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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and
DAVID STALHEIM, AND FUTUREWISE,
Appellants,

v.

WHATCOM COUNTY AND GROWTH MANAGEMENT HEARINGS
BOARD,
Respondents,
and

WASHINGTON STATE ASSOCIATION OF COUNTIES, SQUAXIN
ISLAND INDIAN TRIBE, CENTER FOR ENVIRONMENTAL LAW
AND POLICY, WASHINGTON REALTORS®, BUILDING
INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON
STATE FARM BUREAU, AND STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Amicus Curiae.

**APPELLANTS' ANSWER TO THE AMICUS CURIAE BRIEF OF
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

The Growth Management Hearings Board (“Board”) found that Whatcom County (“County”) failed to protect water resources as required by the Growth Management Act (“GMA”).¹ Amicus curiae State of Washington, Department of Ecology (“Ecology”) seeks to invalidate the Board’s decision. Ecology contends that its own interpretation of the law, or more accurately, the version of its interpretation that it articulates in its amicus briefs in this case, renders the Board’s decision clearly erroneous. The Board’s GMA interpretation, not Ecology’s amicus briefs, should be given “substantial weight,”² and the Board’s decision should be upheld under RCW 36.70A.070(5)(c)(iv) and 36.70A.020(10).

The GMA embodies the Legislature’s recognition that uncoordinated and unplanned growth “poses a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.”³ To “[p]rotect the environment and enhance the state’s high quality of life,”⁴ the GMA requires the County to protect and enhance water resources, including the availability

¹ AR 1367-1410, *Hirst v. Whatcom County*, Western Wash. Growth Mgmt. Hearings Bd. Case No. 12-2-0013, Final Decision and Order (June 7, 2013) (“FDO”) at 20 – 44. “AR” refers to the Certified Administrative Record prepared by the Growth Management Hearings Board. We omit the preceding zeroes.

² *Kittitas County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 154, 256 P.3d 1193 (2011) (“*Kittitas*”).

³ RCW 36.70A.010.

⁴ RCW 36.70A.020(10).

of water.

By rule,⁵ Ecology established instream flows and basin closures in Whatcom County thirty years ago. Ecology itself has determined that “[m]ost water in the Nooksack watershed is already legally spoken for,” and that water supply is challenged by “[i]ncreasing demands of water from ongoing population growth, diminishing surface water supplies, declining groundwater levels in some areas during peak use periods, and the impacts of climate change.”⁶ To protect and enhance the County’s “health, safety, and high quality of life” as the GMA requires,⁷ the Board found that the County must protect water availability.

The Board interpreted the GMA’s water resource protection requirements in the context of the Nooksack Rule’s instream flow protection requirements and the factual record before it, showing frequent and widespread unmet instream flows. The Board determined that the County’s Comprehensive Plan does not contain the measures necessary to protect closed basins and surface waters with unmet instream flows from new withdrawals by permit-exempt wells.

Ecology, however, insists that it has granted permit-exempt wells

⁵ Ch. 173-501 WAC, the Instream Resources Protection Program for Nooksack Water Resource Inventory Area 1 (“Nooksack Rule” or “Rule”).

⁶ AR 421, (Ecology, *Focus on Water Availability: Nooksack Watershed, WRIA 1*, Aug. 2011 [“*Focus on Water Availability*”] at 1).

⁷ RCW 36.70A.020(10).

immunity from basin closures and unmet instream flows in Whatcom County, rendering the Board’s consideration of instream flows clearly erroneous. Ecology’s amicus brief interprets the Nooksack Rule as creating an instream flow water right that only exists if, when, and to the extent that junior permit-exempt well users do not want to withdraw water. If Ecology’s amicus brief interpretation is upheld, junior permit-exempt wells in hydraulic continuity with closed basins and unmet instream flows must be allowed to withdraw water – down to the last drop. Ecology’s amicus brief interpretation thus would protect junior permit-exempt wells from senior instream flows, rather than protecting instream flows from junior water withdrawals, as state law requires.

This interpretation violates the state law of prior appropriation, which governs the relationship between senior and junior water rights.⁸ It also conflicts with this Court’s ruling that instream flow water rights are not limited rights⁹ that may be subjected to piecemeal impairment by junior withdrawals.¹⁰

Ecology does not ground its interpretation in state law, however. It

⁸ RCW 90.03.010.

⁹ *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 91, 11 P.3d 726 (2000) (“*Postema*”).

