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NO. 68162-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

SWINOMISH INDIAN TRIBAL COMMUNITY,
a Federally Recognized Indian Tribe,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

**DEPARTMENT OF ECOLOGY'S ANSWER TO
BRIEFS OF AMICI CURIAE TRIBES AND CELP**

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I. INTRODUCTION

This appeal involves the Swinomish Tribe's challenge to the validity of the Department of Ecology's (Ecology) 2006 amendment to the Skagit River Basin Instream Flow Rule (WAC 173-503, the "Amended Rule"). The Department of Ecology's Response to Appellant's Opening Brief (Ecology Response Bf.) provides the background, authority, and argument explaining why the Amended Rule is lawful and the superior court's decision to uphold it should be affirmed. The Center for Environmental Law and Policy (CELP) and eight tribes (Amici Tribes) have filed amicus curiae briefs which make additional arguments opposing the Amended Rule. CELP and the Amici Tribes offer incomplete and incorrect statutory construction arguments, which if adopted would eliminate or limit the Legislature's explicit grant of authority to Ecology to allow new uses of water which may affect streamflows based on "overriding considerations of the public interest" (OCPI).

The arguments in both of these amicus briefs fail. Under the plain language of the statutes, Ecology is authorized to undertake rulemaking to set instream flows, consider the array of public interests in play, and determine whether and when limited exceptions to the maintenance of instream flows are warranted. Ignoring the rule of statutory construction

that a statute must be read in context with its statutory scheme, amici selectively construe statutory terms in isolation.

The amici argue for constructions of the statutory scheme so narrow they would render entire provisions meaningless. The language subject to this appeal is from the 1971 Water Resources Act, which authorizes withdrawals of water that conflict with base flows where it is clear that “overriding considerations of the public interest will be served.” RCW 90.54.020(3)(a). The Amici Tribes narrowly construe this provision as applying only to individual applications for water rights in “emergency” situations, and contend that it cannot be applied by Ecology to establish reservations of water for future uses in a river basin by rulemaking. CELP argues for an even narrower construction of the OCPI provision, claiming that it can never be applied to affect minimum instream flows—even in approving individual water right applications, and even in an emergency. CELP bases its argument on inclusion of the words “base flows” instead of “minimum instream flows” in the OCPI provision, but ignores that the two terms have the same meaning and serve the same purposes in the overall statutory scheme.

Ecology’s interpretation of the statute—that the law authorizes certain water uses even if minimum instream flows may be impaired, but only in cases of overriding considerations of the public interest—is a

logical reading that gives effect to each statutory provision without rendering any of them meaningless. Ecology properly determined that, in this case, overriding considerations justified the establishment of reservations of water for new uses in the Skagit River Basin. As such, the Amended Rule was adopted squarely within the authority of the statute and should be upheld.

II. ARGUMENT

A. Answer to CELP's Amicus Brief

1. **The Legislature established the OCPI exception for “base flows” to apply to minimum instream flows set by rule.**

CELP argues that the statutory authorization for an OCPI exception to “base flows,” under RCW 90.54.020, does not apply whatsoever to allow any new water use which might affect “minimum flows” set by rule, as defined by RCW 90.22, because one chapter uses the word “base” and the other uses the word “minimum.” The Legislature referred to “base flows” of perennial rivers and streams in RCW 90.54.020 when authorizing Ecology to adopt rules related to “future water resource allocation and use”—and used “minimum water flows,” in RCW 90.22, to describe Ecology’s authority to adopt rules establishing “minimum water flows or levels for streams, lakes, or other public waters.” RCW 90.54.020, .040; RCW 90.22.010, .020.

CELP's attempt to depict these as two mutually exclusive terms fails for multiple reasons. First, the terms "base flows" and "minimum flows" have the same meaning and effect as shown within specific definitions in RCW Title 90. Second, the Supreme Court has recognized that the OCPI provision is a basis for an exception allowing water uses which conflict with minimum instream flows. And, third, an integrated reading of the entire statutory scheme clearly shows that the Legislature intended to give Ecology authority to regulate instream flows, but also included a "safety valve" to consider evolving public needs for water through the OCPI exception.

