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**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

MAGDALENA T. BASSETT;
DENMAN J. BASSETT; and
OLYMPIC RESOURCE PROTECTION
COUNCIL,

Petitioners,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

NO. 14-2-02466-2

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY'S
RESPONSE BRIEF

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1 **I. INTRODUCTION**

2 The State of Washington, Department of Ecology, through its attorneys of record,
3 Stephen H. North and Travis H. Burns, Assistant Attorneys General, submits this response to
4 Plaintiffs' Opening Brief (Petitioners' Brief) seeking to invalidate the Dungeness Rule, WAC
5 173-518. The Dungeness Rule is a water management rule that represents the culmination of a
6 multi-decade and multi-million dollar effort amongst collaborators, stakeholders, governments,
7 scientists, and citizens to protect and restore undisputedly depleted flows and endangered
8 fisheries in the basin and provide water for future human needs.

9 Petitioners ignore the legal and scientific framework that the Legislature has established
10 for setting instream flows by rule, as well as the purposes for which the Legislature has
11 authorized Ecology to adopt flow rules. Flow rules are established under RCW 90.54 (Water
12 Resources Act of 1971) and RCW 90.22 (Minimum Water Flows and Levels) and serve
13 different purposes than water right permits, which are issued under RCW 90.03.290 to allow
14 consumptive water uses. The express purposes of the statutes that authorize flow rules cannot
15 be satisfied if the Court accepts Petitioners' conflation of these two distinct processes.

16 The Dungeness Rule is consistent with Ecology's instream rulemaking authorities and
17 its adoption was necessary to meet statutory provisions that go unmentioned in the Petitioners'
18 Brief, notably the Watershed Planning Act, RCW 90.82, the operative procedural and
19 substantive statute for adopting the Dungeness Rule. Not only did the Act result in a planning
20 process that supports the key Rule provisions challenged by Petitioners, it was instrumental in
21 leading to the 2005 Watershed Plan recommendations that legally obligated Ecology to adopt
22 the very same instream flows at issue here. Petitioners also fail to contest Ecology's science
23 and the "Instream Flow Incremental Methodology" used to set flows in the Rule. Ecology's
24
25
26

1 science is fully explained in the record and its methodology was directly upheld by the State
2 Supreme Court in the *Elkhorn*¹ decision, discussed herein.

3 Petitioners also serve up a misguided attack on the optional cost-benefit analysis that
4 Ecology prepared in support of the Dungeness Rule. An examination of the record and the
5 analysis itself demonstrates that the benefits of the Rule outweigh its costs. The baseline in the
6 basin, as the record undisputedly shows, is one of overappropriation of water resources. The
7 Rule does not “take water” from future out of stream uses by optimizing flows. The record
8 shows that every drop of water in the Dungeness River legally belongs to someone who came
9 along long before the Dungeness Rule and long before the Petitioners. Additionally,
10 groundwater withdrawals, permit-exempt or otherwise, undisputedly capture water headed for
11 the basin’s depleted rivers and streams. The economic analysis rightfully reflects and analyzes
12 this reality (which is the baseline) and fully supports the conclusion that the benefits of the
13 Rule outweigh its costs.

14 By requesting invalidation of the Rule, Petitioners are asking the Court to upend over
15 twenty years of cooperation, planning, sound science, and public and private investment in the
16 restoration of flows in one of our state’s premier watersheds, all so they can dip their ladle into
17 someone else’s bucket. The Court should reject this invitation and fully affirm the Dungeness
18 Rule.

19 II. COUNTERSTATEMENT OF THE ISSUES

- 20 A. Whether the Dungeness Rule exceeds Ecology’s statutory authority.
- 21 B. Whether Ecology’s optional Cost-Benefit Analysis for the Dungeness Rule is
22 valid and supported by the record.
- 23 C. Whether the Dungeness Rule is arbitrary and capricious.
- 24

25 ¹ *Dep’t of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cty.*, 121 Wn.2d 179, 849 P.2d 646 (1993), *aff’d*.
26 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (*PUD No. 1 of Jefferson Cty. or Elkhorn*).