¹⁰ *Id.* at 89. As discussed below, in Section II.A.1, there is a single “narrow” statutory exception that would allow the impairment of instream flows in Whatcom County: the establishment of “overriding concerns of the public interest” (“OCPI”). Ecology has never explained why it believes that Nooksack instream flows may be impaired without an OCPI analysis. It merely “interprets” the OCPI requirement out of state law.

simply declares that it has “discretion”¹¹ to interpret the Nooksack Rule as creating a partial, limited instream flow water right that is subservient to junior permit-exempt water withdrawals. Ecology supports this broad assertion of discretion solely through new, post-record testimony of its own “intent”¹² when it adopted the Rule in 1985.

According to Ecology, it never “intended” to protect instream flows from junior permit-exempt wells because it believed, when it adopted the Rule in 1985, that permit-exempt wells would not impair instream flows. This belief, Ecology testifies, was founded in the obsolete, inaccurate groundwater science of the time.¹³ In the present case, thirty years later, Ecology interprets the Rule as if the mistaken beliefs of a previous generation had not been superseded by developments in science and the law. In short, Ecology claims an unwarranted “vested right to ignorance”¹⁴ in interpreting the Nooksack Rule and the GMA – and then demands deference to this interpretation.¹⁵

The world has not stood still in the past thirty years, and state law does not support Ecology’s effort to interpret the Nooksack Rule as if the clock stopped in 1985. Ecology’s own interpretations of the Nooksack

¹¹ State of Washington, Department of Ecology Amicus Curiae Brief, Wn. Supreme Ct. No. 91475-3 (Sept. 4, 2015) (“Ecology Amicus Brief”) at 20.

¹² *Id.* at 10.

¹³ *Id.* at 19-20.

¹⁴ *Postema*, 142 Wn.2d at 91, fn. 7.

¹⁵ Ecology Amicus Brief at 12.

Rule, prior to filing its amicus briefs, acknowledge this reality by reflecting changes in science and the law. As discussed further below, Ecology's guidance document on the Nooksack Rule, which is part of the administrative record before the Board,¹⁶ correctly states that closed basins are closed to all junior groundwater withdrawals. Ecology's 2013 interpretation of a similar instream flow rule in the *Squaxin Island Indian Tribe* case¹⁷ is consistent with the Board's decision, but inconsistent with Ecology's amicus brief interpretation in this case.

The Board's decision, and not Ecology's amicus brief interpretation, is consistent with both the GMA and state water law. The Board's interpretation of the GMA should be upheld under RCW 36.70A.070(5)(c)(iv) and 36.70A.020(10).

II. ARGUMENT

A. The Board's Decision is Consistent with Both the GMA and State Water Law, Including the Water Resources Act of 1971, Chapter 90.54 RCW.

1. The Nooksack Rule's Requirements to Retain, Protect, and Enhance Instream Flows Applies to Permit-Exempt Wells.

Ecology recognizes that the Nooksack Rule establishes instream

¹⁶ See Section II.B, below.

¹⁷ *Squaxin Island Indian Tribe v. Dept. of Ecology*, 177 Wn. App. 734, 737, 312 P.3d 766, 768 (2013) ("*Squaxin Island Indian Tribe*"). See also *Squaxin Island Indian Tribe Amicus Curiae Brief*, Wn. Supreme Ct. No. 91475-3 (Sept. 4, 2015) ("*Squaxin Island Indian Tribe Amicus Brief*").

flows and basin closures in Whatcom County.¹⁸ Ecology concedes that the Board correctly interpreted the GMA's legal principles as requiring the protection of instream flows.¹⁹ The County's Comprehensive Plan includes no measures requiring the protection of instream flows from development relying on permit-exempt wells in areas of basin closure and unmet instream flows. Yet Ecology nonetheless claims, incorrectly, that the County's Comprehensive Plan is "consistent" with the Nooksack Rule²⁰ and therefore complies with the GMA.

Ecology fails to address the inconsistency of the County's Comprehensive Plan with the Nooksack Rule's unequivocal statements that:

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

. . .

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. . . . 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 . . .²¹

This provision of the Nooksack Rule reflects the requirements of

¹⁸ Ecology Amicus Brief at 13 (the Nooksack Rule "establishes minimum instream flows for all of the stream management units").

¹⁹ *Id.* at 5.

²⁰ *Id.* at 2.

