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SUPREME COURT OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF ECOLOGY

Petitioner,

v.

CENTER OF ENVIRONMENTAL LAW & POLICY; AMERICAN
WHITEWATER; and SIERRA CLUB,

Respondents.

AMICUS BRIEF OF THE WASHINGTON KAYAK CLUB AND
PADDLE TRAILS CANOE CLUB

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I. Introduction

The Washington Kayak Club and Paddle Trails Canoe Club respectfully offer the following arguments regarding Washington's and other States' water resources statutes, cases, and regulations, for the benefit of the Court in determining how such laws protect instream flows in the Spokane River.

II. Identity and Interests of Amicus Curiae

Amicus curiae Washington Kayak Club is a membership-based, non-profit corporation, founded in 1948. It is the Club's mission to promote public goodwill and understanding of paddle sports and to foster its safe development in the Pacific Northwest; to encourage exploration and recreational use of rivers and other waters by offering training and instruction, by developing and providing expert leadership and by scheduling trips throughout the year; and to encourage, aid, and promote the conservation of water resources and adjacent lands for recreational purposes. The Washington Kayak Club has a website at: wakayakclub.clubexpress.com.

Friend of the court Paddle Trails Canoe Club is a nonprofit corporation, founded in 1970. Its mission is to encourage paddling in an environment emphasizing safety, skill development, fellowship and

environmental stewardship. The Club maintains a comprehensive website at: paddletrails.org.

Members of both Clubs navigate on rivers and flatwater throughout the year and throughout the State of Washington. The Clubs have a direct interest in the Spokane River instream flow rule, Ch. 173-557 WAC. The Spokane River rule is authorized by the Water Resources Act of 1971, Ch. 90.54 RCW, and the Minimum Flows Act, Ch. 90.22 RCW, which direct the Department of Ecology to establish water levels to protect, *inter alia*, recreational, and aesthetic use of Washington's rivers. The Clubs rely on protection of instream flows as a way to promote and enjoy recreational boating on behalf of their members.

III. Statement of the Case

The Clubs concur with and adopt the statement of the case set forth in the Respondents' Answer to Petition for Review, dated October 10, 2019, at 2-6.

IV. Argument

A. The Water Resources Act of 1971 and the Minimum Flows Act of 1969 are unique and important statutes to protect recreational use of Washington's rivers.

The Washington State Constitution and various statutes and court decisions have established rights of public use of Washington's public waterways. Article XVII, Section 1 of the State Constitution declares

public ownership of “the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.”

The Court has interpreted this constitutional provision as the source of Washington’s Public Trust Doctrine, which guarantees public rights of access and use of the state’s navigable waterways. “[T]he sovereignty and dominion over this state’s tidelands and shorelands, as distinguished from title, always remains in the state and the state holds such dominion in trust for the public. It is this principle which is referred to as the ‘public trust doctrine.’” *Caminiti v. Boyle*, 107 Wash. 2d 662, 669-70, 732 P.2d 989 (1987).

The public’s interest in using and accessing such vital natural resources includes the right “of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.” *Id.* (quoting *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969)); *see also Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, XX, 413 P.3d 549, 554-55 (2018) (affirming public rights of navigation under the public trust doctrine).

The court eloquently stated the importance of instream flows for aesthetic and recreational purposes:

How does one put a dollar value on being in the presence of crystal-clear water coursing down a steep slope through a rock-lined, moss-edged stream bed among evergreen trees, for example? While commercial uses of the state's instream flows might be made – tourism and paid-for recreation, for example – such uses do not entail the total benefits derived from streams and lakes.

Swinomish Indian Tribal Community v. Dep't of Ecology, 178

Wash.2d 571, 600 n. 15, 311 P.3d 6 (2013).

The public right to boat on Washington's waterways can, however, be derogated through diversions and extractions, which are capable of destroying navigation on state rivers. This is why the Legislature enacted the Water Resources Act of 1971, reaffirming recreational use of waterways as a beneficial use of water,¹ and then mandated the retention of base flows necessary to protect instream uses of waterways, including navigational values. RCW 90.54.020(1) and (3)(a)² and RCW 90.22.010.

