

FILED
SUPREME COURT
STATE OF WASHINGTON
2/21/2020 3:10 PM
BY SUSAN L. CARLSON
CLERK

No. 97684-8

SUPREME COURT OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Appellant,

v.

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

Respondents

SUPPLEMENTAL BRIEF OF RESPONDENTS

Ted Howard
WSBA # 54019
Center for Environmental
Law & Policy
85 S. Washington St.
Suite 301
Seattle, WA 98104
(206) 829-8299
thoward@celp.org

Dan Von Seggern
WSBA # 39239
Center for Environmental
Law & Policy
85 S. Washington St.
Suite 301
Seattle, WA 98104
(206) 829-8299
dvonseggern@celp.org

Andrew Hawley
WSBA # 53052
Western Environmental Law Center
1402 3d Ave
Suite 1022
Seattle, WA 98101
(206) 487-7250
hawley@westernlaw.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

III. ISSUES PRESENTED FOR REVIEW 5

 A. Did the Court of Appeals properly find that Ecology exceeded its statutory authority when it adopted the 850 cfs summer instream flow? 5

 B. Was Ecology’s adoption of the 850 cfs flow arbitrary and capricious? 5

IV. STANDARD OF REVIEW 5

V. ARGUMENT 7

 A. The Court of Appeals correctly found that Ecology must meaningfully consider all the values listed in RCW 90.54.020(3)(a). 7

 1. Ecology erroneously characterizes RCW 90.54.020 as subordinate to 90.22.010. 7

 2. Ecology’s interpretation of RCW 90.54.020(3)(a) conflicts with this Court’s *Swinomish* decision. 9

 3. Ecology’s interpretation of RCW 90.54.020(3)(a) is not entitled to deference 10

4.	The Legislature’s use of “shall” signifies that Ecology is required to preserve all the listed instream values.	11
5.	The Court of Appeals’ decision does not conflict with <i>Bassett v. Ecology</i>	13
6.	The Court of Appeals’ decision did not announce an “ambiguous new standard.	13
B.	The Court of Appeals correctly held that Ecology’s Rule was arbitrary and capricious.	14
1.	The statement that flows for fish will preserve other instream values is wholly unsupported.	14
2.	The summer 850 cfs flow ignored studies of flows needed to preserve recreation and navigation.	15
3.	<i>Elkhorn</i> does not hold that Ecology may adopt an instream flow based only on IFIM studies.	15
4.	The assertion that 850 cfs is “the best flow available” is contradicted by the record.	16
C.	Invalidating the Rule would not adversely affect instream flows or other instream flow rules.	18
1.	The remedy for an invalid Rule is adoption of a valid one, not acceptance of the invalid one to avoid short-term adverse impacts.	18
2.	The Court of Appeals’ decision does not automatically put other instream flow rules into question.	19
3.	Protecting the drought-level 850 cfs flow does not improve Washington’s position <i>vis-à-vis</i> Idaho.	19
VI.	CONCLUSION	20
VII.	CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

CASES

<i>Bassett v. Ecology</i> , 8 Wn. App. 2d 284, 438 P.3d 563 (2019)	13
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007)	6
<i>CELP v. Ecology</i> , 9 Wn. App. 2d 746, 444 P.3d 622 (2019) (amended August 20, 2019).	<i>passim</i>
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985)	6, 10
<i>Ecology v. Campbell & Gwinn</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	5
<i>Ecology v. PUD No. 1 of Jefferson County</i> , 121 Wn.2d 179, 849 P.2d 646 (1993) (aff'd by <i>PUD No. 1 v. Washington Dep't of Ecology</i> , 511 U.S. 700, 128 L. Ed. 716 (1994))	16
<i>Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998)	7
<i>Edelman v. State ex rel. Pub. Disclosure Comm'n</i> , 152 Wn.2d 584, 99 P.3d 386 (2004).	6
<i>Erection Co. v. Dept of Labor & Indus.</i> , 121 Wn.2d 513, 852 P.2d 288 (1993)	11
<i>Foster v. Ecology</i> , 184 Wn.2d 465, 362 P.3d 959 (2015).	10
<i>Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.</i> , 129 Wn. App. 35, 118 P.3d 354 (2005).	6, 11
<i>Port of Seattle v. Poll. Cont. Hr'gs Board</i> , 151 Wn.2d 568, 90 P.3d 659 (2004)	5
<i>Postema v. Poll. Cont. Hr'gs Board</i> , 142 Wn.2d 68, 11 P.3d 726 (2000)	6, 7