²¹ WAC 173-501-020, citing Ch. 90.54 RCW (emphasis added). *See also Swinomish Indian Tribal Community v. Dept. of Ecology*, 178 Wn.2d 571, 594-95, 311 P.3d 6 (2013) ("*Swinomish*") (emphasizing that subsequent legislation has confirmed "the importance of minimum flow rights").

the “relevant statutory scheme,”²² including the Water Resources Act of 1971, Chapter 90.54 RCW (“Water Resources Act”).

Addressing the Water Resources Act’s unambiguous requirements, this Court recently stated that “withdrawal of water necessary to maintain minimum flows impairs an existing water right, contrary to law.”²³ Ecology nonetheless contends (without citation to any case or statute) that it has “discretion”²⁴ to interpret the Nooksack Rule as allowing permit-exempt wells to impair instream flows.

Ecology fails to address the fact that the relevant statutory scheme only provides one “narrow exception” to the requirement to protect instream flows from impairment by subsequent withdrawals. This exception “is found in the statute that permits impairment of minimum flows set by rule in situations where it is clear that overriding considerations of the public will be served.”²⁵ Ecology has never established that overriding considerations of the public interest (“OCPI”) allow permit-exempt wells to impair instream flow water rights in Whatcom County.²⁶ State law provides for no other exception, and

²² *Postema*, 142 Wn.2d at 84.

²³ *Swinomish*, 178 Wn.2d at 578-79.

²⁴ Ecology Amicus Brief at 20.

²⁵ *Swinomish*, 178 Wn.2d at 602, referring to RCW 90.54.020(3)(a).

²⁶ We raised this issue before the Court of Appeals, but the court failed to address it. Appellants’ Brief and Brief of Respondents, Ct. of Appeals, Div. I No. 70796-5-I (May 16, 2014) at 35-36.

Ecology's argument should be rejected on this basis.

Ecology's assertion of discretion to ensure that junior permit-exempt wells may withdraw water that impairs senior instream flows, without meeting OCPI, has statewide implications. It would allow Ecology to interpret most existing basin rules as allowing instream flow impairment by junior permit-exempt wells without an OCPI analysis.²⁷ It also would allow Ecology to adopt new rules in more than 30 basins, allowing permit-exempt wells to impair instream flows without meeting OCPI requirements.²⁸

Ecology's amicus brief interpretation of the Nooksack Rule creates a new, "discretionary" exception that is not authorized by any statute. If upheld, this broad discretion would render *Swinomish* irrelevant.²⁹

Ecology's amicus brief interpretation should be rejected.

2. Ecology's Proclamation That "The Rule Cannot be Read to Do Something That it Does Not Actually State" Does Not Justify Ecology's Interpretation.

Ecology attempts to support its "interpretation" by proclaiming

²⁷ The rules for the Snohomish, Cedar-Sammamish, Green-Duwamish, Puyallup, Nisqually, and Okanogan river basins, *inter alia*, do not specifically address exempt wells. See Chapters 173-507, 173-508, 173-509, 173-510, 173-511, and 173-549 WAC. See also Amicus Curiae Brief of the Center for Environmental Law and Policy ("CELP") supporting Hirst's Petition for Review, Wn. S. Ct. 91475-3 (May 22, 2005) at 9, fn. 9.

²⁸ "[N]o instream flow rule has been adopted in more than 30 Water Resource Areas in Washington." Amicus Curiae Brief of CELP at 10.

²⁹ In the Skagit basin, for example, Ecology could simply adopt an amended rule that fails to address permit-exempt wells. Contrary to *Swinomish*, this rule could allow permit-exempt rules to impair instream flows without having to meet the narrow OCPI exception contained in the Water Resources Act.

that “the Rule cannot be read to do something that it does not actually state.”³⁰ No citation to any case, statute, or regulation provides a foundation for Ecology’s maxim or supports its application to this case.

Two fatal flaws, discussed below, establish that Ecology’s proposed principle does not support its interpretation of the Rule.

a. State Law Governs Ecology’s Administrative Rules.

First, Ecology’s proposed maxim of rule interpretation places Ecology’s administrative regulations above state law. Nowhere does Ecology address *Postema*’s statement that “[t]he statutory requirement is that there be no impairment of existing rights, and administrative rules and regulations cannot amend or change statutory requirements.”³¹

Under *Postema*, therefore, the Nooksack Rule cannot be read to do something that state law prohibits. Ecology nonetheless reads the Nooksack Rule to create instream flows that are subject to piecemeal impairment by permit-exempt wells, contrary to state law. This interpretation violates *Postema*’s determination that such piecemeal impairment “would not preserve flows necessary to protect fish, wildlife and other environmental resources.”³²

³⁰ Ecology Amicus Brief at 19. *See also id.* at 3, incorporating a slight variation (the Rule “cannot be read to do something different than it actually states”).

