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SUPREME COURT NO. 97684-8

COURT OF APPEALS NO. 51439-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, AND SIERRA CLUB,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND JAY INSLEE,

Respondents.

STATE OF WASHINGTON'S RESPONSE TO APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants challenge a portion of an Ecology water management Rule for the Spokane River and Spokane Rathdrum Prairie Aquifer that establishes summer minimum instream flows in the lower part of the river at 850 cubic feet per second (cfs), WAC 173-557-070.

Boiled down, Appellants' challenge is little more than a thinly veiled effort to judicially force Ecology to establish optimal flows for Appellants' preferred use of the river, recreational boating, and to judicially superimpose the quasi-constitutional public trust doctrine on the statutes that govern Ecology's water management rulemaking activities. These arguments fail, first because Ecology adopted the Rule consistent with the express language of its statutory authorities to establish minimum flows for the river that preserve numerous instream values, including recreational boating and navigation, using the long-accepted scientific Instream Flow Incremental Methodology (IFIM). This Court long-ago held that IFIM is appropriate for establishing minimum, and not optimal, flows. *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cty.*, 121 Wn.2d 179, 202–203, 849 P.2d 646 (1993), *aff'd* 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (*Elkhorn*). The comprehensive administrative record also demonstrates that Ecology adopted the Rule through a process of reason and that the summer minimum flow supports

all instream values, including fish, recreation, aesthetics, and navigation, just not at Appellants' enhanced levels.

Appellants' public trust doctrine argument also fails because the Court also long-ago held that the doctrine does not serve as an independent source of authority for Ecology's decision-making in its water management activities. *Postema v. Pollution Control Hearings Bd.,* 142 Wn.2d 68, 98–99, 11 P.3d 726 (2000). To avoid this dispositive authority, Appellants argue that Ecology's *implementation* of its statutory rulemaking authorities violates the public trust doctrine. But this case is not a challenge to the validity of the statutes themselves; and Appellants misapprehend that rule challenges are governed by the Administrative Procedure Act (APA). RCW 34.05.570(2). The proper test of rule validity under the APA with respect to this claim is not whether the Rule is invalid because it conflicts with quasi-constitutional, or common law principles. The proper test is whether Ecology exceeded its statutory authority when it adopted the Rule. RCW 34.05.370(2)(c). As explained herein, it did not.

Finally, Appellants' argument that Ecology deliberately excluded certain information from the administrative record in an effort to "stack" the record in Ecology's favor fails because it is false. Ecology did not exclude the mere three documents that the Appellants sought to add to the record. In actuality, the superior court declined to grant Appellants'

Motion to Supplement the Record with those documents after concluding that Appellants' failed to meet their burden under RCW 34.05.562 to show that the documents should be added to the record under the statute's narrow standards. That decision is now reviewed for a manifest abuse of discretion by the superior court, which is a standard Appellants have not briefed and cannot overcome.

II. COUNTERSTATMENT OF ISSUES

Below, Appellants challenged the summer flow in the Rule as well as Ecology's decision to deny their petition for rulemaking. Appellants have not assigned error to the superior court's finding and associated conclusion that they failed to meet their burden of demonstrating that Ecology's denial of their rulemaking petition was outside of the agency's authority or arbitrary and capricious. Accordingly, that issue is waived.[1] Based upon Appellants' assignments of error, Ecology reframes the issues as follows:

1. Whether Ecology's decision to set summer flows in the Spokane River at 850 cfs exceeds Ecology's statutory authority, or is arbitrary and capricious.

2. Whether the Supreme Court's decision in *Postema* disposes of Appellants' public trust doctrine argument, and, if not, whether the Rule violates the public trust doctrine anyhow.

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[1] Where no error is assigned to a trial court's findings of fact, and such findings support the conclusions of law and judgment, judgment must be affirmed. *Tremlin v. Tremlin,* 59 Wn.2d 140, 367 P.2d 150 (1961).

3. Whether the Superior Court manifestly abused its discretion when it denied Appellants' motion to supplement the administrative record.

III. STATEMENT OF THE CASE

A. Background on the Spokane River and Rathdrum Prairie Aquifer

The Spokane River originates at the outlet of Lake Coeur d'Alene in Idaho and flows west for approximately 111 miles to the Columbia River in eastern Washington. AR 8062. The Spokane River and Spokane Valley Rathdrum Prairie Aquifer are located in eastern Washington and encompass portions of the cities of Spokane, Spokane Valley, Liberty Lake, and Millwood. AR 2978. Though the river and aquifer are a shared resource between Idaho and Washington, each state has distinct regulatory systems. AR 2979. Developing the Rule establishes Washington State's interest in this shared resource and may also serve to protect Washington's interest in the water in the river should an interstate dispute occur with Idaho. AR 63, 72, 3383, 3390.

Flows in the river are declining due to increased groundwater use from the aquifer. AR 63. The aquifer is the sole source of municipal water supply for the area and there are enough existing municipal water rights to meet future demand. AR 2979.

