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No. 68162-1-I
Thurston County Cause No.: 08-2-01403-4

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

SWINOMISH INDIAN TRIBAL COMMUNITY,
a Federally Recognized Indian Tribe,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

AMICUS CURIAE BRIEF OF INTERESTED INDIAN TRIBES

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR -9 AM 11:26

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I. IDENTITY AND INTERESTS OF THE *AMICI* TRIBES

A. The *Amici* Tribes Hold Federally Reserved Fishing Rights.

Amici tribes¹ are federally recognized Indian tribes located in this state. They base their participation on the statewide impact on their federally protected rights of the matters being considered in this case. Along with other rights, each Tribe holds fishing rights reserved by treaty. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

The Tribes hold the right to fish on all runs that pass through their “usual and accustomed” fishing areas, regardless of where those fish runs originate. *United States v. Wash.*, 384 F. Supp. at 344. The importance of fish to the Tribes cannot be overstated. The Supreme Court characterized these rights as being “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905). For the fish themselves, adequate stream flows literally are the “atmosphere they breathe,” for without sufficient water for spawning, rearing and migration, there will be no salmon.

The Department of Ecology’s (Ecology) interpretation of the water code provisions at issue in this action has the potential to affect streams

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

throughout the state. Ecology's interpretation, if accepted by this Court, will undermine state law protections for instream flows necessary to protect fish and fish habitat. The Tribes have a vital interest in ensuring state law provisions that require maintenance of adequate instream flows are honored and enforced. Impairment of fish habitat and reductions in fish production resulting from decreased flow will adversely affect tribal economies, the livelihood of tribal members, and tribal cultures. For these reasons, the Tribes seek to make their views known as *amicus curiae*.²

B. Impacts to Flow, Fish Habitat, and Fish Production Have Cut Tribal Harvests and Negatively Impacted Treaty Rights.

In 1974, the Court in *United States v. Washington*, *supra* affirmed the Tribes' treaty fishing right to take up to half of the harvestable salmon returning to this State's waters. In *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), the Supreme Court confirmed that the Tribes' treaty fishing right is much more than just a chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters. "It was thus the right to take fish, not just the right to fish, that was secured by the treaties." *United States v. Wash.*, 2007 WL 2437166 (W.D. Wash. 2007, Judge Martinez Order on Cross-Motions for Summary Judgment).

² The Tribes' arguments herein rest solely on state law. The Tribes reserve all arguments based on their federally reserved rights and any other rights arising under federal law.

After 1974, the Tribes' harvest opportunities and share of the harvestable catch grew, at least temporarily. Judge Martinez' 2007 Order in *United States v. Washington* explains in footnote 3:

[Tribal] harvest levels in 1974 and 1975 were 860,537 and 1,001,431 fish respectively. The number of fish harvested rose steadily to 5,494,973 in 1985. Numbers of fish harvested then fluctuated between approximately three and four million fish for the next several years, higher in the odd-numbered years when large numbers of pink salmon were harvested. After 1991, harvests of four million fish were not seen again, and after the 1993 harvest of 3,497,537 fish the numbers declined dramatically, dipping as low as 575,958 in 1999. While post-1999 harvest numbers have risen somewhat, to 2,148,802 fish taken in 2003, the Tribal harvest through 2004 . . . remained less than half that of the years 1985 to 1991. Declaration of Keith Lutz, Dkt. #299.

In an updated declaration submitted to the District Court in 2009, Mr. Lutz reported that from 2004-2007, tribal harvest was less than two million fish per year – levels quite similar to the tribal harvest in the late 1970's.

Overall, the tribal harvest today is less than half that of the late 1980's.

This lost harvest opportunity is despite Tribes implementing highly-conservative fishery management practices and prudent use of hatcheries.

The fundamental reason for the reduction in harvest levels is the ongoing destruction, degradation, and modification of salmon habitat needed for their survival. Inadequate stream flows are a significant factor in the reduction of fish habitat and the decline of fish runs. Anthropogenic impacts to habitat and streamflow resulted in the listing of Puget Sound

Chinook and steelhead as threatened under the Endangered Species Act. 64 Fed. Reg. 14308 (March 24, 1999); 72 Fed. Reg. 26722 (May 11, 2007). Failure to protect flow, habitat, and fish will result in further impairment of tribal harvests and the treaty fishing right.