³¹ *Postema*, 142 Wn.2d at 83 (emphasis added).

³² *Id.* at 89.

Ecology also argues that, under its interpretation of the Rule, “Ecology did not make the flow closures applicable to permit-exempt ground water use.”³³ *Postema* makes it clear, however, that instream flow rights are water rights. The Rule does not need to “make them applicable” to junior water withdrawals; the state law of prior appropriation governs the relationship between senior and junior water rights.³⁴ The Rule cannot be read to do something different than state law requires, and state law requires that instream flows be protected from junior permit-exempt withdrawals under the law of prior appropriation.

Rather than addressing the state law of prior appropriation, Ecology attempts to sidestep *Postema* and to divert attention from governing state law. Ecology asserts that the Board’s consideration of governing state law, including *Postema*,³⁵ is impermissibly equivalent to “judicial review of an agency rule under the APA . . . and the Rule cannot

³³ See, e.g., Ecology Amicus Brief at 2 (the Nooksack Rule “only makes its instream flows and stream closures applicable to water rights permits”); *id.* at 8 (“the Rule’s closure and minimum flow requirements are not applicable to permit-exempt wells in Whatcom County”). Ecology thus argues explicitly that it has the discretion to interpret its rules as creating partial instream flows subject to piecemeal impairment, without addressing the clear language of the Rule, of state law, or of *Postema*.

³⁴ RCW 90.03.010; *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219, 227, 858 P.2d 232 (1993) (RCW 90.44.030 “makes evident the Legislature’s intent that ground water rights [are] part of the overall water appropriation scheme, subject to the paramount rule of first in time, first in right.”)

³⁵ AR 1386, FDO at 40; and Ecology Amicus Brief at 19. Ecology claims that “Petitioners are asking the Court to rule that Ecology acted contrary to statutory authority in adopting the Nooksack Rule.” Ecology Amicus Brief at 19. Hirst, of course, is doing no such thing. Hirst is asking this Court to uphold the Board’s decision. The Board’s decision does not challenge Ecology’s statutory authority to adopt the Rule or the adoption of the Rule.

be read to do something different than it actually states.”³⁶

This is circular reasoning. Ecology attempts to position its amicus brief interpretation of the Nooksack Rule as presumptively correct and then insists that the Board (and this Court) lack jurisdiction to address any state law that undermines the interpretation. However, Ecology’s amicus brief merely presents an argument about how state law should be interpreted. It does not, as Ecology would have it, supersede either state water law or the GMA.

Ecology provides no support for its novel proposition that its amicus arguments bar the Board from considering state law when it interprets the GMA.³⁷ To the contrary, *Kittitas* specifically found that the Board has statutory authority to resolve challenges involving water issues in land use planning.³⁸ *Kittitas* also specifically upheld the Board’s authority to “connect[] the GMA’s mandates to protect water” with state

³⁶ Ecology Amicus Brief at 19.

³⁷ In light of the fact that Ecology’s amicus briefs postdate the administrative record, Ecology appears to be arguing that the Board must wait until Ecology speaks during litigation before the Board may interpret the GMA’s water resource protection provisions. This argument is specious. The Board has the authority and obligation to interpret the GMA and is not required to wait until Ecology articulates an interpretation of its water resource regulations.

³⁸ *Kittitas*, 172 Wn.2d at 176, 181 (“Because the GMA includes requirements to protect water, the Board has statutory authority to hear petitions that challenge whether development regulations violate those GMA provisions that require a county to address water issues in its land use planning.” “The court gives ‘substantial weight’ to a board’s interpretation of the GMA. The GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA. The Board properly interpreted the GMA’s mandate to protect water . . .”) (citations omitted).

water law as interpreted by the courts.³⁹

Neither the Board nor this Court is barred from considering whether Ecology's argument complies with state law.

b. The Nooksack Rule “Actually States” That Instream Flows Shall Be Retained. It Does Not “Actually State” That Permit-Exempt Wells Are Allowed to Impair Instream Flows.