The river is central to both the area's economy and its sense of community. AR 2983. Recreational activities on the river include floating, fishing, wading, sightseeing, or simply enjoying the riparian corridor. Many surveys indicate the river is a central feature of the identity of the

region. The river has come to represent and reflect the community, and the aquifer that feeds it is central to the well-being and future of the river and the economy of inland northwest. *Id.*

B. How Hydroelectric Projects Govern River Flows

Avista Corporation operates five hydroelectric projects located on the Spokane River in northern Idaho and eastern Washington.[2] The Post Falls development is the uppermost project on the river. *Id.* The development includes generating facilities and impounds nine miles of the Spokane River to the outlet of Lake Coeur d'Alene. *Id.*

Importantly, Avista uses its Post Falls development to regulate flows in the Spokane River typically for six months a year starting in late June or July, after spring runoff flows have peaked and largely subsided. AR 8067. Avista regulates river flows in accordance with minimum flow requirements in its *federal license*, which incorporates other considerations of lake level, downstream flow considerations, energy demands, flood control, and upstream recreational, residential, and commercial interests. Throughout the summer recreation season, Coeur d'Alene Lake is maintained at or near an elevation of 2,128 feet. Generally during the week after Labor Day, Avista begins to release stored water at Post Falls, resulting in a gradual drawdown in lake levels. The timing of the

[2] A detailed description of each of these projects are found in the record at AR 8058–224, which is The United States of America, Federal Energy Regulatory Commission 2009 Order Issuing New License and Approving Annual Charges for Use of Reservation Lands. More specifically, see AR 8063–066.

drawdown varies annually based on flow conditions, weather forecasts, and energy demands. *Id.*

Avista, as a condition of its federal license to operate its projects, is required to implement numerous measures to protect and enhance fish, wildlife, water quality, recreation, cultural, and aesthetic resources at the project. AR 8074–078. The license requires Avista to operate the Monroe Street and Upper Falls dams to provide minimum flows of 850 cfs from June 16 to September 30 each year. AR 8074. The flows are intended to enhance aquatic habitat for rainbow trout and mountain whitefish in the Spokane River. *Id.* Avista's federal license also requires Avista to release flows for whitewater boating from Post Falls dam ranging from 3300 cfs to 5500 cfs. AR 8077. Flows that serve the recreational community occur every year on the Spokane River, but the timing and duration of those recreational flows varies. AR 2985.

To change the actual flow in the river to better suit a particular recreational use, one would need to seek changes in Avista's license because it has control over water storage and controls releases per its federal license. *Id.*, AR 8058–224. The Rule does not, and cannot, require control or release of water from storage. AR 2985. An instream flow rule does establish regulatory flows with a priority date as to other water rights, meaning new rights are subject to the flows and new rights must be curtailed when flows are not met. AR 5, 2798; RCW 90.03.247. The Rule does not, however, put water in the river or affect the exercise of existing water rights. AR 2798. Ecology rule writer Guy Gregory gave a

presentation at the public hearing for the proposed Rule in Spokane in October 2014 (AR 2789–2815) wherein he makes clear that Avista's federal license controls minimum releases to the river, and that "Ecology's Instream Flow Rule *only addresses* new junior water uses and when they are interruptible to protect the instream flow." AR 2809; *see also, e.g.*, AR 3006, Ecology's Concise Explanatory Statement and Response to Comments ("The instream flow rule does not control the hydrograph of the river."); AR 3016 ("Flow in the River is controlled largely by discharges from Avista Hydroelectric developments, regulated under the FERC license.").

C. Ecology's Development and Adoption of Instream Flows for the Spokane River

Ecology approaches instream flow rules differently in each watershed. Each rule area has unique needs due to geography, geology, population, and local water management. AR 100. As explained, summer Spokane River flows are dependent on releases from Avista's Post Falls dam.

1. Watershed planning

Ecology has been working with watershed planning groups since 1998 to develop instream flow protection for the Spokane River. AR 2984. Under RCW 90.82, the Watershed Planning Act, the Legislature recognizes that "local development of watershed plans for managing water resources and for protecting existing water rights is vital to both state and local interests." RCW 90.82.010. If a watershed planning unit reaches

consensus on instream flows during the watershed planning process, then Ecology must adopt those flows by rule. RCW 90.82.080(1)(b). If a planning unit does not reach consensus on flows, then Ecology may initiate rulemaking under the APA to adopt flows. RCW 90.82.080(1)(c).

Here, the planning unit failed to reach consensus on instream flow levels during their planning process. AR 2985.[3] Ecology thus chose to use science-based fish studies to develop the instream flow Rule. *Id.*

2. Setting instream flows

Ecology formally commenced rulemaking in January 2014. AR 72. The record reflects that Ecology engaged in a deliberative process to ultimately set summer minimum flows at 850 cfs by relying on science-based fish studies that protected fish as a baseline and that also served to protect other instream values, including recreation, navigation, and aesthetics.

In 2012, Washington Department of Fish and Wildlife (WDFW) Instream Flow Biologist Dr. Hal Beecher wrote his flow recommendations for the Spokane River, which Ecology ultimately adopted. AR 3831–841. In his summary, Dr. Beecher writes that the recommended minimum instream flow for the Spokane River is 850 cfs from June 16 to September 30. AR 3831. Dr. Beecher notes that "[i]nstream flows should address what the river needs to preserve its values and resources and

[3] The Watershed Plan for Water Resources Inventory Area 55 and 57 is in the record at AR 3421–540. At AR 3482, the plan discusses how "into the fall Avista controls the flow in the Spokane River with the Post Falls [development]."

ecological functions." *Id.* He notes how flows were developed in cooperation with Ecology with an emphasis on fish[4] and based upon the results of four scientific studies:

> In developing instream flow recommendations for the lower Spokane River, the Washington Department of Fish and Wildlife (WDFW), in cooperation with Department of Ecology (Ecology), has emphasized rainbow trout and mountain whitefish. . . .
>
> Results of several studies (EES Consulting 2007, NHC and HD 2004, Parametrix 2003a,b, Addley and Peterson 2011) provide information on trout and whitefish habitat at different flows and different seasons in the lower Spokane River.