1 permit-exempt wells.² *Id.* Thousands of permit-exempt wells have been drilled in the county
2 since the 1970s, most in the shallowest aquifer. ECY 7986–7987.

3 In 2008, Ecology modeled the impacts of groundwater withdrawals to surface water
4 bodies in the Dungeness Basin. The model was built using well established programs and
5 software (MODFLOW and Groundwater Vistas), a large amount of relevant data, standard
6 methods and calibration techniques, and it is best suited to regional scale simulation due to its
7 coarse grid resolution. ECY 2167. The 2008 model is the “best tool currently available to
8 estimate hydrologic impacts within the local groundwater flow system.” *Id.*

9 The basin is one of 16 “fish critical” basins in Washington State with a known shortage
10 of water for endangered species. ECY 71464. The basin is home to several important fish
11 species including Chinook, Coho, pink and chum salmon, steelhead, cutthroat, and bull trout.
12 There are four species protected under the federal Endangered Species Act (ESA): Chinook
13 and summer chum salmon, steelhead, and bull trout. ECY 1838, ECY 6610, ECY 71218.
14 Dungeness Chinook is one the five key populations of Chinook identified as in need of
15 restoration. ECY 71218. Dungeness Chinook must be recovered to meet the federal recovery
16 goals. ECY 3233. Stream flows during the critical low-flow months of the summer and fall
17 have been identified as an important factor in the decline and potential future recovery of these
18 populations. ECY 1838.

19 Three federally recognized Native American tribes have interests in the Dungeness
20 Watershed—The Lower Elwha Klallam, Jamestown S’Klallam, and Port Gamble S’Klallam.
21 ECY 71218. Through treaties, these tribes have fishing rights in their historic “usual and
22 accustomed fishing areas” along with an asserted right to healthy salmon habitat. *Id.*³ The

23 ² RCW 90.44.050 requires a state permit to withdraw and use groundwater, excepting certain small uses,
24 including single and group domestic uses that are less than 5,000 gallons per day.

25 ³ The 1974 “Boldt” decision held that the tribes who had signed treaties in 1855, in what is now
26 Washington State, were entitled to the opportunity to harvest half of the harvestable salmon and steelhead
returning to off-reservation fishing grounds. *United States v. State of Wash.*, 384 F. Supp. 312 (1974). In 1988, an
independent fact finder hired by the Washington State Legislature to review state water policies indicated that the

1 Dungeness River is the river of most interest to the nearby Jamestown S’Klallam Tribe.
2 ECY 3233. Although the Jamestown S’Klallam Tribe has never explicitly asserted claims to
3 rights to stream flow or requested an adjudication of such rights, tribal fishing-related rights in
4 Washington are considered to have a priority date of “time immemorial.” *Id.* The Jamestown
5 S’Klallam Tribe, particularly, has expressed its desire to pursue a path of cooperation
6 throughout the watershed planning and rule making process. ECY 68266. However, the Tribe
7 has not ruled out a lawsuit, noting that other Washington tribes have gone to court to assert
8 claims to treaty-reserved water rights.⁴ ECY 31906.

9 **2. Historic over-allocation and adjudication of the Dungeness River**

10 Basin agriculture depends on water from the Dungeness River. ECY 71217. In 1895,
11 farmers formed the Sequim Prairie Ditch Company. By 1923, the state had issued nine large
12 water rights for irrigation, most of which withdrew water directly from the Dungeness River.
13 *Id.* In the past, irrigators diverted up to 80 percent of the natural flow of the river. *Id.* Virtually
14 all of the irrigation water in the valley is diverted from the river between river miles 6.9 and
15 8.9 and distributed through a network of over 170 miles of canals, ditches, and pipelines.
16 ECY 6610.