¹ RCW 90.03.290 requires a finding of beneficial use before issuance of a permit to withdraw water.

² See Barwin, Robert F., Kenneth Slattery and Steven J. Shupe, "Protecting Instream Resources in Washington State" at 5-6 (1988), in *Instream Flow Protection in the Western United States: A Practical Symposium (March 31-April 1)*, online at <http://scholar.law.colorado.edu/instream-flow-protection-in-western-united-states/11>.

Several statutes and regulations govern aspects of recreational boating in Washington³ which shows the importance the Legislature places on recreational boating. However, it is only the Water Resources Act that addresses the conflict between maintaining instream flows for navigation and the extraction of flow through water rights.

RCW 90.54.020(3)(a) (mandating instream flows that protect recreation and navigation); RCW 90.03.247 (new water rights must be conditioned on previously adopted instream flows).

Ecology's role in evaluating and determining appropriate instream flows is exclusive. "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 ..." RCW 90.03.247.

Ecology may also impose recreation flows as conditions of hydropower licenses using the Clean Water Act Section 401 Certification process. 33 U.S.C. § 1341; RCW 90.48.260 (authorizing Ecology to implement federal Clean Water Act programs). However, the 401 Certification process is distinguishable because it applies solely to federal

³ See for example RCW 4.24.200-.210 (limiting landowner liability to recreational boaters), RCW 79A.05.380, *et seq.* (state water recreation trail program), and WAC 173-201A-200(2) (establishing recreational use as a beneficial use under state water quality standards).

permits for, most commonly, dam operations and is binding only on the permittee. In contrast, the instream flows adopted under Chs. 90.22 and 90.54 RCW provide generally applicable protections for instream uses and are specifically binding on the subsequent issuance of water rights. RCW 90.03.247(1)(a); RCW 90.03.345; *Swinomish Indian Tribal Comm'ty v. Wash. Dept. of Ecology*, *supra* at 578-79 (“minimum flows and levels established by administrative rules ... are appropriations of water with priority dates of the rules' adoption, and therefore water necessary to meet established minimum flows and levels is unavailable for appropriation to other uses.”)

Ecology's argument that it need only consider fishery needs when setting flows is unavailing. Ecology's position is contrary to the mandate of the Water Resources Act, that state waterways “shall be retained with base flows necessary to provide for preservation of ... navigational values,” RCW 90.54.020(3)(a), which is mandatory and dispositive of the question before the Court. Further, RCW 90.54.020(1) does not define any one beneficial use as more important than any other. By defining recreational uses as beneficial, the Legislature therefore placed them on an equal footing with withdrawals of water for consumptive uses.

As a corollary, state water quality regulations, which protect multiple instream uses of rivers, also designate both fisheries and

recreation as protected uses and do not subordinate one to the other. WAC 173-201A-200. These water quality standards relate to the same statute that mandates flow protection here: RCW 90.54.020(3)(a). *Wash. Dept. of Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 189, 192, 849 P.2d 646 (1993). Ecology's instream flow setting process is unique in the protections it affords to recreational navigation on Washington's rivers. It is critically important, when Ecology adopts new flow rules, that the agency independently study, evaluate and quantify recreation flow needs.

B. Interpretation of Ecology's Statutory Duty to Protect Recreational Flows is a Matter of Import for Future Instream Flow Rules.

This appeal has import beyond resolution of the Spokane River instream flow controversy. Specifically, the Department of Ecology has not yet adopted instream flows for roughly half of Washington's watersheds. To implement the instream flow program, Ecology administratively sectioned Washington into 62 watersheds, referred to as Water Resource Inventory Areas or WRIAs.⁴ WAC 173-500-990 (map). As indicated in WAC Chapters 501 through 563, flow rules have been adopted for only 27 of these watersheds.⁵ The current status of flow rules

⁴ Two additional flow rules are adopted for the mainstems of the Columbia and Snake Rivers. See WAC Chs. 173-563 and -564.

⁵ WAC 173-539A addresses groundwater in Upper Kittitas County and does not include instream flows; WAC 173-531A governs the McNary

is illustrated in Ecology's online WRIA map.⁶ There remain many watersheds where instream flow rules are yet to be adopted, including a large swath of eastern Washington, south-central Washington, and the northern Olympia peninsula⁷ which are all important for recreational boating.