AR 3832.[5]

The EES Consulting Study, which uses the IFIM,[6] particularly presented relationships between instream flow and fish habitat in terms of what is called "weighted usable area." Weighted usable area is a standard index that combines habitat quantity and quality in instream flow studies and is based on a number of observed fish preferences, for example, depth, velocity, and bed material at different life stages. *Id.* When considering the need to protect the maximum weighted usable area for both trout and

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[4] Mountain whitefish and rainbow trout are the species of concern, and are weighted equally. These species were identified as the principal species of concern for WRIA 54 and 57 by WDFW and this decision was supported by an established Instream Flow Technical Team guiding the study, and by the WRIA 54 and 55/57 Planning Units. Both species utilize the study area during a significant portion of their life cycle. AR 3858

[5] Each of these studies is found in the record at AR 3842, 3883, 3981, and 4157, respectively.

[6] Ecology has used the IFIM in numerous watersheds throughout the state. *See* AR 1144–168, "Instream Flow Science The Trout the whole trout & nothing but the trout So help me cod," a document by Ecology Natural Resource Scientist James Pacheco explaining in detail how Ecology sets instream flows using methodologies such as IFIM.

mountain whitefish, Dr. Beecher concluded that "a flow of 850 cfs should be protected." AR 3834. A chart in the record (included below) perfectly demonstrates how a flow of 850 cfs during this period maximizes the weighted usable area for both species.

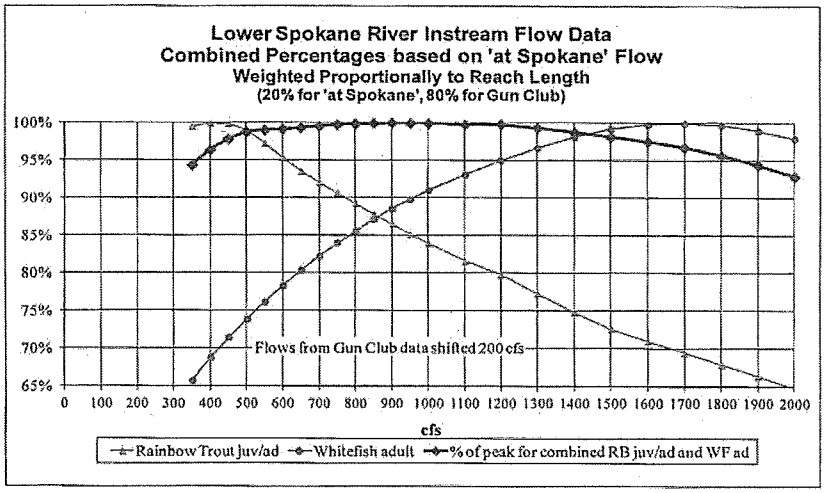

Figure 1. Modeled relationship between fish habitat (WUA) and flow in the lower Spokane River as determined by EES Consulting (2007) in a study commissioned by the Watershed Planning Unit. Juvenile and adult rainbow trout WUA, mountain whitefish WUA, and a combination of the two species were graphed in terms of percent maximum WUA. These relationships were used for recommending summer instream flow.

AR 3834, Fig.1.

The record demonstrates that Ecology and WDFW fish biologists at various times during the watershed planning process authored multiple opinions regarding flows. As they gathered more scientific data, their recommended flows were adjusted multiple times. In December 2007, Dr. Beecher wrote a memorandum wherein he recommended a summer flow of 900 cfs. AR 7749–751. In September 2008, Ecology biologist Brad Caldwell wrote a memo noting that Ecology and WDFW were having difficulty determining the correct flow to protect trout from April 1

to June 15. AR 7747–748. In December 2008, Dr. Beecher drafted a memo recommending "850 cfs as the summer flow measured at the Spokane gage." AR 7772–784. Dr. Beecher notes in his 2012 memo that recommends 850 cfs as the summer flow that WDFW has revised its prior seasonal flow recommendations based upon "new information from the Addley and Peterson study and to integrate a re-evaluation of the EES, NHC and HD, and Parametrix studies." AR 3833. The state caucus of fish biologists made it clear that they had reached consensus regarding the appropriate minimum flow values in their August 1, 2012, letter to the Watershed Planning Unit: "The recommended flows presented in this document supersede any previously presented flow number proposals from the State Caucus during the watershed planning process. Our intent is to use the revised recommendations as the basis for instream flow rule-making for the Spokane River." AR 4199.

During the Rule adoption period, Ecology received dozens, if not hundreds, of comments regarding its decision to set summer flows at 850 cfs. *See, e.g.*, AR 3025–050. Ecology responded:

> Ecology does not agree that the instream flow levels adopted in this rule are too low to protect instream resources in the Spokane River. Ecology believes the instream flows in this rule, based as they are on four independent fish studies, are science-based. The flows have been vetted by top scientists, staff, and management of all concerned state agencies. The instream flows have been reviewed and analyzed by all local Water Resource Inventory Area Watershed planning groups. **Since these flows were first proposed to the planning unit, no entity has emerged with scientific information to indicate these flows are not appropriate**. It is our opinion these flows are the best flows available to protect the instream

> resources of the Spokane River. **They are flows necessary for stream health, ecological function, and preservation of other instream resources including scenic, aesthetic, and navigational values.**

AR 3031 (emphasis added).

Ecology also responded to concerns about recreation, aesthetics, and navigational values, noting that it considered these issues at multiple stages throughout the rulemaking process, and that the subjects were addressed in detail during Avista's Federal Energy Regulatory Commission (FERC) relicensing process for their hydroelectric facilities.[7] AR 2985. The subject of recreational, aesthetic, and navigational flows was also addressed during the watershed planning process[8] and during the comment period on preliminary drafts of the Rule. Ecology noted that it had read the whitewater paddling study conducted during the Avista relicensing process, listened to many river users, and reviewed anecdotal observations, opinions, and photos submitted by whitewater enthusiasts and others. Ecology then explained in detail why it chose not to set flows based on recreational needs and why not setting flows based on those needs is not the same as not considering them:

> They [recreational flows] were considered by the department and rejected as the primary basis for establishing instream flows. Ecology chose to use science-based fish studies to develop the instream flow values for the rule when the Watershed Planning unit failed to reach consensus about instream flow values . . . . While [the flows] are based on fish habitat studies, the instream flow levels established in [the] rule will preserve wildlife,

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[7] *See* AR 8063–066.
[8] *See* AR 3484–485.