Even by its own terms, Ecology's maxim fails to support Ecology's amicus brief interpretation of the Nooksack Rule. The second fatal flaw in Ecology's argument is that the Rule does not “actually state” that junior permit-exempt wells must be allowed to impair senior instream flows. As Ecology acknowledges, “[t]he express language of the Rule pertains only to whether water rights can be established under the permitting system administered by Ecology.”⁴⁰ Extrapolating from the “express language,” Ecology argues that “[t]his emphasis on the permitting system indicates that Ecology did not intend for this Rule to govern permit-exempt groundwater use.”⁴¹

Ecology's “interpretation” of the Nooksack Rule thus is based on an inference derived from an “indication” of what Ecology “intended.” It is not based on what the Rule “actually states.”

³⁹ *Id.* at 175 (referring to the Board's interpretation of state water law as interpreted in *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 4, 43 P.3d 4 (2002)).

⁴⁰ Ecology Amicus Brief at 14-15.

⁴¹ *Id.* at 15.

The Rule does “actually state,” however, that instream flows “shall be retained,”⁴² protected, and enhanced. Ecology’s interpretation allows piecemeal impairment of instream flows and fails to implement this “actual” requirement.

3. Ecology’s Interpretation of the Nooksack Rule Relies on Outdated Science, Contrary to *Postema*.

Ecology attempts to prove its “intent” to create a partial, limited instream flow water right by emphasizing Ecology’s reliance on “the scientific understanding at the time [1985]”⁴³ Ecology testifies that it “determined [in 1985] that only permitted water uses in hydraulic continuity with streams could potentially impair instream flows.”⁴⁴ Based on its 1985 scientific understanding, Ecology argues, it “did not make the flows and closures applicable to permit-exempt uses,” relying on “its discretion to determine which types of water uses would be subject to the minimums instream flows and stream closures under the Rule.”⁴⁵

This rationale does not support Ecology’s assertion of discretion to interpret the Rule as creating a partial, limited instream flow water right. If Ecology is arguing that permit-exempt wells will not, in fact, impair instream flows, substantial evidence in the record defeats this argument.

⁴² WAC 173-501-020, *citing* Ch. 90.54 RCW (emphasis added).

⁴³ Ecology Amicus Brief at 19.

⁴⁴ *Id.* No citation to facts in the record support this testimony.

⁴⁵ *Id.* at 19-20.

The Board explicitly found that substantial evidence, including the County's own studies and decision documents, establishes that exempt wells adversely affect surface and groundwater flows. For example, in the County's Water Resource Plan, "the County reported a proliferation of rural residential exempt wells already created 'difficulties for effective water resource management' by drawing down underlying aquifers and reducing groundwater recharge of streams."⁴⁶

If Ecology intends to rely on its 1985 beliefs, its argument runs afoul of *Postema*. In *Postema*, appellants urged the Court to evaluate evidence of Ecology's intent when it adopted instream flow rules.⁴⁷ The Court rejected this argument, stating that it "would effectively freeze Ecology's ability to implement the statutes, requiring it to rely on scientific knowledge which is now outdated."⁴⁸ The Court concluded: "Nor can there be any serious thought that Ecology intended groundwater withdrawals be allowed to deplete surface streams; Ecology's aim has been to protect instream flows as required by statute."⁴⁹ Here, Ecology claims that reliance on outdated scientific knowledge provides it with

⁴⁶ AR 1348, FDO at 24, citing AR 393, Ex. C-671-D, *Whatcom County Water Resource Plan* at 49 (emphasis added).

⁴⁷ *Postema*, 142 Wn.2d at 87. In *Postema*, appellants at least cited a declaration in the administrative record. Here, Ecology merely makes an unsupported assertion of fact and can point to no relevant evidence in the administrative record.

⁴⁸ *Id.* at 88 (emphasis added).

⁴⁹ *Id.*

discretion to allow groundwater withdrawals to deplete surface streams.

Postema establishes that Ecology is wrong.

Fourteen years ago, *Postema* addressed the fact that Ecology's understanding of the effects of groundwater withdrawals in closed watersheds had changed dramatically since 1985⁵⁰ and emphasized that "[n]o party has a vested right in ignorance."⁵¹ *Postema* held squarely that "*minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows."⁵² *Postema* rejected all arguments asserting that instream flows are limited rights⁵³ and concluded that "Ecology's intent was and is to prevent interference with instream flows."⁵⁴ The Board's interpretation of the GMA incorporated these principles and should be upheld.

