the rule amendment. However, that is not the issue here, where Appellants seek to protect the rule from impairment by its subsequent amendment.

²⁰ *Postema*, 142 Wn.2d at 88. In that case, water right applicants argued that their impairment analysis should be guided by outdated methods of measuring impact.

consider new information to better manage the resource when making decisions on applications, so, too, must Ecology be allowed to amend its rules in order to better implement statutes and manage the resource.

In sum, Ecology can clearly amend its own instream flows to reach different policy conclusions regarding how to implement chapter 90.54 RCW without having to protect the original IRPP rule from its subsequent amendment. The priority date and the “first-in-time” principle do not freeze instream flow rules in their present state and prohibit future amendment. The Court should reject the Appellants’ mischaracterization. The repeated assertions by the Tribe and CELP that IRPP rules are “perfected” water rights that are immutable is incorrect, confusing, and does not help the Court to resolve this case.

3. Appellants’ theory of “perfected” administrative rules would violate the separation of powers doctrine.

Appellants’ argument that an IRPP rule creates a vested or perfected water right that cannot be amended, rescinded, or otherwise altered would freeze Ecology regulations in place in perpetuity and preclude legislative or administrative authority to change regulations. This theory of administrative rules is unconstitutional because the executive branch, acting by and through Ecology IRPP rules, would bind the legislature and preclude legislative action.

While the Washington Constitution does not contain a formal separation of powers clause, the separation of powers doctrine “recognizes that each branch of government has its own appropriate sphere of activity”

and “ensures that the fundamental functions of each branch remain inviolate.” *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009). To enforce the separation of powers doctrine, the Court examines whether the activity of one branch of government threatens the independence or integrity or invades the prerogatives of another. The Legislature may delegate authority to administrative agencies, but an agency’s power to promulgate rules “does not include the power to legislate and . . . regulations must be within the framework and policy embodied in the statute.” *Smith v. Greene*, 86 Wn.2d 363, 371, 545 P.2d 550 (1976). Any agency rules or regulations “which have the effect of extending, or which conflict in any manner with, the authority-granting statute, do not represent a valid exercise of authorized power, but, on the contrary, constitute an attempt by the administrative body to legislate.”²¹

Appellants’ theory of “perfected” administrative rules violates separation of powers for at least two reasons. First, a determination that an instream flow rule is frozen in time upon its adoption would effectively change an enactment of the legislature. Appellants’ interpretation of IRPP rules as perpetual and immutable appropriations would grant Ecology more power than contemplated by the legislature and allow Ecology to create a protected class of water rights that is not authorized by statute.²²

Second, Appellants’ interpretation would bind the legislature to

²¹ *State v. Miles*, 5 Wn.2d 322, 326, 105 P.2d 51 (1940).

²² *See Miles*, 5 Wn.2d at 326 (holding that game commission rules were an improper attempt to legislate).

Ecology's determination regarding minimum instream flows and preclude future legislative action. This would violate the separation of powers, because not even the legislature can prevent a future legislature from exercising its law-making power. The Court recently considered whether the legislature was barred from enacting an amendment that retroactively established fiscal year 2006 expenditures limited under the Taxpayer Protection Act.²³ The Court stated that "[i]mplicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power."²⁴ If the legislature itself does not have this power, then an administrative agency, which is a creation of the legislature and has only the powers granted to it by the legislature, also cannot bind a future legislature to a particular determination.

C. The OCPI Exception Is an Important Tool For the Effective Management of the Water Resource and is Not As Constrained As Appellants Contend.

The legislature has crafted the OCPI Exception to allow certain withdrawals that would otherwise interfere with minimum flows:

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.²⁵

²³ *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 299, 174 P.3d 1142 (2007).

²⁴ *Id.* at 301.

²⁵ RCW 90.54.030(3).

The OCPI Exception is one of the tools by which Ecology can balance the often competing needs of people, farms and fish.

Throughout their briefs, Appellants advance an overly restrictive interpretation the OCPI Exception in an effort to minimize its applicability. Appellants urge the Court to adopt an interpretation that favors instream resources over all else, and precludes Ecology from managing the water resource consistent with *all* of the goals articulated in RCW 90.54.020. The statutes do not support their flawed interpretation.

1. The OCPI Exception provides Ecology with meaningful authority to balance competing interests as the Legislature intended.

The OCPI Exception from minimum flows is a critical tool in achieving the legislature's goal of "providing and securing sufficient water to meet the needs of people, farms and fish" because it allows Ecology to balance those often competing interests when making decisions on individual water right applications, or when amending IRPP rules more generally.

The Water Code establishes a broad commitment to addressing various, often conflicting water resource needs. In addition to protection of instream resources, the "general declaration of fundamentals" in RCW 90.54.030 includes other interests that broadly reflect the statutory commitment in RCW 90.54.005 to provide and secure sufficient water for people, farms and fish. *See also* RCW 90.03.005. Similarly, RCW 90.54.010 provides that "water supplies are managed to best meet both

instream and offstream needs” as well as “promotion of public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values.” The OCPI Exception exists in this balanced context. The legislature directed Ecology to manage the water resource consistent with wide-ranging goals, and the Court should interpret the OCPI Exception in a manner that confirms Ecology has meaningful authority to apply the OCPI Exception in a manner that allows Ecology to effectively balance between these needs.