> scenic, aesthetic, and other environmental values in the Spokane River, in accordance with RCW 90.54.020.

Id.

Ecology specifically responded to comments and concerns regarding recreation (AR 3001–009), noting that "[f]lows that serve the recreational community occur every year in the Spokane River." AR 3009.[9] The agency also addressed and responded to comments on aesthetics (AR 3009–011, 3033).[10]

Following the APA rulemaking process, Ecology adopted the Rule on January 27, 2015, and the Rule became effective on February 27, 2015. AR 18130. The Rule establishes flows on the lower river, below the Monroe Street Dam, at 850 cfs. WAC 173-557-050. On February 29, 2016, Appellants submitted a Petition to Ecology requesting that Ecology amend the Spokane Rule pursuant to RCW 34.05.330. AR 10488–577. On April 27, 2016, Ecology issued a detailed response denying the Petition. AR 10598–609.

IV. STANDARD OF REVIEW

This case involves judicial review of an agency rule. Under the Administrative Procedure Act (APA), Appellants bear the burden to prove that the Rule is invalid. RCW 34.05.570(1)(a). The Court may declare a

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[9] The record shows that Ecology considered in detail the Berger 2004 Whitewater Boating Study, and how the "whitewater community is one of many uses of the Spokane River [and] [a]mong its members, a significant range of needs and desire are expressed." AR 3031–033.

[10] *See* AR 3033 ("for aesthetics, we anticipate a range of flows in the river to be representative of the needs and desires of those sampled and the entire population. No primacy among these uses exists in statute.").

rule invalid "only if it finds that: [t]he 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). Here. Appellants argue that the Rule exceeds Ecology's statutory authority and that it is arbitrary and capricious.

For rule challenges, the agency's rulemaking file serves as the record for judicial review. RCW 34.05.370(4); *Musselman v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 841, 853–54, 134 P.3d 248 (2006). "The rule-making file is necessary for effective judicial review because it contains information the agency considered contemporaneously with the adoption of the rule." *Musselman*, 132 Wn. App. at 854. The validity of a rule is determined as of the time the agency adopted it. RCW 34.05.562(1), .570(1)(b); *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 906 n.16, 64 P.3d 606 (2003).

In considering whether a rule "exceeds the statutory authority of the agency," our courts will uphold a duly enacted rule 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). Rules are presumed to be valid, and 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). Additionally, agency action is "arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 904. The reviewing court must consider the relevant portions of the rulemaking file and the agency's explanations for adopting the rule in order to determine whether the agency's action was willful and unreasoning and taken without regard to the attending facts or circumstances. *Id.* at 906. Courts are required to uphold a rule that the court deems erroneous as long as the rule was enacted with due consideration. *Id.* at 904.

Appellants incorrectly assert that Ecology's Rule is afforded no deference on judicial review. To the contrary, courts "give the agency's interpretation of the law great weight where the statute is within the agency's special expertise." *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). The Court has specifically deferred to Ecology's expertise in interpreting water resources statutes. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

Lastly, in a review under RCW 34.05.570, "the court may (a) affirm the agency action or (b) order an agency to take action required by

law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order." RCW 34.05.574(1). Appellants apparently seek only a remand to Ecology to reconsider the summer flow levels. Opening Br. at 46.

V. ARGUMENT

A. The Spokane Rule's Summer Flows are Consistent with Ecology's Rulemaking Authorities, Protect All Instream Values, and are Well-Reasoned and Supported by the Record

Despite Appellants' arguments to the contrary, the Rule is expressly consistent with Ecology's statutory rulemaking authorities and adequately protects all instream values, including recreation, navigation, and aesthetics. Indeed the methodology that Ecology used here for establishing flows was long-ago approved by the Court. Additionally, Ecology's decision to set minimum flows at 850 cfs is well reasoned and supported by the comprehensive administrative record.

1. The Rule is expressly consistent with Ecology's statutory rulemaking authorities

Ecology has exclusive authority for setting minimum instream flows by rule. RCW 90.03.247. Once established, flow rules have the status of water rights. RCW 90.03.345. Ecology derives its primary

instream flow rulemaking authority from RCW 90.22, the Minimum Water Flows and Levels Act.[11] The Act provides:

> The department of ecology may establish **minimum water flows or levels** for streams, lakes or other public waters for the purposes of protecting fish, game, birds **or** other wildlife resources, **or** recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.

RCW 90.22.010 (emphasis added). RCW 90.22.020 then provides in relevant part, "[f]lows or levels authorized for establishment under RCW 90.22.010 . . . shall be provided for through the adoption of rules."[12]

Under the plain language of RCW 90.22.010, the Legislature, through its use of the word "or" in the statute, has provided Ecology discretion to determine the purposes for which Ecology sets minimum flows. This makes perfect sense, as explained in the record, because each river, or rule area, is unique, thus requiring Ecology to approach rules differently in different watersheds. AR 100. As Ecology explains, "Ecology is not required to establish minimum flows for fish **and** recreational values or aesthetic values. The department has some

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[11] The Watershed Planning Act also authorizes and requires Ecology to set minimum flows by rule when a watershed planning unit reaches consensus on flows. RCW 90.82.080(1)(b). This did not occur here, and so rulemaking defaulted to Ecology under the APA. RCW 90.82.080(1)(c).