First, the only definition of "minimum flow" and "base flow" together in RCW Title 90 is set forth in the Watershed Planning Act, RCW 90.82:

"Minimum instream flow" means a minimum flow under chapter 90.03 or 90.22 RCW or a base flow under chapter 90.54 RCW.

RCW 90.82.020(3). This chapter sets forth a collaborative process to establish minimum instream flows within watersheds throughout the state. This process involves local watershed planning units that collaborate with Ecology in setting flow levels. RCW 90.82.080(1)(a). Minimum flows determined by planning units are established by Ecology through rule-making. RCW 90.82.080(1)(b). If suitable flows are not determined

through watershed planning, Ecology is authorized to initiate rulemaking to establish flows based on its own judgment. RCW 90.82.080(1)(c). As such, this definition in RCW 90.82.020 clearly shows the Legislature's intent that the terms "base flows" and "minimum flows" have the same meaning and effect within the water codes.

Second, the Supreme Court, in recognizing minimum instream flows as senior water rights with the full benefits of prior appropriation, acknowledged that the OCPI exception of RCW 90.54 applies to instream flow rights. In *Postema*, the very case relied upon by the appellant and amici in arguing that instream flows set by rulemaking are priority water rights with seniority over future groundwater withdrawals, the Supreme Court has specifically recognized that the OCPI exception is applicable to minimum flows established in RCW 90.22:

Once established, a minimum flow constitutes an appropriation with a priority date as of the effective date of the rule establishing the minimum flow. RCW 90.03.345. Thus, a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals. RCW 90.03.345; RCW 90.44.030. *The narrow exception to this rule is found in RCW 90.54.020(3)(a), which provides that withdrawals of water which would conflict with the base flows "shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served."*

Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 81, 11 P.3d 726 (2000) (emphasis added). *Postema* reviews the various authorities under which Ecology sets instream flows and reads them all together to hold that minimum flows are a fully realized water right (not a “partial” right, as asserted by appellants in that case). In doing so, the Supreme Court concludes that nothing can override minimum flow rights once established by rule—nothing, it is remarked, *except the clear statutory exception of OCPI* cited by the Court in the paragraph above. *Postema* cannot be read piecemeal, as CELP attempts to do. The very same case law that articulates the senior water right, itself, includes the exception. This is the guidance relied upon by Ecology, in good faith, when carrying out its statutory duties. Like the Supreme Court, in adopting the Amended Rule, Ecology assumed that the OCPI exemption for “base flows” applied to instream flows or levels set under any chapter of RCW Title 90.

This leads to the third reason that CELP’s narrow and segregated statutory construction must fail: the state’s water policy is contained within several chapters of RCW Title 90, and the cross-references within the statutory scheme make clear that the OCPI provision applies to minimum flows. This is how the Legislature directs and authorizes Ecology to manage water resources. As described in *Postema*, water is regulated by “several statutes” that all together “recognize that water is

essential to the state's growing population and economy as well as necessary to preserve instream resources and values"¹ The Court clearly stated that minimum flow rights, established by rule, are intended by the Legislature to be full (not partial) rights because "none of these statutes indicate that they are meant to override minimum flow rights once established by rule, none conflict with the statutes authorizing or mandating rules setting minimum flows, and none conflict with the specific statutes respecting priority of minimum rights." *Postema*, 142 Wn.2d at 83. None, that is, except the OCPI exception of RCW 90.54.020.

To determine whether the Legislature intended a meaningful distinction in the regulation of "minimum flows" as opposed to "base flows," it is useful to look at the beginning of the general Water Code, RCW 90.03. The central principle that instream flows constitute legal "appropriations" of water as equally as do out-of-stream water uses is stated as follows:

The establishment of reservations of water for agriculture, hydroelectric energy, municipal, industrial, and other beneficial uses under RCW 90.54.050(1) *or minimum*

¹ *Postema*, 142 Wn.2d at 82-83 (The Supreme Court here cites to RCW 90.54.010(1)(a); RCW 90.03.005 (describing policy of water use yielding maximum net benefits from both diversionary use of waters and retention of water instream to protect natural values and rights); RCW 90.54.020(2) (generally same); *see also* RCW 90.82.010; RCW 43.21C.030(2)(b) (State Environmental Policy Act of 1971); RCW 43.21H.010 (state economic policy act).).

flows or levels under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter

RCW 90.03.345 (emphasis added). In referring to “minimum flows or levels,” this statute references both RCW 90.22.010 and RCW 90.54 (the chapter that includes the OCPI provision).