<i>Puget Soundkeeper v. State</i> , 102 Wn. App. 783, 9 P.3d 892 (2002)	12
<i>Skokomish Indian Tribe v. Fitzsimmons</i> , 97 Wn. App. 84, 982 P.2d 1179 (1999).	6
<i>Svendsen v. Stock</i> , 143 Wn.2d 546, 23 P.3d 455 (2001)	5, 10
<i>Swinomish Indian Tribal Community v. Department of Ecology</i> , 178 Wn.2d 571, 311 P.3d 6 (2013)	9, 11
<i>Waste Mgmt. of Seattle v. Util. & Trans. Comm.</i> , 123 Wn.2d 621, 869 P.2d 1034)	6
<i>Whatcom County v. W. Wash. Growth Mgmt. Hrgs. Bd.</i> , 186 Wn.2d. 648, 381 P.3d 1 (2016)	12

STATUTES

Clean Water Act, Section 401	16
RCW Chapter 34.05	6
RCW 34.05.320	5
RCW 34.05.570(1)(a)	19
RCW 90.22.010	<i>passim</i>
RCW 90.54.010(2)	8
RCW 90.54.020	<i>passim</i>
RCW 90.54.020(3)	9
RCW 90.54.020(3)(a)	<i>passim</i>
RCW 90.54.020(3)(b)	12, 13
RCW 90.54.040	11
RCW 90.54.050	11

REGULATIONS

Chapter 173-557 WAC *passim*

I. Introduction

When the Washington State Department of Ecology (“Ecology”) adopted a summer instream flow for the Spokane River (“River” or “the Spokane”), it only addressed the needs of fish habitat and failed to consider the other instream values mandated by state law, which requires preservation of “wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” RCW 90.54.020(3)(a). The Court of Appeals correctly found that this action was both contrary to statutory authority and arbitrary and capricious. This Court should uphold the Court of Appeals’ determination that adopting an instream flow that protects only a single instream value fails to meet Ecology’s statutory obligation to preserve *all* of the instream values listed in RCW 90.54.020(3)(a).

II. Statement of the Case

Local residents and visitors use the Spokane for whitewater rafting, kayaking, fishing, hiking, birdwatching, and many other outdoor pursuits, as well as enjoying the River’s scenic value. All of these activities depend on adequate flow in the River. Like most Washington rivers, the Spokane’s flow is highly variable and has decreased due to out-of-stream water uses. AR1908; AR2224; AR10503. High river flows, when they occur, are important in maintaining a healthy river ecosystem. AR3831.

In January 2014, Ecology began formal rulemaking to establish minimum instream flows for the Spokane. AR0071. Ecology's proposed summer instream flow was 850 cubic feet per second ("cfs"), measured at the Spokane gage. AR2709. Ecology has stated that this flow was based only on considerations of fish habitat, and that it "has chosen not to establish instream flow values" based on recreational needs. AR2985.

Washington Department of Fish and Wildlife ("WDFW") provided Ecology with several summer flow recommendations, of which the 850 cfs figure ultimately adopted was the final and lowest.¹ See CELP's Opening Brief (Op. Br.), filed October 13, 2017, at 9, n 32. WDFW biologist Dr. Hal Beecher made the 850 cfs recommendation based on a study by EES Consulting that recommended flows of 850 -1100 cfs for a scenario in which protecting fish habitat was the predominant concern.² AR003833-3834. Dr. Beecher made it very clear, however, that 850 cfs was a minimum flow or "floor," and that higher levels would not be detrimental to fish. AR014232; AR013609; AR018528.