[12] The Water Resources Act of 1971 also provides the agency with general rulemaking authority. Specifically, RCW 90.54.040 authorizes Ecology, through the adoption of rules, to ensure as a matter of high priority "that the waters of the state are utilized for the best interests of the people, to develop and implement in accordance with the policies of this chapter a comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use."

discretion and leeway in the process." AR 2984. "As a default rule, the word 'or' does not mean 'and' unless legislative intent clearly indicates to the contrary." *Tesoro Ref. & Mktg. Co. v. Dep't of Rev.*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008). Yet here, Appellants' primary argument is that the "or" in RCW 90.22.010 should be read as an "and." This construction would remove discretion that the Legislature plainly provided to Ecology to determine the best purposes for which to set minimum flows by rule; and here Ecology properly determined to set flows on the needs of fish, a decision that is consistent with *numerous* provisions of law.[13]

Rather than acknowledging the plain language of RCW 90.22.010, which serves as Ecology's primary rulemaking authority here, Appellants instead root their challenge in the Water Resources Act of 1971, RCW 90.54, which includes a list of *general fundamentals* for utilization and management of waters of the state. Included in that comprehensive list, *inter alia*, is the general fundamental that:

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[13] *See, e.g.*, (1) RCW 90.54.005, wherein the Legislature recognizes that productive fish populations are one of three critically important water resource objectives; (2) RCW 77.57.020, which states that it is "the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state;" (3) RCW 90.22.060, which calls for establishing a statewide list of priorities for evaluation of instream flows: ("In establishing these priorities, the department shall consider the achievement of wild salmonid production as its primary goal."); and (4) RCW 90.82.070, part of the Watershed Planning Act, which calls for an assessment that includes "data necessary to evaluate necessary flows for fish," and strategies "to supply water in sufficient quantities to satisfy the minimum instream flows for fish."

> (2) 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.

RCW 90.54.020(3)(a).

This statute does not mandate that minimum flows must be *established by rule* for each listed value, which appears to be what Appellants are arguing here. It instead states the general fundamental that base flows for the preservation of these values must be maintained through Ecology's water management activities. In other words, Ecology complies with the general fundamental in RCW 90.54.020(3)(a) to preserve and protect the listed values in that statute so long as the agency's water management activities, including the establishment of minimum flows by rule under RCW 90.22, preserve base flows for the listed values in RCW 90.54.020(3)(a).

And here, the record shows not only that Ecology fully considered recreation, navigation, and aesthetics during rule adoption,[14] it shows that

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[14] *See, e.g.*, AR 3003 ("The department considered the recreational, aesthetic, and navigational values arguments for protecting the Spokane River at multiple stages throughout the process which concludes in establishing these instream flows for the river. The subject, as you indicate, was addressed in detail during Avista's FERC relicensing process for their Spokane hydroelectric facilities. (Berger, 2004) Ecology has read the Whitewater Paddling Study conducted under the FERC process, listened to many river users, and reviewed the anecdotal observations, opinions, and photos submitted by whitewater enthusiasts and others. . . . Choosing to not to solely use recreational flow

recreation and navigation occur at flows well below the 850 cfs level. For example, the record shows people, including one of Appellants' listed counsel below (Andrea Rogers), recreating and navigating on the river at a flow of just 770 cfs in a hardshell kayak, softshell kayak, and pontoon boat. AR 11590. The record also shows tubers floating the river at a flow of just 770 cfs. AR 11594. The record further shows a pontoon boat navigating the bowl and pitcher rapids at 770 cfs. AR 11595. The record shows that recreational issues, including whitewater rafting, were also thoroughly evaluated during the Avista federal relicensing process, the same process that resulted in a flow requirement identical to that of Ecology's Rule (850 cfs). AR 8074–078. For Appellants to suggest that Ecology's interpretation of its authorities fails to meet the requirements of RCW 90.54.020(3)(a) because there is insufficient flow for navigation and boating is thus *directly* contradicted by the record. Recreation occurs year round on the river at various flow levels, and has on at least one occasion been enjoyed by counsel below at a flow level of 770 cfs.

Despite their assertions to the contrary, what Appellants are truly seeking in this rule challenge is an enhanced regulatory flow for their preferred use of whitewater paddling and a requirement that Ecology comprehensively study every listed value in RCW 90.54.020(3)(a) before

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criteria to establish flows in an instream flow rule is different than not considering them.").

setting minimum flows by rule.[15] However, RCW 90.22 does not provide Ecology with the authority to enhance flows for any preferred value when it sets minimum flows by rule, and the statute does not affirmatively require that Ecology study every listed value therein. Further, while RCW 90.54.020(3)(a) does authorize Ecology to enhance flows for the listed values therein, that statute plainly provides Ecology discretion to do so by use of the words "where possible."[16] This discretionary language makes sense, again, because RCW 90.54.020 serves as part of a list of general fundamentals for how Ecology is to manage the state's water resources and not as a *mandate* to enhance any one particular use. What the statute means, in effect, is that through its water management

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[15] Appellants' Opening Brief at page 10 states that the American Whitewater survey that they submitted during the rulemaking process "found that 1000 cfs was the minimum flow to allow navigation, with recreational boaters having a *preferred* minimum flow of 1500 cfs." Opening Br. at 10 (citing AR 16258) (emphasis added). Appellants mischaracterize the record here. The document to which Appellants cite is actually a 2014 American Whitewater comment letter submitted during rule adoption that cites to a 2004 recreational flow study. AR 16257–259. Nowhere does this comment letter state that 1000 cfs "was the minimum flow to allow navigation." In fact, the letter supports the proposition that boating opportunities occur year round on the river, consistent with other evidence in the record showing boating at flows below 850 cfs: "This [recreational flow] study found that whitewater boating opportunities on the Spokane River *occur year round* and that river running opportunities exist at flows of approximately 1,500 cfs and greater." AR 16258 (emphasis added). The referenced study, as it pertains to the lower river (AR 2244–246), involved 21 participants. Nowhere does this study's discussion of the lower river state that 1000 cfs is the minimum flow necessary to allow navigation to occur. In fact, it shows that the participants had a preferred minimum range of flows from 0 cfs to 1500 cfs. AR 2246.