Although different terms are used in different parts of RCW Title 90, a sensible reading demands that all chapters be read together and not held against each other to force unintended distinctions. For instance, RCW 90.54 directs Ecology to maintain 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). Similarly, RCW 90.22 authorizes Ecology to establish “minimum water flows or levels” 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” RCW 90.22.010. It would be absurd to apply a segregated statutory construction to RCW 90.22 as the exclusive authority for the protection of “fish, game, birds or other wildlife resources,” and insist that RCW 90.54 only protects “wildlife, fish, scenic, aesthetic and other environmental values.” Read separately and strictly, this would prohibit RCW 90.54 from applying to any protection of birds, as those are exclusively named

only in one chapter and not the other. Likewise, RCW 90.22 requirements for “minimum water flows or levels” can only sensibly be read to incorporate “base flows” as defined in RCW 90.54. And the establishment of “minimum water flows or levels” under RCW 90.22 provides a means to carry out the Legislature’s directive in RCW 90.54.020(3)(a) that “perennial rivers and streams of the state shall be retained with base flows.” “Minimum flows,” as stated in RCW 90.22, and “base flows,” as stated in RCW 90.54 are identical in concept and serve the same purposes.

If CELP’s argument were correct—and the Legislature intended “base flow” as something completely distinct from “minimum flow”—RCW 90.54.020(3)(a) would be rendered meaningless. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). If Ecology cannot maintain “base flows” by addressing minimum flows and levels (either through rulemaking or permit provisions), it cannot regulate base flows at all. That reading would render the entire concept of base flows, and OCPI itself, superfluous.

It would be incorrect to assume the Legislature included meaningless language about “overriding considerations of the public

interest” in the statute, with no intent to vest Ecology with real authority to apply OCPI. After all, if OCPI can only apply to affect “minimum flows,” there would be no practical way for Ecology to implement the exception.

The Legislature included the OCPI exception to provide narrow discretion for an “override” of instream flows in limited situations. No matter how important fish protections are, the Legislature has never deemed fish protection as the *exclusive* goal of water regulation. Indeed, Ecology is continually tasked with finding a balance and satisfying the array of interests in play throughout the state. A limited “override” makes for a more workable system that actually encourages the setting of instream flows in order to protect fish and other instream values. Without OCPI as a “safety valve,” there may be greater reluctance to establish minimum flows because other important public interests could never be considered after the flows are set.

2. The 2001 Skagit Rule itself incorporated OCPI.

Reflecting on the integrated statutory framework authorizing Ecology to set minimum flows, the very rule that set the Skagit Basin minimum instream flows included the OCPI exception from RCW 90.54 within its text. In drafting instream flow rules, Ecology rightfully reads the statutes all together and, more recently, relies upon *Postema* for guidance in incorporating the authority for the OCPI exception. These

instream flow rules are grounded, not just in the procedures of RCW 90.22, but in the fundamentals and exceptions listed in RCW 90.54. This is clear from early in Ecology's instream flow rulemaking. In 1976, when establishing the regulatory scheme for instream flow rules to come, Ecology looked to RCW 90.54 in promulgating WAC 173-500.² The rule directs Ecology to "by regulation establish policies for the beneficial use of public waters pursuant to RCW 90.54.040." WAC 173-500-060(2) (1976).

In 2001, when establishing the original instream flow rule for the Skagit Basin, Ecology again incorporated RCW 90.54. It adopted WAC 173-503 under its statutory directive to retain rivers, streams, and lakes "with instream flows and levels necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality." WAC 173-503-020 (2001). The 2001 rule went on to state that:

Perennial rivers and streams of the state shall be retained with base flows necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict

² This rule was drafted to "apply to chapters 173-501 through 173-599 WAC" and sets forth definitions and guidance in setting future instream flow rules. WAC 173-500-060(1) (1976).

therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. (RCW 90.54.020(3)(a)). . . .

. . . .

In administering and enforcing this regulation, the department's actions shall be consistent with the provisions of chapter 90.54 RCW.

Wash. St. Reg. 01-07-027 (adopted Mar. 12, 2001) (codified at WAC 173-503-020 (2001)).