B. Ecology's Amicus Brief Interpretation of the Nooksack Rule Contradicts Its Interpretations of the Nooksack Rule in the Administrative Record. It Also Conflicts With Ecology's Interpretation of Similar Rules.

Ecology's amicus brief interpretation of the Nooksack Rule is a recent addition to this case. Ecology provided a conflicting interpretation

⁵⁰ *Id.* at 76 ("Ecology's understanding of hydraulic continuity has altered over time"); *see also id.* at 88 (discussing Ecology's concession that 1985 instream flow rules made incorrect assumptions about the effects of groundwater withdrawals on surface waters).

⁵¹ *Id.* at 91 fn. 6 (citation omitted).

⁵² *Id.* at 82 (emphasis in original).

⁵³ *Id.* at 83.

⁵⁴ *Id.* at 88-89.

in documents contained in the administrative record before the Board.

Notably, Ecology's published guidance on water availability under the

Nooksack Rule states:

[Specified] "surface water sources – and any groundwater connected to them – are closed year-round by the current rule to further appropriations (unless mitigated). . . . In addition to year-round closures, certain surface water bodies – and the groundwater connected to them – are closed to new withdrawals during specific times of the year . . .⁵⁵

Thus, Ecology's guidance (part of the administrative record that advised the Board)⁵⁶ correctly states that withdrawals by permit-exempt wells in hydraulic continuity with the identified water bodies would not be allowed without mitigation. Ecology's guidance further states:

The groundwater permit exemption allows certain users of small quantities of groundwater (most commonly, single residential well owners) to construct wells and develop their water supplies without obtaining a water right permit from Ecology. Such a use is only exempt from the requirement to obtain a water right permit. These water uses are subject to all other provisions of the water code including the seniority system and can be regulated to protect existing water rights.⁵⁷

"Existing water rights" of course include instream flow water rights, and Ecology's guidance thus establishes that junior permit-exempt wells may be regulated to protect senior instream flows.

Finally, Ecology's guidance defines "instream flow" as "[a] stream

⁵⁵ AR 422, (*Focus on Water Availability* at 2) emphasis added.

⁵⁶ See Board citations at AR 1362, AR 1370, AR 1371, FDO at 15, fn. 44, 23, 24 fn. 76.

⁵⁷ AR 424, (*Focus on Water Availability* at 4) emphasis added.

flow protected in a rule. These rules specify the amount of water needed in a particular place for a defined time . . . They are the flow levels needed in the river to protect and preserve instream resources and uses.”⁵⁸ The resources that need water in the Nooksack basin include “chinook, bull trout, and steelhead – [which] are listed as ‘threatened’ under the Federal Endangered Species Act.”⁵⁹ Ecology’s guidance, but not Ecology’s amicus brief interpretation, recognizes Ecology’s state law obligation to protect instream flows needed by salmon and other stream-dependent species.

Ecology also provided the County with a letter to Snohomish County, stating that the letter contained “information that may be of interest and/or helpful to you.”⁶⁰ The letter is consistent with Ecology’s guidance on the Nooksack Rule and with the Board’s decision.⁶¹

Case law also supports the Board’s decision and demonstrates that Ecology’s amicus brief interpretation does not represent a settled Ecology interpretation of instream flow rules. In *Squaxin Island Indian Tribe*, the Court of Appeals agreed with Ecology’s assertion that prior appropriation

⁵⁸ AR 421, (*Focus on Water Availability* at 1) emphasis added. *See also Postema*, 142 Wn.2d at 94-95 (“Ecology is required to protect surface waters in order to preserve the natural environment, in particular ‘base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.’” RCW 90.54.020(3)(a).”)

⁵⁹ AR 480, (*WRIA 1 State of the Watershed Report, 2010*) at 11.

⁶⁰ AR 1388, FDO at 41, referencing AR 456, Ex. C-678, Ecology, Maia Bellon letter to Clay White, Snohomish County PDS (Dec. 19, 2011) at 7. *See also* AR 809, Ex. R-082 at 4 (Kasey Ignac, Ecology, email to Whatcom County PDS).

⁶¹ The Board discussed this evidence at AR 1389, FDO at 42.

prevents junior permit-exempt wells from impairing instream flows when instream flow rules do not expressly address permit-exempt wells.⁶² The court held that permit-exempt wells “are subject to the priority system; thus, permit-exempt wells may not impair senior surface water rights such as instream flows. RCW 90.44.030.”⁶³ Ecology’s shifting interpretations of its instream flow rules are further discussed in the Amicus Brief of the Squaxin Island Indian Tribe.