C. Reduction In Instream Flows Directly Correlates With Impairment of Fish Habitat and Fish Production.

Maintaining instream flows is critical to fish health and sustenance of the treaty fishery. Adult salmon require adequate flows as they migrate to their spawning grounds. Low stream flows result in barriers that impede migration. Prior to and during spawning, salmon require deep pools with an abundance of large logs or other hiding structures in close proximity to spawning areas. Incubating eggs and alevins (the life stage between hatching and juvenile fish stage) require a continual supply of water through the redd (salmon spawning nest) to protect them from high temperatures, provide oxygen, and process waste. Emerging fry and juveniles require shallow stream margins and pools for rearing.

Simply put, fish need sufficient water to survive. Reductions in instream flows result in reduced wetted habitat, increased temperatures, and impaired channel configuration. Ecology biologists have found that a 1% loss in streamflow closely correlates with a 1% loss in fish habitat during low-flow conditions. RA 3006. As flows go down, productive,

protective side channels become shallow, isolated ponds where fish are trapped. As stream temperatures rise, oxygen content is reduced and potential for disease increases. Low flows and reduced habitat area result in reduced food supply. RA 3047. Competition for food increases as fish are concentrated into a smaller area. *Id.* Finally, dewatering of streams can leave salmon eggs dry, exposed, and lifeless. Ecology has stated:

Low stream flows put fish and other resources at risk. In many watersheds, low flows have contributed to the decline of many threatened fish populations including Chinook, Coho and chum salmon, cutthroat, steelhead and bull trout.³

In 2008, the National Marine Fisheries Service identified habitat loss (which results from loss of stream flow) as the “principal factor in the decline of the [Puget Sound] steelhead.”⁴ NMFS found that “salmon declines are particularly prevalent in Washington . . . due to greater human impacts on freshwater and estuarine habitats.” *Id.* at p. 42. NMFS identified the need for critical habitat consisting of spawning, rearing, and migration areas with adequate water quantity and quality. *Id.* at p. 45.

Other studies confirm a direct relationship between maintenance of instream flows and future fish production. RA 814-15; RA 3006-3008.

³ Washington Department of Ecology, *Managing Our Water Successfully*, Jan. 2007, pg 7, at <http://www.ecy.wa.gov/pubs/0611023.pdf>

⁴ NMFS Biological Opinion on Implementation of the National Flood Insurance Program in the State of Washington, September 2008, p. 30, at https://pcts.nmfs.noaa.gov/pls/pcts-pub/pcts_upload.summary_list_biop?p_id=29082

Higher flows improve rates of smolt survival, and directly result in more adult fish returning to the stream to spawn years later. *Id.* The importance of instream flows, and the correlation between fish production/habitat and higher flows is especially strong in smaller streams. RA 14135. “Studies have consistently found over the last few decades that the higher the spring, summer, and fall instream flow – the higher the salmon and steelhead survival.” RA 814. Because protecting instream flows is critical to fish production, *amici* tribes have a direct and substantial interest.

D. Legal Protection and Preservation of Instream Flows Is Critical Due to Growing Consumptive Water Demand.

Over forty years ago, Washington’s Legislature recognized the fast-increasing conflict between consumptive use of water and preservation of instream flows for fish, wildlife, recreation, and other non-consumptive values. In 1969, the Legislature authorized Ecology to “establish minimum water flows or levels for streams, lakes or other public waters.” RCW 90.22.010. Once established, these minimum flows are perfected water rights. RCW 90.03.345. Two years later, in the 1971 Water Resources Act, the Legislature mandated that “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).

Demand for consumptive uses of water continues to grow rapidly. Washington's 2010 Census data shows 14.1% population growth in the last ten years, increasing the need for responsible water management, including conservation, transfer mechanisms, and instream protection. The Legislature saw this growth coming over four decades ago and wisely demanded protection of flows for non-consumptive values in order to prevent streams from running dry due to increased consumptive use. Ecology's interpretation of its authority now threatens that protection.