Ecology acknowledges that it received "dozens, if not hundreds" of comments critical of the 850 cfs summer instream flow during the

¹ The record does not provide an explanation for WDFW's reduction in its recommended flow.

² Of the four studies cited by Ecology, only the single EES Consulting study for Spokane County Public Works and the WRIA 55/57 planning units addresses summer rearing flows for fish in the part of the river at issue here. (AR3842-3882).

rulemaking process. Ecology's Response Brief, filed November 13, 2017, at 11 (Resp. Br.). Many commenters stated that such a low flow would impair instream uses such as navigation, recreation and aesthetics. AR3001-11. Ecology's response was the bare assertion that protecting flows for fish will "ensure flow in the river for preservation of other instream values, including scenic, aesthetic, and navigational values." AR 3009.

Two scientific studies addressed flows for recreation and navigation. A study by the Louis Berger Group for Avista Corp., using controlled flow releases and surveys of persons who navigated the river during those releases, concluded that 1350 cfs was a "reasonable minimum flow for the lower Spokane." AR2225-2289; AR2258. This study also noted that "at the 1350 cfs study flow, all of the boats, including kayaks, open canoes and rafts, were able to navigate all drops, but most boaters hit rocks on the shallower rapids." *Id.* American Whitewater submitted a second study during the rulemaking process, based on a 2014 survey of kayakers, canoeists, and rafters. AR2290-2494; AR2519-2527; *summarized at* AR16257-9. Preliminary findings based on an average for all watercraft showed that "acceptable flows" ranged from 1500 – 15,000 cfs, and higher flows would be required for rafting.³ AR16258.

³ The scientific bases for such survey-based studies are discussed in the report provided by aesthetic and recreation flow researchers Drs. Bo Shelby and Doug Whittaker. AR11567-70

Despite overwhelming evidence showing that an 850 cfs flow would not preserve recreational and navigational use, Ecology adopted this flow in its final Rule. WAC 173-557-050. As with all instream flow rules, the 850 cfs flow will become a legal threshold to determine whether water is available for new appropriations. AR2984. Water users will be permitted to withdraw water so long as streamflow is at or above the 850 cfs level. WAC 173-557-060; AR13330-1; AR10602. Over time, the flow of the river will predictably be reduced to the 850 cfs level for essentially all of the summer, that is, the “floor” will become the “ceiling.” As a result, navigation of the river by many recreational craft will become difficult if not impossible. AR2258; AR16258.

Ecology’s final rule was adopted as WAC Chapter 173-557 on January 27, 2015 and became effective February 27, 2015. AR018130. On February 29, 2016, CELP filed a Petition to Amend the Rule pursuant to RCW 34.05.320. AR010489-578. After Ecology formally denied the Petition on April 27, 2016, CELP filed an action in Thurston County Superior Court, alleging that both the Rule and Ecology’s denial of the petition were outside Ecology’s statutory authority and arbitrary and capricious. AR10598-10609; CP 5-54. On June 9, 2017, Thurston County Superior Court Judge James Dixon denied the petition, and the Court of

Appeals, Div. II, reversed on June 26, 2019. *CELP v. Ecology*, 9 Wn. App. 2d 746, 444 P.3d 622 (2019) (amended August 20, 2019).

III. ISSUES PRESENTED FOR REVIEW

- A. Did the Court of Appeals properly hold that Ecology exceeded its statutory authority when it adopted the 850 cfs summer instream flow?
- B. Did the Court of Appeals properly hold that Ecology's adoption of the 850 cfs flow was arbitrary and capricious?

IV. STANDARD OF REVIEW

Administrative actions, including administrative rules, are reviewed under the Administrative Procedure Act, RCW 34.05. When the inquiry demands construction of a statute, review is *de novo*. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). In interpreting a statute, a court is to consider "all that the Legislature has said in the statute and related statutes." *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). Where possible, a court must give effect to all language in a statute, with no part deemed superfluous or inoperative unless the result of obvious error. *Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001); *Cox v. Helenius*, 103 Wn.2d 383, 387-8, 693 P.2d 683 (1985).