Not only the statutes and the Supreme Court, but the *very rule at issue*, all incorporate the OCPI exception into a minimum instream flow set by rule. Ecology agrees as to the value of minimum instream flows. It follows legislative directives and guidance in setting minimum instream flows through rulemaking. And Ecology agrees that a minimum flow constitutes a water right that cannot be impaired by junior water rights—except, as the statute says, in the rare cases that the high standard of OCPI applies. In this case, the administrative record clearly supports the conclusion that it did so.

3. The amended rule does not violate the public trust doctrine.

CELP contends that Ecology's application of the OCPI exception to establish the water reservations in the Amended Rule violated the public trust doctrine. Amici Tribes Bf. at 19. This argument fails.

To the extent the public trust doctrine applies in the context of water resources management, it is embodied in the state's water resources laws, which include the OCPI provision in RCW 90.54.020(3)(a). For the prudent management of the state's water resources, the Legislature provided the OCPI exception as a means for Ecology to allow water uses that would affect instream flows when there are "overriding considerations of the public interest."

The courts have repeatedly established that the public trust doctrine does not provide any independent water resources management authority to Ecology or impose any requirements on the agency in its management of water beyond the authority and requirements provided in the relevant water statutes.

The Washington Supreme Court has considered the role of the public trust doctrine in the context of water resources management in three cases. In *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993), the Supreme Court held that the public trust doctrine did not authorize Ecology to regulate between different classes of water users in a manner that the Court determined was not expressly authorized by the water code. The Court held that Ecology has no common law authority under the public trust doctrine that is independent of the statutory authority conferred on the agency by the Legislature:

[T]he duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof. Nowhere in Ecology's enabling statute is it given the statutory authority to assume the State's public trust duties and regulate in order to protect the public trust.

Rettkowski, 122 Wn.2d at 232.

In *R.D. Merrill Company v. Pollution Control Hearings Board*, 137 Wn.2d 118, 133-34, 969 P.2d 458 (1999), the Supreme Court considered whether decisions by Ecology to approve certain applications for changes of water rights violated the public trust doctrine. The Court followed its earlier holding in *Rettkowski*:

Without question, the state water codes contain numerous provisions intended to protect public interests. However, the public trust doctrine does not serve as an independent source of authority for [Ecology] to use in its decision-making apart from the provisions in the water codes.

R.D. Merrill Co., 137 Wn.2d at 134; *see also Postema*, 142 Wn.2d at 98-99 (public trust 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”).

CELP's argument that the public trust doctrine imposes requirements on Ecology in its role as the state's water management agency beyond those contained in the water statutes has already been rejected by the Supreme Court on three occasions. In applying OCPI to establish the water reservations through the Amended Rule, Ecology

implemented a statutory provision enacted by the Legislature and did not run afoul of any purported “prohibition” imposed by the public trust doctrine.

B. Answer to Brief of Amici Tribes

The Amici Tribes do not adopt CELP’s novel argument that the OCPI exception applies only to “base flows” and not to “minimum flows,” but instead appear to recognize that the two terms have no difference in meaning or effect. Instead, the Amici Tribes acknowledge that RCW 90.54.030(3)(a) allows for “withdrawals” of water that would affect minimum flows—but argue that this cannot include “aggregate” withdrawals of water from streams in the form of “reservations” of water established through rule-making. Amici Tribes Bf. at 12-16. Essentially, the Amici Tribes argue that Ecology may apply the OCPI exception when evaluating individual water right applications, but not when promulgating water management rules for overall river basins.

The Amici Tribes are incorrect for three reasons. First, they downplay the Legislature’s policy prerogative and statutory scheme, as explained above, that authorizes Ecology to set minimum instream flow requirements to maintain base flows, but also provides Ecology with an exception that allows such flows to be affected by water uses when there are overriding considerations of the public interest. Second, their

interpretation of RCW 90.54.020(3)(a) is strained because they read the word “withdrawals” far too narrowly. The word “withdrawals” should be read to include removals of water from a river or aquifer through a “reservation” that enables such withdrawals of water to occur. Lastly, the Amici Tribes erroneously contend that OCPI can only be applied to allow uses of water that would conflict with minimum instream flows in “situations of an emergency or exigent nature.” *See* Amici Tribes’ Bf. at 19.