E. Affirming Ecology's Interpretation Would Undermine Legal Protection for Instream Flows in Washington.

Faced with general evidence of increasing consumptive demand, Ecology has unlawfully decided to sacrifice instream flow to satisfy that future demand through a generalized reservation of waters that have already been appropriated for instream flow. Ecology concedes that its reservation is only designed to meet the next 20 years of water demand. RA 2862. After 20 years, if supply again becomes inadequate, Ecology can (in its view) simply make another reservation, further reducing instream flow. Ecology's interpretation of its authority is a slippery slope that could eviscerate instream flow protection in Washington State.

Reducing instream flows is not the only option to address a water shortage. Conservation measures, cost increases, transfers of water rights,

and other mechanisms are available to rationally allocate water to those who need or want it most. A water policy that simply makes more water available for consumption by decreasing required minimum flows jeopardizes the non-consumptive values designated for protection by the Legislature and simply defers the hard questions about what to do when water supply is inadequate to meet growing demand.

Ecology's briefing attempts to minimize the impact of its decision, but the precedent set by Ecology's interpretation (if accepted) is a wide-ranging and dangerous one. If Ecology can make generalized reservations of water for consumptive use out of water already appropriated for instream flow, and then allow subsequent withdrawals (or diversions) to occur under the authority of such reservations, the statutory protection for instream flows will become largely meaningless. *Postema v. PCHB*, 142 Wn.2d 68, 89 (2000) (stating an "instream flow right subject to piecemeal impairment would not preserve flows necessary to protect fish, wildlife and other environmental resources[,] a result "at odds with the relevant statutes and the obvious legislative intent manifested in them").

The Tribes urge the Court to find that Ecology has exceeded its statutory authority in this case and has violated both the letter and the spirit of the statutory instream flow requirements of the Washington Water Code. The broader concern about how Ecology's interpretation, if

accepted, could be applied throughout the state and the impacts that Ecology's interpretation would have on streams, flows, and fish habitat prompts the Tribes to submit this *amicus curiae* brief.

II. ARGUMENT

A. Ecology's Interpretation of its Authority Conflicts With the Letter and the Intent of the Washington Water Code.

The meaning of a statute is a question of law reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). An agency's interpretation of a statute must be struck down if such interpretation conflicts with the language and intent of the statute. *Postema*, 142 Wn.2d at 77. "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning" *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9. No deference to the agency is due when statutory language is clear or where the agency interpretation conflicts with the statute. *Postema*, 142 Wn.2d at 77.

In this case, Ecology's interpretation of its authority directly conflicts with the plain language and the intent of the Water Code. Ecology has no statutory authority to make reservations of water for future use unless such water is legally available for appropriation. RCW 90.03.290; *Postema*, 142 Wn.2d at 79. Instream flows set by rule are protected water rights and are entitled to protection from impairment, just

like other properly perfected water appropriations under Washington law. RCW 90.03.345. Here, the relevant waters were already appropriated under state law for instream flows. They are protected senior water rights that cannot be reserved for future use by others. *Id.*; RCW 90.03.010.

Ecology's reliance on the "OCPI" exception in this case ignores, conflicts with (and effectively re-writes) relevant sections of the Water Code. The OCPI exception does not apply to, or authorize, "reservations" of water. RCW 90.54.020(3)(a). The Legislature has granted Ecology a narrow and limited ability to authorize, on a case-by-case basis, specific "withdrawals" of water that conflict with "base flows" when overriding considerations of the public interest clearly demand such withdrawals. *Id.* However, no statutory authority exists for Ecology to generally reserve and set aside waters that have already been appropriated for instream flow.

Ecology's interpretation also conflicts with basic principles of Washington water law such as respect for the "first-in-time, first-in-right" principles of prior appropriation and the mandate that senior water rights are not subject to any form of impairment no matter how small. RCW 90.03.010; *Postema*, 142 Wn.2d at 82, 89-90. The Legislature, in RCW 90.54.900 and .920, has expressly barred Ecology from using RCW 90.54.020 (or any provision of the WRA) to impair instream flow water rights. Ecology's interpretation directly conflicts with the Code.