A court may substitute its interpretation of the law for the agency's. *Postema v. Pollution Cont. Hearings Board*, 142 Wn.2d 68, 77, 11 P.3d 726

(2000). An administrative rule that “is not reasonably consistent with the statute being implemented” is invalid and unenforceable. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). A rule is invalid where the agency too narrowly construes the authorizing statutes. *Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 591-2, 99 P.3d 386 (2004).

Where the statute is within the agency's special expertise and ambiguous, the agency's interpretation is accorded great weight. *Id.* Absent ambiguity, however, the court does not defer to an agency's interpretation of a statute. *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005). And a court will not defer to an agency interpretation that conflicts with the statute. *Postema*, 142 Wn.2d at 77 (citing *Waste Mgmt. of Seattle v. Util. & Trans. Comm.*, 123 Wn.2d 621, 628, 869 P.2d 1034).

Deference to an administrative agency “does not extend to agency actions that are arbitrary, capricious, and contrary to law.” *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 94, 982 P.2d 1179 (1999). Agency action is arbitrary and capricious if it is willful, unreasoned, and taken without regard to the attending facts and circumstances. *WA Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998).

V. ARGUMENT

A. The Court of Appeals correctly held that Ecology must meaningfully consider all the values listed in RCW 90.54.020(3)(a).

1. Ecology erroneously characterizes RCW 90.54.020 as subordinate to 90.22.010.

The Legislature addressed establishment of instream flows in both RCW 90.22.010 and RCW 90.54.020(3)(a). RCW 90.22.010 provides that 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 90.54.020(3)(a) states that:

“[t]he 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. . . .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. (Emphasis added.)

Nothing in the text of either statute, in any decision of this Court, or in any authority provided by Ecology indicates that RCW 90.54.020(3)(a) is in any way subordinate to RCW 90.22.010, or that its provisions are any less binding.

Despite this, Ecology asserts that RCW 90.22.010 is its “primary rulemaking authority,” while suggesting RCW 90.54.020(3)(a) is no more than a “general policy statute” or list of “general fundamentals” that imposes no duties on Ecology.⁴ Ecology is incorrect, and may not ignore RCW 90.54.020’s command that “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” (emphasis added).⁵

Ecology concedes this point in its briefing: “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).*” Resp. Br. at 19 (emphasis added). Put another way, even if RCW 90.22.010 were somehow a “primary” statute (it is not, and CELP in no way concedes that it is), Ecology agrees that it must comply with RCW

⁴ See Resp. Br. at 16-19; Ecology’s Petition for Review at 5; *Id.* at 14 (“Pet. Rev.”).

⁵ Legislative intent that the WRA be directive in nature is also shown by the statute’s statement of purpose, which includes “to provide direction to the department of ecology.” RCW 90.54.010(2).

90.54.020(3)(a) and preserve flows for the listed instream values. And that is precisely what Ecology failed to do here.⁶

2. Ecology’s interpretation of RCW 90.54.020(3)(a) conflicts with this Court’s *Swinomish* decision.

This Court previously affirmed the import of RCW 90.54.020(3)(a) in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) (“*Swinomish*”). *Swinomish* considered RCW 90.54.020(3)(a)’s third sentence, which provides that “[w]ithdrawals of water that would conflict [with base flows necessary to protect instream values] shall be authorized only in those situations where . . . overriding considerations of the public interest will be served.” *Id.* at 581. Ecology had amended the Skagit River instream flow rule to add reservations of water for future out-of-stream uses, relying on the “overriding consideration of the public interest” (OCPI) standard. *Id.* at 583. *Swinomish* invalidated the amended rule, holding that the language “reserving water for designated future beneficial use is inconsistent with the plain language of RCW 90.54.020(3)(a) and inconsistent with the statutory context and the entire statutory scheme.” *Id.* at 602. *Swinomish* thus demonstrates that RCW 90.54.020(3)(a) stands on its own and is not a mere “policy statement.”⁷

⁶ As discussed in Section II, *supra*, the record demonstrates that the 850 cfs summer flow fails to preserve recreational and navigational values.