[16] RCW 90.54.020(3) states that "[t]he quality of the natural environment shall be protected and, *where possible*, enhanced." (Emphasis added).

activities, Ecology must maintain base flows for the listed values, and do its best to enhance those values if possible.

Importantly, Appellants cite to nothing in the record that supports the proposition that, at a flow of 850 cfs, the Spokane River cannot support recreation or navigation, or that the aesthetic value of the river is diminished or lost. That is because the record fully supports Ecology's reasonable decision to set flows at 850 cfs based upon the scientific needs of fish, while knowing that flows at that level would also preserve and protect base flows for other instream values, including recreation, aesthetics and navigation.

Lastly, to the extent Appellants argue that the methodology that Ecology used to establish flows here, the scientifically based IFIM, is insufficient to comply with the requirements of RCW 90.54.020(3)(a), that challenge also fails because the Court has already affirmed Ecology's use of the IFIM to establish minimum, and not optimal flows. *Elkhorn*, 121 Wn.2d at 202–203. In *Elkhorn*, Ecology used IFIM to impose a minimum flow condition on the water quality certificate for a proposed hydroelectric project on the Dosewallips River based upon the needs of fish. *Elkhorn*, 121 Wn.2d at 189. The Court expressly affirmed Ecology's use of IFIM to establish minimum flow levels for rivers. ("Ecology's stream flow conditions were necessary to ensure compliance with

RCW 90.54.020(3)(a)"). *Id.*[17] This Court's affirmation of Ecology's use of the IFIM to establish minimum, and not enhancement flows, based on the needs of fish, thus undermines Appellants' claim that Ecology exceeded its statutory authorities in this case.

In summary, Appellants fail in their burden to demonstrate that Ecology's decision to set summer minimum flows by Rule in the Spokane River at 850 cfs exceeds Ecology's statutory authorities. Indeed, Ecology's decision is directly consistent with those authorities, this Court's precedent approving Ecology's methodologies, and is also backed by a record which demonstrates that the flow level adequately preserves and protects all instream values.

2. The Rule is not arbitrary and capricious

Appellants offer multiple similar arguments as to why they think the Rule's summer flows are arbitrary and capricious. Not one of these arguments, however, is sufficient to overcome their heavy burden of demonstrating that Ecology's decision was "willful and unreasoning and taken without regard to the attending facts and circumstances." *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 905. Indeed, the comprehensive administrative record on file with the Court demonstrates that Ecology's

[17] Dr. Beecher, who recommended the 850 cfs flow here, was also one of the scientists involved in the IFIM studies at issue in *Elkhorn*. *See Elkhorn*, 121 Wn.2d at 202 n.2.

ultimate decision was adopted through a deliberative process of reason and that Appellants simply disagree with the ultimate decision that the agency made.

Appellants first argue that Ecology failed to protect instream values other than fish habitat. For the reasons stated above, this is simply false. The record plainly shows that at flows even below 850 cfs, other instream uses, including recreation and navigation, are plentiful.

Appellants' argument that Ecology's assertion that the Rule protects all instream values including navigation and boating is conclusory is also refuted by the record, which shows these values were well-considered by Ecology during the rulemaking process. AR 2985, 2995, 3003, 3009, 3010, 3033. For example, in response to comments on the proposed Rule, Ecology states:

> The department considered the recreational, aesthetic, and navigational values arguments for protecting the Spokane River at multiple stages throughout the process which concludes in establishing these instream flows for the river. The subject, as you indicate, was addressed in detail during Avista's FERC relicensing process for their Spokane hydroelectric facilities. (Berger, 2004) Ecology has read the Whitewater Paddling Study conducted under the FERC process, listened to many river users, and reviewed the anecdotal observations, opinions, and photos submitted by whitewater enthusiasts and others. . . . Choosing to not to solely use recreational flow criteria to establish flows in an instream flow rule is different than not considering them.

AR 3003.[18]

If anything is conclusory and without support in the record, it is Appellants' assertion that Ecology did not consider recreational or navigational values when it adopted the Rule, and that the Rule does not also protect these values.

As explained, RCW 90.22.010 authorizes Ecology to adopt minimum flows necessary to preserve and protect instream values, which cannot undermine the values listed in RCW 90.54.020(3)(a). And here, the record makes clear that the Rule does in fact protect all listed values. For example, Avista's federal license requires Avista to release flows for recreation. AR 8077. Flows that serve the recreational community occur every year on the Spokane River. AR 2985. Avista's federally required flows from June 16 to September 30 are identical to Ecology's summer flows in the Rule, 850 cfs. The comment letter submitted by American Whitewater concedes that boating occurs year round on the river. AR 16258. Direct evidence shows boaters, including counsel below,

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[18] *See also* AR 3031: ("Ecology believes the instream flows in this rule, based as they are on four independent fish studies, are science-based. The flows have been vetted by top scientists, staff, and management of all concerned state agencies. The instream flows have been reviewed and analyzed by all local Water Resource Inventory Area Watershed planning groups. Since these flows were first proposed to the planning unit, no entity has emerged with scientific information to indicate these flows are not appropriate. It is our opinion these flows are the best flows available to protect the instream resources of the Spokane River. They are flows necessary for stream health, ecological function, and preservation of other instream resources including scenic, aesthetic, and navigational values.").

navigating on the river in multiple water craft at flows of just 770 cfs. AR 11590. The record makes clear that recreational issues have been exhaustively considered through Ecology's rulemaking process and the prior Avista relicensing process in 2009. That Appellants prefer a higher flow for whitewater paddling is as clear now as it was when the Avista relicensing process considered recreational issues. However, Appellants are incorrect to assert that Ecology arbitrarily and capriciously assumed the 850 cfs flow protects navigation, recreation, and aesthetics. The record plainly shows that it does.