1. OCPI is an exception to the general rule that minimum flows cannot be impaired by appropriations of water that are junior in priority.

The foundation of the Amici Tribes’ argument is the principle that an instream flow set by rule is a form of water right that is “entitled to protection from impairment, just like other properly perfected water appropriations under Washington law.” Amici Tribes’ Bf. at 10. As explained in answer to CELP’s brief, in Section II.A.1 above, this argument fails to recognize that the OCPI exception goes hand-in-hand with the authority for instream flow rulemaking. Just as the Legislature has authorized Ecology to establish instream flow requirements through rule-making as a means to maintain “base flows,” through RCW 90.54.020(3)(a), the Legislature has also authorized Ecology to allow uses of water that would conflict with these flows when there are

overriding considerations of the public interest. *See Postema*, 142 Wn.2d at 81. The Amici Tribes also wrongly contend that RCW 90.54.900 and .920 “[bar] Ecology from using RCW 90.54.020 . . . to impair instream flow rights.” Amici Tribes’ Bf. at 10. RCW 90.54.900, enacted as part of the Water Resource Act in 1971, states that nothing in RCW 90.54 “shall affect any existing water rights.” RCW 90.54.920, which was enacted as an amendment to the Water Resources Act in 1989, states that nothing in RCW 90.54 shall “affect or impair any existing water rights.” The Skagit River Basin Instream Flow Rule, which established the instream flows at issue in this case, was adopted in 2001, long after these two provisions became effective in 1971 and 1989. Thus, the Skagit instream flows were not “existing rights” shielded by these provisions at the time they became effective.

Moreover, a specific statute will supersede a general one when both apply. *Kustura v. Dep’t of L&I*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010) (quoting *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994)). Here, *arguendo*, even if one reads “existing water rights” in these provisions to go beyond appropriative water rights that existed prior to 1971 and 1989 and include “instream flows” that were established by Ecology after the effective dates of RCW 90.54.900 and .920, the specific exception provided in

RCW 90.54.020(3)(a) would still control. Thus, even if RCW 90.54.900 and .920 could be read to generally “bar” impairment of the Skagit instream flows through the operation of RCW 90.54, the OCPI statute provides a specific exception.

2. Ecology can establish reservations of water to authorize “withdrawals” under RCW 90.54.020.

In the rule-making scenario in this case, Ecology created “reservations” to allow limited withdrawals of water in several areas in the Skagit River Basin that are otherwise closed to new water uses. In applying the OCPI exception, through an extensive analysis, Ecology found that overriding considerations of the public interest would clearly be served because the benefits of allowing some very limited new withdrawals of water for domestic, commercial, and agricultural uses—amounting to no more than two percent of the lowest weekly flow that the stream experiences on average once every ten years—would greatly outweigh the potential harm to fish populations. RA002987-RA002992 (Skagit Rule Amendment Rule Making Criteria, May 2006).

The Amici Tribes contend that Ecology acted contrary to its statutory authority because:

the OCPI exception in RCW 90.54.030(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.

Amici Tribes' Bf. at 13-14.

Amici Tribes read the word "withdrawals" in RCW 90.54.020(3)(a) in an overly narrow manner in contending that Ecology lacks authority in rule-making to establish "reservations" of water that would authorize multiple "withdrawals" of water in a specific area. First, the Amici Tribes present a severely constrained interpretation of "withdrawals" by contending that it can only mean specific, individual removals of groundwater, rather than individual or aggregate removals of water from either surface water bodies or groundwater aquifers. Then, they make far too much of the lack of the word "reservations" in the OCPI provision. Their argument fails because there is no basis under the water statutes to interpret the word "withdrawals" so narrowly, and they fail to recognize that a "reservation" is simply a mechanism to allow "withdrawals" in the aggregate.

The Amici Tribes attempt to impose a cramped interpretation of the term "withdrawal" by citing to numerous provisions in the water codes where the word "withdrawal" is used to describe the removal of water from the ground, and the word "diversion" is used to describe the removal of water from surface water bodies. Amici Tribes' Bf. at 14-15. By

asserting that the word “withdrawal” is distinguishable from the word “diversion,” the Amici Tribes attempt to show an even greater distinction between the words “withdrawals” and “reservations,” to support their contention that “the term ‘withdrawal’ clearly refers to a specific removal of groundwater.” *Id.* Their ultimate implication, that, even if their position that “withdrawals” cannot include surface water uses is correct (which it is not), “withdrawals” cannot even refer to aggregate uses of groundwater, through a reservation, is a far-fetched reach of logic that defies all sensible construction of the Legislature’s statutory scheme.