⁷ See also *Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015). *Foster* applied RCW 90.54.020(3)(a)’s requirements for protecting instream flows and considered the OCPI exception with no mention whatsoever of RCW 90.22.010.

This case involves RCW 90.54.020(3)(a)'s command that “[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” *Swinomish* holds that RCW 90.54.020(3)(a) requires that instream flows *must* be protected from impairment absent overriding considerations of the public interest. The statute also requires that the instream values set forth in the same subsection *must* be preserved. Ecology has provided no support for its position that two sentences of a single statutory provision should be interpreted differently.

Crucially, Ecology’s interpretation of the statute would render the OCPI exception superfluous. If RCW 90.54.020(3)(a) were merely a nonbinding “policy statement” or a “general fundamental” to be interpreted at Ecology’s discretion, then Ecology could make its own determination as to whether to impair instream flows, and there would be no need for a specific exception in the statute. Construction of RCW 90.54.020(3)(a) in a manner that renders a portion of the statute superfluous is improper. *Svendsen*, 143 Wn.2d at 555, *Cox*, 103 Wn.2d at 387-8.

3. Ecology’s interpretation of RCW 90.54.020(3)(a) is not entitled to deference.

A court will give an agency’s interpretation of a statute great weight where the statute is within the agency’s special expertise and it is ambiguous. *Friends of Columbia Gorge*, 129 Wn. App. at 47-48. RCW

90.54.020(3)(a) is not ambiguous, and Ecology has never argued that it is ambiguous. This Court does not need to defer to Ecology's attempt to diminish the importance of RCW 90.54.020(3)(a) through an "interpretation" that essentially rewrites the clear, straightforward language of the statute.

4. The Legislature's use of "shall" signifies that Ecology is required to preserve all the listed instream values.

The Court of Appeals correctly held that Ecology acted outside of its statutory authority when it failed to consider all the instream values listed in RCW 90.54.020(3)(a). It is "well settled" that the word "shall" in statute is presumptively imperative and creates a duty. *Erection Co. v. Dept of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). Use of "shall" and "may" in the same statute indicates that the two are intended to have different meanings. *Id.* at 519. "May" does appear in other sections of the WRA. RCW 90.54.040 (Ecology "may" develop a comprehensive water resources program in stages); RCW 90.54.050 (Ecology "may" withdraw waters from additional appropriations).

Here, as the Court of Appeals noted, "use of the word 'shall' directs Ecology what values it *must* consider." *CELP*, 9 Wn. App. 2d at 764 (emphasis added). The court found that Ecology must "meaningfully consider the instream values enumerated in RCW 90.54.020(3)(a), and

attempt to preserve them to the fullest extent possible” and that under the statutory scheme, Ecology lacked authority to preserve only one instream value that [it] deemed ‘best.’” *Id.* at 765-6.

The fact that RCW 90.54.020(3)(a) creates a duty is illustrated by considering the next subsection, RCW 90.54.020(3)(b), which requires that wastes proposed for discharge to the state’s waters must be “provided with all known, available, and reasonable methods of treatment.” Like RCW 90.54.020(3)(a), this subsection is preceded by the command that “the quality of the natural environment *shall* be protected.” If RCW 90.54.020(3)(b) did not create a duty, “shall” here would not obligate Ecology to require treatment of wastes. But this Court has consistently held that this is not the law. *See Whatcom County v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 186 Wn.2d. 648, 690, 381 P.3d 1 (2016) (noting that “*plain language*” of RCW 90.54.020(3)(b) “*requires* quality of natural environment to be ‘protected,’” and that waters are protected when waste materials “*are not allowed* to enter the waters” (emphasis added)); *Puget Soundkeeper v. State*, 102 Wn. App. 783, 789, 9 P.3d 892 (2002) (NPDES permits issued by Ecology must ensure compliance with AKART “whenever possible”). Because RCW 90.54.020(3)(b) requires that wastes be treated, then RCW 90.54.020(3)(a) requires that the listed instream values be protected.