Appellants' next argue that the 850 cfs minimum flow is not the "best flows available" to protect the instream resources of the Spokane River. Opening Br. at 28. This argument once again tips Appellants' hand and reveals that they are truly seeking enhanced flows, rather than the "minimum" or "base" level flows that are required by law. RCW 90.22.010 does not authorize Ecology to adopt the *best flow* available to protect instream resources, or even any particular preferred use like whitewater paddling. Rather, RCW 90.22.010 is a statute that provides only for the adoption of minimum flows by rule to preserve and protect instream values. Ecology does not dispute that higher flows were once contemplated in differing contexts in the past, for example watershed planning or the relicensing process for the Avista projects. But the record

reflects that Dr. Beecher ultimately recommended the 850 cfs flow based upon new information from four new scientific studies. AR 3833. In an October 2014 email from Dr. Beecher to Ecology's rule team, Dr. Beecher states, "I still believe that our [850 cfs] figure is the most defensible I can come up with." AR 18589. Appellants did not submit any competing science during the Rule adoption process.[19] They simply disagree with the ultimate decision that Ecology made. "Where there is room for two opinions, and the agency acted honestly and upon due consideration, [courts] should not find that an action was arbitrary and capricious, even though [the] court may have reached the opposite conclusion." *Port of Seattle,* 151 Wn.2d at 589. The record shows that Ecology reasonably concluded that the flows it selected are "necessary for stream health, ecological function, and preservation of other instream resources including scenic, aesthetic, and navigational values." AR 3031.

In summary, Appellants have failed to demonstrate that Ecology's decision to set summer flows at 850 cfs was not reached through a process

[19] Appellants' brief references a report prepared by Professor Alan Scholz. Opening Br. at 28. This report is irrelevant to Appellants' Rule challenge because it was submitted as part of Appellants' petition to amend the Rule, and thus was not considered by Ecology during the rule-adoption process. *Wash. Indep. Tel. Ass'n,* 148 Wn.2d at 906. As indicated, Appellants have chosen not to pursue their claim that Ecology wrongfully denied their petition, as they did not assign error to the superior court's decision denying that claim.

of reason. Their claim that that decision was arbitrary and capricious thus fails.

B. As a Matter of Law the Public Trust Doctrine Does Not Apply to Ecology's Rulemaking Activities

Appellants also argue that the Rule and Ecology's interpretation of RCW 90.54.020(3)(a) conflict with the public trust doctrine, a "quasi-constitutional" doctrine that stems from English common law. Opening Br. at 33 (citing *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 990 (1987)). Rule challenges are governed by the APA, something that is lost on Appellants here. The proper test of rule validity under the APA with respect to this claim is not whether the Rule is invalid because it conflicts with quasi-constitutional, or common law, principles. The proper test is whether Ecology exceeded its statutory authority when it adopted the Rule. RCW 34.05.570(2)(c). For the reasons stated above, it did not. In any event, this Court has already held that the public trust doctrine does not apply to Ecology's water management activities, and because the record demonstrates that the Rule is compliant with the public trust doctrine anyhow, Appellants' arguments here fail.

1. *Postema* precludes Appellants' public trust doctrine argument

The Court long ago ruled that the public trust doctrine does not serve as an independent source of authority for Ecology's decision

making. *Postema,* 142 Wn.2d at 98–99 ("Ecology's enabling statute does not permit it to assume the public trust duties of the state; the doctrine does not serve as an independent source of authority for Ecology to use in its decision-making apart from code provisions intended to protect the public interest."). Thus, in the context of water resources management, Ecology's authority is provided in the water resources statutes, including RCW 90.22 and RCW 90.54, and the agency has no independent authority or obligations under the public trust doctrine.

To avoid this controlling authority, Appellants cite the Court's "two-part test" in *Caminiti* and argue, "the issue here is not whether the agency is directly empowered to implement the public trust. Rather, it is whether or not Ecology's actions violated the public trust." Opening Br. at 36. Without saying as much, by challenging Ecology's actions here, they are challenging Ecology's *implementation* of its statutory authorities, RCW 90.22 and RCW 90.54; and because the Court has plainly held that Ecology cannot consider the public trust when it implements those authorities, Appellants' argument is essentially de-cloaked as a direct challenge to the authorities themselves. But the validity of those authorities is not before the Court.

Further, the "two-part" test at issue in *Caminiti* is in fact clearly a test to determine whether *legislation* violates the public trust, not whether

an agency's implementation of that legislation violates the public trust. The test asks "(1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by doing so the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it." *Caminiti*, 107 Wn.2d at 670. Appellants go on to analyze these factors, but the Court need not do so here, again, because the validity of the statutes that provide Ecology's rulemaking authority is not before the Court.[20]

Here, had Ecology considered the public trust doctrine when it adopted the Rule, Ecology would have exceeded its authority as determined by *Postema* and the result would be an invalid Rule. Therefore, despite Appellants' arguments, the public trust doctrine simply has no application here.