But the Amici Tribes fail to acknowledge that the word “withdrawal” is not specifically defined in RCW 90.54, nor anywhere else in the statutes relied upon in this rulemaking. The only actual definition of “withdrawal” in statutes affecting water rights of which Ecology is aware refutes the Amici Tribes’ claim. The Family Farm Water Act, RCW 90.66.040(8), defines “withdrawal” as “to withdraw groundwater or to divert surface water.”

Even if “withdrawal” were an otherwise undefined statutory term, its plain meaning is apparent. The Court may discern the plain meaning of a nontechnical statutory term from its dictionary definition. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010) (quoting *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006)). “Withdrawal” is defined as

“the act of drawing someone or something back from or out of a place or position.” *Webster’s Third New International Dictionary* 2626 (1971). In that plain sense, the term equally applies to surface water and groundwater removals. No legislative history exists that in any way suggests that the Legislature intended to depart from this plain meaning and distinguish between surface and groundwater withdrawals.³ The “withdrawal” of water can involve drawing surface water out of a river or groundwater out of an aquifer. This plain meaning of the term “withdrawal” is often used in the subject area of water resources. *See, e.g.*, R. Beck, *Waters & Water Rights* § 2.2 (“withdrawals and consumptive use”); A. Dan Tarlock and Sarah B. Van de Wetering, *Growth Management and Western Water Law: From Urban Oases to Archipelagos*, 5 *Hasting W.N.W. J. Envtl. L. & Policy* 163, 168 (1999) (“water withdrawals in the nineteen western states”).

The context of RCW 90.54.020 also reinforces that “withdrawal” does not have an unstated restriction to groundwater. The statute makes a

³ The Amici Tribes’ reliance on the Supreme Court’s decision in *Campbell & Gwinn* and a 1996 decision of the Pollution Control Hearings Board (PCHB) in support of this argument is misplaced. Amici Tribes’ Bf. at 14 (citing *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 15-16, 43 P.3d 4 (2002), and *In the Matter of Appeals from Water Rights Decisions of the Dep’t of Ecology*, 1996 WL 514630 at *6 (Summary Judgment Order, Jul. 17, 1996)). *Campbell & Gwinn* did not involve any issue as to the meaning and scope of the term “withdrawal.” While the PCHB interpreted the term “withdrawal” as used in RCW 90.54.020 to apply only to groundwater uses, that interpretation was dicta (unnecessary to the PCHB’s ruling), and was not made with the benefit of briefing on any issue over interpretation of this term.

“general declaration of fundamentals.” RCW 90.54.020(1). Thus, it provides *general* direction on a broad scale and is not intended to make unstated, fine distinctions between groundwater and surface water that provide a more restrictive meaning than the commonly understood meaning of the term “withdrawal.” The term “withdrawals” is used in the context of making exceptions to protections for base flows in rivers and streams. Groundwater uses may conflict with base flows just as surface water uses do. State water law recognizes the close interconnections between ground and surface water. RCW 90.44.020, .030, .040.⁴ Thus, to interpret the use of the term “withdrawal” in the declaration of “fundamentals” as narrowly applying to just groundwater, without any specific direction to this effect, is inconsistent with the recognition that both ground and surface water appropriations affect base flows. The purposes or substantive provisions of RCW 90.54 provide no reason to believe that the Legislature intended to only allow exceptions to instream flow requirements for groundwater uses, but not surface water use exceptions, based on overriding considerations of the public interest.

⁴ In water statutes other than RCW 90.54, when the term “withdrawal” is used in a narrow sense, it is either in the context of the Groundwater Code, RCW 90.44, itself, where a specific type of use is contemplated, or in the context of being juxtaposed with the term “diversion.” *See, e.g.*, RCW 90.03.255, .370, .470; RCW 90.14.051, .091, .140; RCW 90.42.040; RCW 90.58.065; RCW 90.80.070. RCW 90.54 is not a statute that focuses specifically on groundwater, and does not otherwise use specific language to distinguish between “diversions” and “withdrawals.”

a. A reservation is a mechanism to authorize multiple “withdrawals of water” when they are justified as a result of OCPI.