5. The Court of Appeals’ decision does not conflict with *Bassett v. Ecology*.

Ecology argues that the Court of Appeals decision conflicts with *Bassett v. Ecology*, 8 Wn. App. 2d 284, 438 P.3d 563 (2019) (“*Bassett*”) because, in Ecology’s framing, *Bassett* held that RCW 90.54.020 “does not give rise to enforceable rights and duties.” But what *Bassett* actually holds is that RCW 90.54.020 does not impose a specific balancing test for maximum net benefits whenever Ecology makes an allocation of water; in other words, the statute does not prescribe the *method* Ecology must use in carrying out its objectives. *Bassett*, 8 Wn. App. 2d at 305. This is fully consistent with the Court of Appeals’ statement in this case that RCW 90.54.020 “directs Ecology what values it must consider,” which is a statement of *what* Ecology must do, not *how* it must do it. *CELP*, 9 Wn. App. 2d at 764. The *Bassett* court’s acknowledgement that the agency retains some discretion in *how* it fulfils the statutory mandate to preserve the values enumerated in the statute does not convert RCW 90.54.020(3)(a)’s commands to mere “suggestions,” nor does it make them optional.

6. The Court of Appeals’ decision did not announce an “ambiguous new standard.”

The Court of Appeals’ statement that Ecology must preserve the values listed in RCW 90.54.020(3)(a) to the “fullest extent possible” is

consistent with the statute, and indeed with Ecology’s own statements in this case. *CELP* at 765; Resp. Br. at 21-2 (“Ecology must maintain base flows for the listed values, and do its best to enhance those values if possible”). RCW 90.54.020(3)(a) requires that the listed values be “preserved.” As the statute cannot require the impossible, “preserve” is logically equivalent to the Court of Appeals’ articulation of the statutory duty as being to “preserve to the fullest extent possible.”

B. The Court of Appeals correctly held that Ecology’s Rule was arbitrary and capricious.

1. The statement that flows for fish will preserve other instream values is wholly unsupported.

The administrative record, including studies conducted by whitewater rafting groups and affidavits from operators of river-dependent businesses establishes without contradiction that the 850 cfs summer flow would not preserve instream values such as recreation, navigation, and aesthetics. *See* Sec. II, *supra*; AR10557-9.

Ecology has consistently relied on the conclusory statement that “while [flows] are based on fish habitat studies, the instream flow levels established in [the] rule will preserve wildlife, scenic, aesthetic, and other environmental values in the Spokane River, in accordance with RCW 90.54.020.” *See, e.g.*, AR 3009; Resp. Br. at 12-13; Pet. Rev. at 1. But repeating this argument does not make it so. Ecology has neither cited to

any evidence on this point nor provided any explanation whatsoever of how these additional values would be protected. Ecology's conclusory statement merely establishes that it did *not even consider* the evidence in the record establishing that other flow values would not be preserved.

2. The summer 850 cfs flow ignored studies of flows needed to preserve recreation and navigation.

Ecology presents no discussion of flows needed to protect instream values other than fish. But the record contains two studies of streamflows needed to support recreation and navigation, both of which unambiguously call for flows higher than 850 cfs. Ecology has not explained why these higher flow recommendations were discounted other than that it "chose not to" consider flows for recreation and navigation in determining the instream flow. Resp. Br. at 12. There is no evidence of "careful consideration" of the facts and circumstances regarding the instream values listed in RCW 90.54.020. The Court of Appeals correctly found that Ecology's decision to adopt the 850 cfs instream flow rule was arbitrary and capricious.

3. *Elkhorn* does not hold that Ecology may adopt an instream flow based only on IFIM studies.