This distinction is important, especially to WWUC members. As noted in the statement of interests, water utilities hold water rights that are regulated by Ecology’s instream flow rules and significant regional municipal drinking water sources have recently been approved where Ecology invoked the OCPI Exception. The Appellants advance arguments that would restrict Ecology from using the OCPI Exception in this way. The water utilities that are WWUC members do not always support the balance Ecology ultimately strikes when managing the water resource and making decisions on individual applications for new appropriations and changes. However, Ecology needs to have meaningful authority to achieve its statutory objectives of balancing between competing interests. The Tribe, Amicus Tribes, and CELP ask this Court to effectively preclude Ecology from considering any interests beyond those of instream resources. The Court should reject this narrow construction of the Water Code and should recognize the wide-ranging policy goals the Legislature established. The Court should reject the Appellants’ flawed interpretation

of Ecology's OCPI authority.

2. Appellants' arguments that OCPI is only allowed to address emergencies are not supported by law.

CELP and the Amicus Tribes advance the extreme view that Ecology may only rely on OCPI in an emergency. Neither provides any case law or statutory language that supports their extremely narrow interpretation. Amicus Tribes simply quote limited, out of context excerpts from general policy statements in RCW 90.54.010 and RCW 90.54.020 that reflect solely the one interest that they want to protect exclusively, while ignoring the remainder of the statutory language. *See* Amicus Tribe Brief at 19. In fact those remaining statutory provisions recognize a wide range of interests, not merely the protection of instream resources as the Amicus Tribes imply.²⁶ CELP does not cite to any case or statute but seems to imply (on page 11 of its brief) that that the application of OCPI impairs the underlying instream flow rule. The Court should reject CELP's argument. As further described above, CELP misconstrues the amendment of the instream flow rule (which was premised on OCPI) with a new appropriation in order to argue that the pre-amendment rule should be protected from impairment by its subsequent amendment. CELP's illogical argument is not supported by law.

²⁶ *See* RCW 90.54.010 (articulating the need to ensure that "water supplies are managed to best meet both instream and offstream needs" as well as "promotion of public health and the economic well-being of the state and the preservation of its natural resources and aesthetic values"); RCW 90.54.020 (general declaration of fundamentals for management of waters of the state).

3. The terms “base flows” and “minimum flows” refer to the same regulatory mechanism that is subject to OCPI.

The Court should reject the Tribe’s and CELP’s hyper-technical argument that “base flows” are different from “instream flows.” The Tribe and CELP seize on the slightly different terminology in various statutory references²⁷ to infer a legislative intent to create different classifications of minimum flows that are governed by different rules, only one of which has an exemption for OCPI.

Contrary to the Tribe’s and CELP’s assertions, Ecology’s authority to retain “base flows” is legally equivalent to its authority to establish “instream” or “minimum flows.” Whether using the phrase “minimum water flows or levels,” “base flows,” or “instream flows,” these statutory references, when read as a whole, clearly refer to the same concept. They achieve a common purpose; namely, the protection of fish and wildlife and recreational and aesthetic values of water. For example, “minimum water flows or levels” authorized under RCW 90.22.010 are “for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters...” Similarly, “base flows” under RCW 90.54.020(3)(a) are the “flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and

²⁷ See Tribe’s Reply Brief at 13-14 (arguing that the OCPI exemption only applies to excise withdrawals that conflict with “base flows,” not “instream flows”).

navigational values.”

Additionally, both statutory references to base flows and minimum instream flows incorporate the concept of exceptions to those flows when in the public interest. Chapter 90.54 RCW includes the specific OCPI language at issue in this case, while chapter 90.22 RCW similarly incorporates a concept of “public interest.”²⁸ Indeed, several statutory provisions (including those to which the Tribe cites) equate the “base flows” under chapter 90.54 RCW with “minimum flows” as that phrase is used in chapters 90.03 and 90.22 RCW.²⁹ These statutory provisions reflect the legislature’s intent that base flows and minimum flows refer to the same regulatory mechanism.

Even *Postema* equates base flows and instream flows. The Court synonymously uses the concept of flows expressed in chapter 90.22 RCW, RCW 90.54.020(3), and RCW 90.03.345 and expressly acknowledged that the OCPI exemption in RCW 90.54.020(3) applies to that broad concept of minimum instream flows.³⁰ While the Tribe characterizes Ecology’s

²⁸ See RCW 90.22.010 (the authorization to protect minimum instream flows only exists to the extent that “it appears to be *in the public interest* to establish the same.”) (emphasis added).

²⁹ See RCW 90.82.020(3) (“‘Minimum instream flow’ means a minimum flow under chapter 90.03 or 90.22 RCW or a base flow under chapter 90.54 RCW.”); RCW 90.03.345 (the establishment of “minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations...” (emphasis added); RCW 90.03.247 (“No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive, as provided in chapter 90.03 RCW and RCW 90.22.010 and 90.54.040.”).

³⁰ *Postema*, 142 Wn.2d at 81.

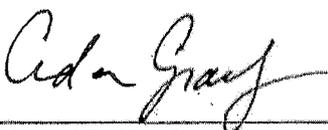
long-standing interpretation of the statutes as “untenable,” the Court in *Postema* adopted the same interpretation. It is generally accepted that Ecology’s authority to retain base flows is legally equivalent to its authority to establish minimum flows and the Legislature intended for the disputed OCPI Exception to apply to both.³¹ The Court should reject the Tribe’s and CELP’s untenable theory to the contrary.

V. CONCLUSION

For the foregoing reasons, the WWUC urges the Court to confirm that the legislature granted Ecology the authority to amend its rules setting instream flows and meaningful OCPI authority.

DATED this 11th day of October, 2012.

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³¹ *Id.* See also 23 Wash. Prac., Environmental Law And Practice § 8.61 (2d ed.) (“The water policies articulated by the legislature in 1971 in the Water Resources Act iterate the provisions of the Minimum Flows Act. The 1971 legislation permits uses of water that would conflict with the policy of maintaining flows in perennial rivers and streams and levels in lakes and ponds only if such use would serve the overriding considerations of the public interest.”)