Based on their contention that the term “withdrawals” is constrained only to specific, individual removals of groundwater, the Amici Tribes assert that RCW 90.54.020(3)(a) does not authorize Ecology to allow “withdrawals” of water in the aggregate through the establishment of “reservations” of water:

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)

Amici Tribes’ Bf. at 15.

The Amici Tribes’ argument lacks merit for three essential reasons. First, it fails to recognize that the word “withdrawals,” in the plural, is included in the OCPI provision. By including the term “withdrawals,” rather than “withdrawal” in the singular, the Legislature authorized Ecology to allow for aggregate, rather than individual, water uses when such aggregate “withdrawals” are warranted as a result of OCPI. The OCPI provision does not require that exceptions allowing water use that would conflict with instream flows must be established on an individualized or case-by-case basis. To begin with, no such restriction exists in the language of the statutory exception. Nowhere does the

language in RCW 90.54.020(3)(a) hint that “overriding considerations of the public interest” must be based on the circumstances of individual users rather than on classes of users and aggregate affects. Moreover, such a reading is illogical. In a scenario involving entire classes of users, the public interest may be much greater than in the case of an individual user, whose individual plans are less likely to rise beyond a private interest to be a public one.

Second, another provision in the Water Resources Act, RCW 90.54.050(1), authorizes Ecology to establish “reservations” of water for future uses through water management rule-making in basins throughout the state. And there is no language in RCW 90.54.020(3)(a), or elsewhere in the water codes, which precludes Ecology from establishing reservations to allow for future new uses, i.e. withdrawals, of water, based on OCPI. Under RCW 90.54.050(1), Ecology is authorized to adopt rules to “[r]eserve and set aside waters for beneficial utilization in the future.” The Amici Tribes fail to acknowledge that the OCPI provision, which is also part of the Water Resources Act, does not preclude reserving and setting aside waters for future use, i.e. establishing a reservation, when doing so is justified as a result of OCPI.

Third, in the context of the Amended Rule being challenged in this case, a “reservation” is a mechanism that allows new “withdrawals” of

water in an area of the Skagit River Basin which is otherwise closed to new water uses. Thus, a “reservation” is simply a means to allow “withdrawals” under the OCPI exception. And, the OCPI exception should not be read so narrowly as to preclude Ecology from allowing aggregate “withdrawals” through a “reservation” when the agency finds they are justified due to overriding considerations of the public interest.

The Amici Tribes conclude their argument by contending 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 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

Amici Tribes’ Bf. at 18. The only way this dire scenario could come to pass is if the words “clear that overriding considerations of the public interest will be served” were eliminated from the statute. OCPI is a significant legal limit on Ecology’s ability to affect minimum instream flows and the values they serve. Further, the overall statutory scheme requires Ecology to maintain minimum flows as a means to protect fish and other values. The application of OCPI in this case, where only a two percent reduction of the lowest weekly flow that the stream experiences on average once every ten years is allowed through new withdrawals of water under the reservation, exemplifies how OCPI is a narrow exception that

ensures that instream values must be protected. The Amici Tribes' concern that Ecology's interpretation of the OCPI exception could allow for the "entirety of a streams flow" to be set aside for future consumptive use is entirely unfounded based on the language in the statute, as exemplified by the specific scenario in this case.

3. Ecology's authority to apply OCPI is not limited to emergency situations.

The Amici Tribes are also wrong in contending that "use of the OCPI exception is properly limited to situations of an emergency or exigent nature," such as earthquakes or natural disasters.⁵ See Amici Tribes' Bf. at 19-20. The Amici Tribes add words to the OCPI statute that do not exist. RCW 90.54.020(3)(a) does not define the term "public interest," and does not state that public interests will only be served in situations where water is needed because of an emergency. The statute should not be read so narrowly.

Courts "may not read into a statute matters that are not in it." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990)); see also *State v. Chapman*, 96 Wn. App. 495, 500,

⁵ While CELP argues that OCPI can only be applied to allow water uses that would impair "base flows," and not "minimum flows" set by rule, they also erroneously contend that such uses can only be allowed in emergency situations, "for example, to fight a forest fire or address an emergency need for potable water at a school or hospital." CELP Amicus Bf. at 11.