The GMA does not require the Board to adopt an interpretation of the Nooksack Rule that conflicts with Ecology’s own interpretations as contained in the administrative record before the Board.⁶⁴ Furthermore, as discussed in our Supplemental Brief, the Administrative Procedure Act prohibits reversal of the Board’s decision based on the evidence and testimony presented, for the first time, in Ecology’s amicus briefs.⁶⁵

C. Ecology’s Interpretation of the GMA Is Not Entitled to Deference.

Ecology’s amicus brief includes a lengthy soliloquy expressing Ecology’s unsupported opinion that the GMA allows instream flows to be impaired whenever Ecology decides to “interpret” its rules as allowing

⁶² 177 Wn. App. 734, 737 fn. 3 (2013).

⁶³ *Id.*

⁶⁴ See *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 785, 947 P.2d 732 (1997) (Court rejected, on the merits, an Ecology argument that was raised for the first time during litigation and that was not consistent with evidence provided to the Pollution Control Hearings Board).

⁶⁵ Supplemental Brief of Appellants, No. 91475-3 (Aug. 7, 2015) at 15-17

impairment.⁶⁶ Ecology further argues that its “interpretations” of its water resource regulations solely determine the scope of the GMA’s water resource protection requirements.⁶⁷

Under Ecology’s argument, where Ecology has not adopted basin rules, the GMA water resource protection provisions have no force and effect. Ecology is wrong. As *Kittitas* expressed clearly, the GMA is not a mere appendage to Ecology’s water resource regulations. Ecology “ought to assist” counties in their planning activities,⁶⁸ but the GMA imposes planning obligations on the County, not Ecology.⁶⁹

The Board, not Ecology, is entitled to deference in interpreting the GMA’s water resource protection requirements, and the Board’s interpretation should be upheld.

III. CONCLUSION

Where water scarcity imposes limits on new users, as in Whatcom County, there is a strong incentive to dip into public instream water rights. And yet, as Chapter 90.54 RCW provides and *Swinomish* emphasized,

⁶⁶ Ecology Amicus Brief at 9-11.

⁶⁷ *Id.* at 9 (arguing that, under *Kittitas*, a county complies with the GMA’s land use planning requirements if its development regulations are consistent with Ecology’s “interpretations” of its water resource regulations).

⁶⁸ *Kittitas*, 172 Wn.2d 144 at 180.

⁶⁹ RCW 36.70A.050(5)(c)(iv).

*“instream resources and values must be preserved and protected so that future generations can continue to enjoy them.”*⁷⁰

The GMA similarly embodies the Legislature’s recognition that “the health, safety, and high quality of life enjoyed by residents of this state”⁷¹ requires the protection of water resources, including instream resources and values. We respectfully request this Court to uphold the Board’s interpretation of the GMA, which protects instream resources for future generations as required by both the GMA and Chapter 90.54 RCW.

Respectfully submitted on this 6th day of October, 2015.

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⁷⁰ RCW 90.54.010(1)(a) (emphasis added by *Swinomish*, 178 Wn.2d at 587).

⁷¹ RCW 36.70A.010.

DECLARATION OF SERVICE

I, Tim Trohimovich, certify that I am a resident of the State of Washington, residing or employed in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on October 6, 2015, I caused the following documents to be served on the following parties in the manner indicated: Appellants' Answer to the Amicus Curiae Brief of State of Washington, Department of Ecology in Case No. 91475-3.

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Signed and certified on this 6th day of October, 2015,

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Tim Trohimovich

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Subject: Answers to Amicus Briefs in Case No. 91475-3 Hirst et al. v. Whatcom County

Dear Sirs and Madams:

Enclosed please find for filing:

1. The Hirst and Futurewise Appellants' Answer to the Amicus Curiae Brief of State of Washington, Department of Ecology in Case No. 91475-3 *Hirst et al. v. Whatcom County*.
2. The Hirst and Futurewise Appellants' Answer to the Amicus Curiae Briefs of Washington Realtors®, Building Industry Association of Washington, Washington State Farm Bureau, and Washington State Association of Counties in Case No. 91475-3 *Hirst et al. v. Whatcom County*.

We are also serving them as indicated in the Certificates of Service. Please contact me if you need anything else.

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