Ecology's informal policy to exclude consideration of recreational use of rivers when setting flows has tremendous significance for the public's ability to use and enjoy a substantial portion of Washington state waterways. We agree with Division 2 that, where conflicts between different instream uses exist, then Ecology must engage in a balancing process and may well decide in favor of the biological use. See *Ctr. for Env'tal Law & Policy v. Wash. Dept. of Ecology*, 9 Wn. App. 2d 746, 765

pool in the Columbia River and defers instream flow conditions to WAC Ch. 173-563, the Columbia River mainstem flow rule.

⁶ See

<https://apps.wr.ecology.wa.gov/docs/WaterRights/wrwebpdf/wsisf.pdf>.

⁷ Specifically, instream flow rules have not been adopted in WRIAs 2 (San Juan), part of 3 (Samish), 16 (Skokomish-Dosewallips), part of 18 (Elwha), 19 (Lyre-Hoko), 20 (Sole Duc), 21 (Oucets-Quinault), 24 (Willapa), 29 (Wind-White Salmon), 30 (Klickitat), 31 (Rock-Glade), 33 (Lower Snake), 35 (Middle Snake), 34 (Palouse), 36 (Esquatzel Coulee), 40 (Alkali-Squilchuck), 41 (Lower Crab), 42 (Grand Coulee), 43 (Upper Crab-Wilson), 44 (Moses Coulee), 47 (Chelan), 50 (Foster), 51 (Nespelem), 52 (Sanpoil), 53 (Lower Lake Roosevelt), 54 (Lower Spokane), 56 (Hangman), 58 (Middle Lake Roosevelt), 60 (Kettle), 61 (Upper Lake Roosevelt), and 62 (Pend Oreille). In addition, state instream flows have not been set for streams and rivers in the Yakima watershed, comprising WRIAs 37, 38, and 39.

(2019). That does not, however, authorize Ecology to ignore uses other than fisheries, particularly when those uses are called out in statute as is navigation. RCW 90.54.020(3)(a).

C. Other States recognize the importance of recreation in setting instream flow.

States from Vermont to Hawaii include recreation in their analytical structure and balancing of the interests establishing instream flows. *In Re Morrisville Hydroelectric Project Water Quality*, 2019 VT 84 (2019) The Vermont Supreme Court rejected the fish-recreation dichotomy in an agency assessment of water quality designated uses and requiring consideration of whitewater recreation needs.

The Hawaii Supreme Court, *In re Ground Water Management Area*, 128 Hawaii 228, 287 P.3d 129 (2012) pointed out in particular, the definition of instream flow standard states that it is “a quantity or flow of water or depth of width which is required.”

Like Washington, “The Hawaii State Water Code lists several protected instream uses, which include, but are not limited to: (1) Maintenance of fish and wildlife habitats; (2) Outdoor recreational activities; (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation; (4) Aesthetic value such as waterfalls and scenic waterways; (5) Navigation; (6) Instream hydropower generation; (7) Maintenance of water quality; (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and (9) The protection of traditional and customary Hawaiian rights. HRS § 174C-3.

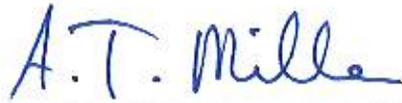
See also Colorado - FLOWS, RECREATION AS BENEFICIAL USE, AND THE PUBLIC INTEREST IN COLORADO WATER LAW University of Denver Water Law Review Spring, 2005 8 U. Denv. Water L. Rev. 517. It is clear that water flowing for recreation is a beneficial use of rivers and streams that must be considered in the balance of setting instream flows.

V. Conclusion

For the foregoing reasons, the Washington Kayak Club and Paddle Trails Canoe Club respectfully urge the Court to uphold the Court of Appeals opinion and remand the rule to Petitioner for reconsideration of the 850 cfs summer instream flow for the Spokane River.

RESPECTFULLY SUBMITTED this 15th day of April, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I caused this document to be served on the following individuals in the manner listed below:

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