Ecology attempts to justify its decision to preserve only fish habitat by claiming that use of the Instream Flow Incremental Method (IFIM) to determine instream flows complies with the requirements of RCW 90.54.020(3)(a), citing to *Dep't of Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.2d 646 (1993) ("*Elkhorn*"). But *Elkhorn* is

inapposite. That case dealt with the narrow question of whether IFIM was a permissible method of determining an instream flow to preserve fish habitat, not with whether (or how) any other of RCW 90.54.020(3)(a)'s listed instream values should be preserved. *Id.* at 204. IFIM, by its nature and design, provides information only about habitat for fish, not for other instream values. *Elkhorn's* statements that Ecology's actions "assure compliance with RCW 90.54.020(3)(a)" are confined to the discussion of whether an instream flow may be included in a Certification under Section 401 of the Clean Water Act. *Elkhorn*, 121 Wn.2d at 192; *id.* at 193. *Elkhorn* in no way supports the proposition that Ecology may use IFIM, standing alone, to determine the level of instream flow required to comply with RCW 90.54.020(3)(a).

4. The assertion that 850 cfs is "the best flow available" is contradicted by the record.

A key part of Ecology's stated justification for the 850 cfs summer instream flow is that it is "the best [flow] available" to protect the river in summer. AR2984. This is simply incorrect. Far from being unavailable, flows above 850 cfs currently exist. The hydrograph for the Spokane shows that summer flows exceed 850 cfs for essentially the entire summer in an average year, and for much of the summer even in the driest 10% of years. See Fig. 1. Even the seven-day low flow (the average flow in the lowest seven-day period of the year) exceeds 850 cfs in most years. AR10509. And

Ecology has stated that existing municipal water rights are adequate to supply anticipated demands. Resp. Br. at 4 (*citing* AR2979).

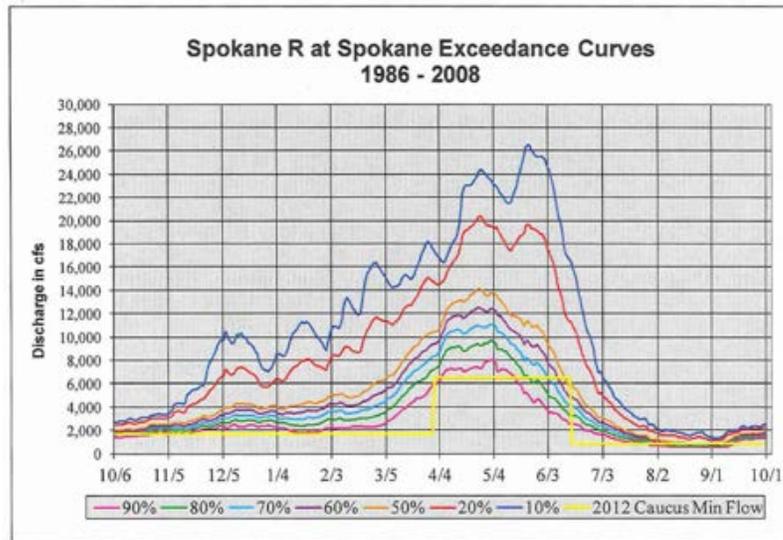


Fig. 1. Spokane river hydrograph (AR3840). River flows are commonly referred to in terms of “exceedance flows.” A 90% exceedance flow is that which is exceeded in 90% of years; it is therefore a very low flow. Conversely, a 10% exceedance flow is higher than all but the 10% of wettest years and represents a very wet year. The 50% exceedance flow is roughly equivalent to an average year. The instream flow adopted by Ecology is shown by the solid yellow line. *See also* AR3873-4.

By petitioning for a higher summer instream flow, CELP does not ask that “more water be put in the river,” or that the flow be “enhanced.” Ecology has repeatedly raised this specious argument in an attempt to show that CELP is asking it to do the impossible. See Pet. Rev. at 7-8; Ecology’s

Resp. Br. at 5-7. A higher instream flow would not “increase flows in the river,” but would protect a greater portion of the flow *that is now available*.

Ecology asserts that an instream flow higher than 850 cfs would require changes in the Federal Energy Regulatory Commission (“FERC”) license granted to Avista Corp., which operates a hydropower project including two dams directly upstream from the Spokane gage. Resp. Br. at 6. However, while the FERC license requires a minimum release of 850 cfs in summer, the dams do not *limit* flow. Because they operate as “run-of-the-river” dams with little water storage, when the river above the dams is flowing at levels above 850 cfs, flow below them will also exceed that level. AR3873-4. AR8074; AR8068. Preserving these higher flows would require no changes to Avista’s license or operating procedures. *CELP*, 9 Wn. App. 3d at 768 n. 13.