B. Ecology Lacks Authority to Reserve Water For Future Use Unless Such Water Is Legally Available For Appropriation.

In the Water Resources Act of 1971, (Ch. 90.54 RCW), the Legislature authorized Ecology to “reserve and set aside waters for beneficial utilization in the future.” RCW 90.54.050(1). However, a “reservation” can apply only to those waters that remain legally available for appropriation. RCW 90.03.290; *Postema*, 142 Wn.2d at 79. The 25 cfs reserved and set aside by Ecology in this case is already appropriated as instream flow. RCW 90.22.010. Because the 25 cfs is already appropriated under Washington law, it is legally unavailable, and can not be reserved for future consumptive use under RCW 90.54.050(1).

Instream flows set by rule “constitute appropriations . . . with priority dates as of the effective date of their establishment.” RCW 90.03.345. Such flows are perfected water rights on the same footing and subject to the same protections that apply to other senior water rights, including protection from impairment or infringement by junior water rights. *Id.*; *Postema*, 142 Wn.2d at 82, 89; *Hubbard v. Dep’t of Ecology*, 86 Wn. App. 119, 124-125 (1997). As Ecology concedes, “Ecology generally may not approve a new appropriation that conflicts with a minimum instream flow.” Ecology Super. Ct. Brief, at 6.

No provision of the Water Code authorizes Ecology to use its “reservation” authority to infringe upon instream flows already appropriated and established as senior water rights. The law is both clear and logical: water must be available in order for it to be reserved and set aside for future use. Conversely, water that is already appropriated cannot be reserved or set aside for future use by others. The water “reserved” by Ecology here was already appropriated and thus not available. Because there was no water available to reserve, Ecology’s reservation of the 25 cfs was beyond its statutory authority and facially invalid.

C. Ecology Is Barred By Statute From Impairing Instream Flows.

Ecology’s reliance on the “OCPI” (overriding considerations of public interest) exception in RCW 90.54.020(3)(a) to justify its reservation is misplaced. The 1971 WRA, which Ecology claims as the source of its authority to impair the minimum instream flow water right in the Skagit, explicitly denies Ecology that authority. RCW 90.54.900, enacted in the 1971 WRA, expressly provides: “Nothing in this chapter shall affect *any* existing water rights, riparian, appropriative, or otherwise.” (Emphasis added). Lest there be any misunderstanding, the Legislature added RCW 90.54.920 to the WRA in 1989, which confirms: “Nothing in this act shall affect or operate to impair any existing water right.” Thus, under RCW 90.54.920, the OCPI exception in the WRA cannot be used to affect or

operate in any manner that would impair an existing water right, including an instream flow water right set by rule. Here, the Skagit minimum flows are existing water rights and Ecology, by using OCPI to broadly carve a reservation out of established instream flows, has violated the Legislature's express directive to preserve and protect instream flows.

D. The OCPI Exception In RCW 90.54.020(3)(a) Authorizes Only Specific "Withdrawals" In Specific Limited Circumstances; It Does Not Authorize Wholesale Reservations of Water.

The primary mandate of RCW 90.54.020(3) is that "base flows necessary to provide for preservation of wildlife, fish" and other instream values be retained. The statute provides Ecology narrow authorization to permit individual "withdrawals" of water that conflict with the necessary base flows (but not water rights) only in those specific, unique situations where it is clear OCPI will be served. When OCPI is invoked, the stream will be left with less water than is necessary to preserve the fish, wildlife, and other values that the Legislature has mandated shall be retained. Use of OCPI is appropriate only in the most limited circumstances.

Significantly, the OCPI exception in RCW 90.54.020(3)(a) only permits specific "withdrawals," not general "reservations." A withdrawal [the term used in the OCPI exception] is not the same as a reservation. Ecology has erroneously, and without authority, merged and conflated

those two distinct terms. By doing so, it re-writes the relevant statutes and attempts to broadly expand its very narrow authority to impair base flows.