2. The Rule's 850 cfs summer flow preserves navigation

In any event, Ecology's Rule does adhere to the public trust doctrine. Appellants' public trust doctrine argument rests on the false assumption that "by allowing water to be withdrawn to a degree that will impair recreational use and navigation, Ecology gives up control over (and indeed will arguably diminish or destroy) the *jus publicum*." *See* Opening

[20] Appellants citation to *Chelan Basin Conservancy v. GBI Holding Co.*, 188 Wn.2d 692, 399 P.3d 493 (2017), is also not helpful as that case, too, involved a facial challenge to a statute.

Br. at 36. But, this hyperbolic argument is *directly* contradicted by the record, which shows that 850 cfs is sufficient for the exact recreational activities that Appellants lament. *See* AR 11590. (multiple watercraft navigating the river at 770 cfs); AR 11595 (Pontoon boat navigating Bowl and Pitcher rapids at 770 cfs); AR 11594 (Tubers navigating the river at 770 cfs). In short, the Rule absolutely preserves navigation. If the public trust doctrine applied, and it does not, this Rule would be directly consistent with the state's obligation to protect the *jus publicum*.

C. The Superior Court Did Not Manifestly Abuse its Discretion When it Denied Appellants' Motion to Supplement the Record Below

Appellants mischaracterize what transpired below regarding their efforts to supplement the record with just three documents that were neither in the possession of the agency when it adopted the Rule, nor considered by its rule writers when they adopted the Rule.

To read Appellants' Opening Brief and the 8 pages Appellants devote to this issue, the Court might be left with the impression that Ecology deliberately excluded contrary information about the Rule from the Rule file in an effort to "stack" the record and improve the defensibility of the Rule. *See*, *e.g.*, Opening Br. at 38 ("*Ecology's failure* to consider all of the relevant information in its possession or to place this information in the record sets a precedent that would allow agencies to

tailor the administrative record to reach a predetermined outcome in rulemaking.") (emphasis added); *see also* Opening Br. at 44 ("Agencies may not tailor the agency record to support a desired rule-making outcome."). These representations are in fact a direct misrepresentation of what happened below. What happened below is that Appellants brought a motion to supplement the record after it had been filed with the superior court. The superior court denied that motion after concluding that Appellants had not satisfied the narrow requirements for supplementation of the agency record under RCW 34.05.562.

The validity of an agency rule is determined as of the time the agency took the action adopting the rule. *Wash. Indep. Tel.*, 148 Wn.2d at 906. The rulemaking file required by RCW 34.05.370 constitutes the "official agency rule-making file" for purposes of judicial review. RCW 34.05.370(4). In turn, RCW 34.05.562(1) sets the narrow parameters for superior court consideration of additional evidence. A superior court reviewing an agency decision:

> [M]ay receive evidence in addition to that contained in the agency record . . . only if it relates to the validity of the agency action at the time it was taken and it is needed to decide disputed issues regarding: (a) Improper constitution as a decision-making body . . . ; (b) Unlawfulness of the procedure . . . ; or (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1).

A superior court may not allow additional evidence where the proponent of the evidence alleges only that the record is incomplete. *Lewis Cty. v. Pub. Emp't Relations Comm'n,* 31 Wn. App. 853, 861, 644 P.2d 1231 (1982).

Below, Appellants sought to supplement the approximately 19,000 page record with *just three* documents. In response to Appellants' motion, Ecology's rule writers attested that during Rule development and adoption they neither possessed nor considered any of the documents that Appellants were seeking to add to the record. CP 5–8. The superior court thus denied Appellants' motion to supplement the record. It is as simple as that.

Appellants devote a significant portion of their briefing on this issue to citation of federal case law where federal courts have held that an agency may not "skew" a record in its favor by excluding certain documents from the record. *See, e.g.,* Opening Br. at 41 (citing to *Envtl. Def. Fund v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). All of this case law, however, has no bearing here because it was not the agency that excluded the information that Appellants sought to add below; rather it was the superior court.

A superior court's decision not to supplement the record should be reversed only if there is a showing of a manifest abuse of discretion. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 65, 202 P.3d 334 (2009). Appellants address neither RCW 34.05.562 nor this highly deferential standard of review in their Opening Brief. Their argument that Ecology erred by excluding certain information from the record is thus devoid of any merit.

In sum, this is not a case where Ecology specifically tailored the record to exclude contrary information, as Appellants argue, because an agency cannot exclude information its rule writers do not possess. Moreover, the record in fact includes information showing that the agency vigorously debated what summer flow levels should be, had at times in the past determined that the flows should be at higher levels, and ultimately concluded on the basis of four new scientific studies that the 850 cfs level represented the most legally defensible minimum instream flow based upon the needs of fish and the legal requirement to preserve base flows for other instream values. AR 3831–841; AR 7749–751. While this information in the record reflects precisely the type of reasonable debate that precludes a court from determining that a rule is arbitrary and capricious, it is also information that rebuts Appellants' baseless assertion that Ecology attempted to skew the record in its favor. In short, the

superior court did not manifestly abuse its discretion when it denied Appellants motion to supplement the record.

VI. CONCLUSION

For the reasons stated herein, Ecology respectfully requests the Court affirm WAC 173-557-070, which establishes summer minimum instream flow levels in the Spokane River at 850 cfs.

RESPECTFULLY SUBMITTED this 13th day November 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on November 13, 2017, I caused to be served State of Washington's Response to Appellants' Opening Brief in the above-captioned matter upon the parties herein via the Appellant Court Portal Filing system, which will send electronic notifications of such filing to the following:

Dan J. Von Seggern Center For Environmental Law & Policy 911 Western Avenue Suite 305 Seattle, WA 98104	[ ] U.S. Mail [ ] Overnight Express [ ] By Fax: [x] By Email: dvonseggern@celp.org

DATED this 13th day of November 2017 at Olympia, Washington.

JANET L. DAY, Legal Assistant

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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