C. Invalidating the Rule would not adversely affect instream flows or other instream flow rules.

1. The remedy for an invalid Rule is adoption of a valid one, not acceptance of the invalid one to avoid short-term adverse impacts.

The argument that this Court should reverse the Court of Appeals and reinstate the Rule because there is currently no summer instream flow in place is without merit. The Rule was declared invalid because Ecology failed to meet its statutory obligations in adopting it. *CELP*, 9 Wn. App.2d at 768. The fix is simple: Ecology can re-initiate rulemaking as to the

narrow issue of the summer flow and adopt a rule that comports with the law. There is no basis for leaving an unlawful rule in place simply to avoid having no rule in effect for some period of time.

2. The Court of Appeals' decision does not automatically put other instream flow rules into question.

Ecology posits that other instream flow rules established using flows identified to protect fish habitat are now vulnerable to challenge. Pet. Rev. at 19. But the Court of Appeals' decision is far from a green light for the blanket invalidation of other instream flow rules. Any challenger would have the burden to show, based on the administrative record, that the flows chosen by Ecology failed to preserve the values listed in RCW 90.54.020(3)(a). RCW 34.05.570(1)(a). As Ecology has noted, every river is different; in some cases, the rule in place is adequately protective, so that a challenge would fail. If other rules were to be found inadequate, the eventual result would be instream flows that accomplish the statutory goals and protect Washington's rivers.

3. Protecting the drought-level 850 cfs flow does not improve Washington's position *vis-à-vis* Idaho.

Ecology states that without an instream flow in place, "Washington's standing will be diminished should an interstate dispute ever occur" over the River. Pet. Rev. at 18. Here, too, the remedy is not to simply ignore the law and leave an inadequate Rule in place. If Washington's goal

is to protect water in the river for the use of its environment and citizens, it stands to reason that claiming a higher flow, not a very low drought flow, is more likely to accomplish this goal.

VI. CONCLUSION

The Washington Legislature has spoken clearly: the instream values listed in RCW 90.54.020(3)(a) are to be protected through establishment of instream flows. Ecology's interpretation of the statute would improperly allow it to preserve only those values of its own choosing. The Court of Appeals correctly recognized that adoption of the Spokane River instream flow Rule, based on this incorrect view of the statute, exceeds Ecology's statutory authority and was arbitrary and capricious. CELP respectfully requests that this Court affirm the decision below.

Respectfully submitted this 21st day of February, 2020,

/s Dan J. Von Seggern

Dan J. Von Seggern, WSBA No. 39239
Attorney for Respondents

VII. CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 21st day of February 2020, I caused the forgoing Respondents' Supplemental Brief to be served on the parties herein via the Appellate Court Portal Filing System, which will send electronic notifications of such filing to all parties of record.

Dated this 21st day of February 2020, in Seattle,
Washington.

s/ Dan J. Von Seggern

Dan J. Von Seggern, WSBA No. 39239
Attorney for Respondents

CENTER FOR ENVIRONMENTAL LAW AND POLICY

February 21, 2020 - 3:10 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97684-8
Appellate Court Case Title: Center for Environmental Law & Policy, et al. v. State of Washington,
Department of Ecology
Superior Court Case Number: 16-2-02161-9

The following documents have been uploaded:

- 976848_Briefs_20200221150931SC670300_1066.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was No 976848 Resp Supp Brief.pdf

A copy of the uploaded files will be sent to:

- ECYOlyEF@atg.wa.gov
- cliffordk@atg.wa.gov
- hawley@westernlaw.org
- iamtedhoward@gmail.com
- stephen.north@atg.wa.gov

Comments:

Sender Name: Daniel Von Seggern - Email: dvonseggern@celp.org
Address:
85 S WASHINGTON ST STE 301
SEATTLE, WA, 98104-3404
Phone: 206-829-8299

Note: The Filing Id is 20200221150931SC670300