In Washington, a “withdrawal” refers to the taking or removal of groundwater for specific application to a beneficial use. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 15-16; *In the Matter of Appeals from Water Rights Decisions of the Dep’t of Ecology*, 1996 WL 514630 at *6 (PCHB July 17, 1996). Where surface waters are concerned, the Water Code uses the term “diversion.” The word “withdrawal” is used throughout the Water Code to describe the removal of water from the ground, not the reservation of water for future use. *See* RCW 90.14.020(5) (discussing “rights to divert or withdraw water”); 90.14.130 (posting of notice at the “point of diversion or withdrawal”); 90.14.170 (relinquishment of rights “to divert or withdraw waters”); 90.42.040 (changes to “point of diversion or withdrawal”); 90.44.050 (permits to “withdraw” groundwater); 90.44.060 (requiring application to state specific location for “withdrawal” of ground waters); 90.48.422 (preserving rights of water right holder to “fully divert or withdraw water under a water right permit”).

The word “withdrawal” is used repeatedly in Chapter 90.14 RCW (regarding registration, waiver, and relinquishment of water rights) and Chapter 90.44 RCW (regarding regulation of public ground waters). In these chapters, the term “withdrawal” clearly refers to a specific removal

of groundwater. Those chapters of the Water Code were enacted in 1967 and 1945 respectively. The OCPI exception at issue here was enacted in 1971. Absent express evidence to the contrary, the Court should assume that the Legislature intended the word “withdrawal” in RCW 90.54.020(3)(a) (enacted in 1971) to have the same meaning and connotation as used in the prior 1945 and 1967 legislation.

In contrast to a “withdrawal,” a “reservation” does not actually result in removal of water, but instead prospectively sets aside an amount of water for future use by others. Once a reservation is made, those waters reserved are no longer available for appropriation, except as authorized by the reservation itself. RCW 90.03.345. A general “reservation” of water may ultimately lead to actual “withdrawals” or “diversions” in the future by persons who have valid water rights and who can show their proposed water use falls within the scope of the reservation. However, here, Ecology incorrectly contends it need not evaluate those subsequent withdrawals to determine whether they independently meet the OCPI test.

Ecology’s interpretation would require this Court to effectively re-write RCW 90.54.020(3)(a) by adding the words “*Reservations and*” to the last sentence of RCW 90.54.020(3)(a) (the OCPI exception).

Alternatively, the Court would have to find that the Legislature (for the first and only time in the Water Code) intended the word “withdrawal” as

used in RCW 90.54.020(3)(a) to include “reservations.” The Court should not re-write the Code to accommodate Ecology’s erroneous interpretation. The Legislature, in the WRA, could have granted Ecology authority to reserve and set aside waters on an aggregate basis using OCPI; however, no such authorization appears in the statute as written.

RCW 90.54.020(3)(a) permits Ecology to authorize specific “withdrawals” that conflict with base flows if Ecology makes an affirmative OCPI determination; but, it does not authorize or apply to “reservations” at all. Ecology had no authority to use OCPI as a basis to reserve waters that were already appropriated and set aside by rule as instream flow water rights. The 25 cfs reservation at issue here is invalid.

E. Limiting the OCPI Exception to Specific Withdrawals, and Not Reservations, Is Consistent With Legislative Intent.

There is no dispute that Ecology has statutory authority to approve specific “withdrawals” of water that conflict with base flows “*in those situations* where it is *clear* that overriding considerations of the public interest will be served.” RCW 90.54.020(3)(a) (emphasis added). The Legislature has provided Ecology with narrow authority to evaluate a specific proposal for the withdrawal of water for beneficial use and determine whether the specific withdrawal would qualify under OCPI. *Id.* Here, however, Ecology has broadly reserved water for future

consumptive use without determining whether any of the specific withdrawals that may occur under the reservation warrant impairment of instream flows based on OCPI. This conflicts with statutory intent.

The OCPI provision in RCW 90.54.020(3)(a) is a narrow exception to the general statutory mandate that instream flows for non-consumptive uses should be preserved and protected by law. *Postema*, 142 Wn.2d at 81-82. The Legislature carefully limited the OCPI exception to specific “withdrawals” in order to force Ecology to make a specific, fact-based determination about whether a specific use of water would justify the drastic step of reducing and impairing instream flow protection. A case-by-case withdrawal approach requires Ecology to be very clear that a specific withdrawal justifies impairment of flows.