980 P.2d 295 (1999) (courts “cannot read words into a statute that are not there”). Under RCW 90.54.020(3)(a), “considerations of the public interest” can include multiple public policy factors related to the management of water resources, including, but not limited to, factors relating to emergent situations. If the Legislature intended for the exception to be so limited, it would have expressly stated as much in RCW 90.54.020(3)(a). But it did not—and the statute must be read to apply in a broader range of scenarios where “the public interest will be served.”

4. The amended rule demonstrates that OCPI is not a “slippery slope.”

The first nine pages of the Amici Tribes’ brief emphasizes the importance of fish to the Tribes, the conditions of our region’s fish populations, and factors that affect those fish populations. In supporting its background, the Tribes largely cite to documents that are not part of the agency record in this case. *See* RCW 34.05.558, .562.⁶ The Court should disregard such assertions that are not based on the record. *See Friends of Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd.*, 129 Wn. App. 35, 53, n.18, 118 P.3d 354 (2005).

⁶ Similarly, CELP cites to documents that are not part of the agency record in the “background” section of its brief. *See* CELP Amicus Bf. at 3-4.

Ecology agrees that Washington's water statutes recognize the importance and value of having healthy fish populations, and call for the maintenance of instream flows in order to support fish, wildlife, and aesthetic values. Ecology Response Bf. at 20. But, like CELP, the Amici Tribes fail to recognize that the water codes also recognize and call for the accommodation and promotion of other values related to the management of our state's water resources, including needs for domestic, industrial, and agricultural uses. *Id.* at 20-22, 32 n.10.

While the Amici Tribes discuss the general correlation between instream flows and conditions for fish habitat and production, Ecology went into far more detail in its own rulemaking to determine that the reservations would have minimal impact on fish. Ecology limited the maximum sizes of the reservations to just two percent of the historic summertime low flow, and biologists for Ecology and the Washington Department of Fish and Wildlife found that this threshold would not cause harm to fish and wildlife. Ecology Response Bf. at 11-12, 29-31.

Despite Ecology's rigorous and careful rulemaking, Amici Tribes contend that "Ecology's interpretation of its authority is a slippery slope that could eviscerate instream flow protection in Washington State." Amici Tribes' Bf. at 7. To support this notion, the Amici Tribes assert that "[a]fter 20 years, if supply becomes adequate [in the Skagit Basin]

Ecology can . . . simply make another reservation, further reducing instream flow.” *Id.*

This argument lacks merit in light of the language of the OCPI provision itself, and a provision in the Amended Rule. Again, OCPI is a significant legal limit on Ecology’s ability to affect minimum instream flows and the values they serve, as also required in other provisions in RCW 90.22 and RCW 90.54. Moreover, the Amended Rule provides that:

The reservations are a one-time, finite resource. Once the reservations are fully allocated, they are no longer available and the subbasin management units identified as subject to closure in WAC 173-503-074 are closed

WAC 173-503-073(5). Contrary to the Amici Tribes’ characterization of Ecology’s OCPI authority as a “slippery slope,” the Amended Rule itself specifically provides that the reservations are “finite” and cannot be expanded in the future. This provision demonstrates how Ecology’s OCPI authority cannot be exercised in a manner that would “eviscerate instream flow protection” as the Amici Tribes’ wrongly allege.

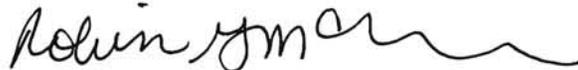
III. CONCLUSION

In adopting the Amended Rule, Ecology followed RCW 90.54.020(3)(a) in considering “overriding considerations of the public interest” and determined that limited, relatively small reservations of water for new uses were amply justified. This exception was clearly

intended by the Legislature to be used as Ecology has done here, in the rare situation where overriding considerations allowed for a small potential impairment of instream flows previously set by rulemaking. Amici have failed to show that the statutory provision for OCPI does not apply in this situation. Ecology's establishment of reservations of water in the Amended Rule did not exceed Ecology's statutory authority. The Amended Rule should be upheld.

RESPECTFULLY SUBMITTED this 30 day of May 2012.

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