Ecology’s interpretation of the OCPI exception in this case would conflict with the Legislature’s careful and narrow approach. Ecology contends that it need not determine that a specific use of water qualifies for OCPI; rather, Ecology submits that it can aggregate an entire group of potential future water demand, for a broad range of beneficial uses, and then reduce instream flows to meet that collective aggregate demand (even though there may be no individual use of water that would independently qualify for OCPI). Ecology’s approach allows it to avoid answering the hard question mandated by the Legislature; that is, is it clear that, in this

situation, overriding considerations of the public interest justify a specific withdrawal of water that will result in impairment of flows?

Ecology argues that the 25 cfs reservation at issue here represents a small infringement on instream flows and thus there is no cause for concern about impacts to fish, habitat, and non-consumptive values. However, any unauthorized impairment of instream flows is unlawful; the amount of the impairment is simply irrelevant. *Postema*, 142 Wn.2d at 89-90 (instream flows are not subject to piecemeal impairment). Moreover, Ecology is incorrect that the impacts are not significant. *Supra*, at 4-6.

Amici Tribes are concerned that, if Ecology's interpretation of the Water Code is accepted here, there is no apparent limit to its authority to carve broad reservations out of instream flows. Under Ecology's aggregation approach, the larger the amount of consumptive water demand, the more likely that Ecology will find OCPI to be met. Taken to its ultimate conclusion, Ecology's interpretation would allow it to reserve the entirety of a stream's flow and set it aside for future consumptive use, so long as Ecology found, in its discretion, clear evidence that overriding considerations of the public interest would be met. The Legislature has not authorized Ecology to use its reservation authority to negate instream flow protections. Ecology's interpretation should be rejected.

F. Use of OCPI Is Limited to Unique, Temporary Situations.

Use of the OCPI exception is properly limited to extreme circumstances that are not present here. The Legislature declared, in the WRA, that “instream resources and values must be preserved and protected so that future generations can continue to enjoy them.” RCW 90.54.010(1)(a). To accomplish this goal, the Legislature directed: “The quality of the natural environment shall be protected . . . Perennial rivers and streams of the state shall be retained with base flows necessary to provide for the preservation of wildlife [and] fish.” RCW 90.54.020(3). This strong, mandatory wording shows that any authorization that conflicts with base flows must be based on extraordinary circumstances and be limited in scope and duration. Otherwise, the resources “necessary” for the long-term preservation of environmental, in-stream values will be compromised and the legislatively mandated goals will not be achieved.

Use of the OCPI exception is properly limited to situations of an emergency or exigent nature. For example, if a community’s water source was compromised by a natural disaster such as an earthquake, OCPI might justify a short-term diminishment of base flows in a nearby stream until water supply was restored. Or, in an extreme drought year, OCPI might be used to maintain basic water supplies for human consumption at the expense of base flows in a stream. In these and similar situations, Ecology

would have authority to permit specific, temporary withdrawals that conflict with base flows. Because the withdrawals would be only temporary, the Legislature's preservation goals could still be achieved.

In contrast, here, Ecology invoked OCPI in response to generalized, ordinary and typical pressures for additional water for future out-of-stream consumptive use. The result of Ecology's action is a permanent diminishment of flows that are necessary for the preservation of instream values. This is hardly the unique, compelling type of situation that the Legislature appears to have had in mind when it authorized a narrow exception to the preservation of base flows "so that future generations can continue to enjoy them." RCW 90.54.010(1)(a).

III. CONCLUSION

The plain language of the Washington Water Code provides that Ecology may, at most, use the OCPI exception to authorize specific "withdrawals" of water that conflict with base flows on a case-by-case basis. The Code does not permit Ecology to broadly reserve and set aside waters that have already been appropriated by rule for minimum instream flows based on a general aggregation of potential future water demand. The Legislature has expressed a clear mandate for preservation of instream flows. To ensure protection of instream flows under state law, this Court must reverse the Superior Court.

Respectfully submitted this 7th day of March, 2012.



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CERTIFICATE OF SERVICE

I certify that on March 7, 2012, I mailed a copy of the foregoing AMICUS CURIAE BRIEF OF INTERESTED INDIAN TRIBES, postage prepaid, to:

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