17 Around 1900, during the late summer, the lower Dungeness River flowed 210 cubic
18 feet per second (c.f.s.). ECY 2111. By the late 1980s flows dropped as low as 21 c.f.s. *Id.* In
19 1994, irrigators began to limit their diversions to 50 percent of the flow resulting in the
20 September monthly average flow increasing from 90 to 125 c.f.s. (RM 0.9). *Id.*

21 Clallam County Superior Court adjudicated the surface water rights for the Dungeness
22 River in 1924. ECY 1838, 71218. An adjudication is a legal process that determines the extent
23 and validity of existing water rights for a given water source. ECY 71218.⁵ The adjudication

24 legal entitlement of tribes for both on-reservation water use and regional fisheries will have a major impact on the
25 direction of state water policy. ECY 68264

⁴ See, e.g., *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

⁵ The adjudication process is found in the water code at RCW 90.03.100–.245.

1 over-allocated water in the river, and the combined adjudicated water rights of the irrigation
2 districts in the valley greatly exceed the Dungeness River's summer flows. ECY 6261,
3 ECY 6610. In particular, the Dungeness River has less water in the river than what can legally
4 be taken out during the July 15 to September 15 timeframe. ECY 1839. The adjudication
5 confirmed water rights totaling 518 c.f.s. during the irrigation season. This total diversion rate,
6 confirmed by the court, compares to actual average flows of 701 c.f.s. during June (when flows
7 are typically higher due to spring runoff) and 171 c.f.s. during September (when flows are
8 typically at their lowest in the river). ECY 1838–1839.

9 The combination of salmon, irrigated agriculture and rapid urban and rural
10 development present a classic case of competition for allocation of limited water resources.
11 ECY 3233. Washington is a “prior appropriation” state, meaning the first in time to the
12 resource is the first in right. In the basin, excepting any time immemorial claims tribes might
13 assert, the irrigators have the most senior rights to what is effectively the entire river, while
14 urban and rural development rely upon groundwater rights that are junior in priority, including
15 permit-exempt wells. ECY 3233.

16 **3. Over two decades of cooperative watershed planning in the basin to restore**
17 **flows and address local needs**

18 **a. The Chelan Agreement and the Dungeness-Quilcene Plan**

19 In the 1980s Washington State policy makers and tribal leaders began an era of
20 cooperation in recognition that protection of fisheries' habitat was a mutual goal. ECY 68264.
21 Discussions over water policy eventually broadened to include a range of water users, and
22 culminated in “The Chelan Agreement,” reached in November 1990. ECY 68264–68265. This
23 agreement incorporated the goals of state, local, and tribal governments, and agricultural,
24 business, environmental, fisheries, and recreation interests. *Id.* It also created a framework for
25 the development of regional water plans. *Id.*

1 Legislation passed that year provided funding for two pilot areas to test the process—
2 the Methow Basin and the northeast portion of the Olympic Peninsula. ECY 68265. The latter
3 became known as the Dungeness-Quilcene (DQ) Project, named after the two major rivers in
4 the area. *Id.* The Jamestown S’Klallam Tribe nominated the Dungeness River as a pilot area due
5 to the scope of water resource and fisheries problems on the river, and the cultural and
6 historical significance of the river to the Tribe. *Id.*

7 The regional planning group developed the “DQ Plan” and submitted it to Ecology on
8 June 30, 1994. ECY 68233–68821. Signatories included the following caucuses: business,
9 environmental, fish, local government, recreation, state, tribal, and a technical committee co-
10 chair. ECY 68244–68245, ECY 68248. The completed plan contained “recommendations and
11 strategies developed to provide water protection and management for the quality and quantity
12 of the region’s surface and ground-water.” ECY 68245.⁶

13 Chapter 6 of the DQ Plan discusses recommendations for the Dungeness Watershed,
14 many of which carried through subsequent watershed planning efforts, *infra.* ECY 68487–
15 68535. These include: (1) that instream flows should be protected and supplemented and
16 improved in the future as possible, to provide minimum flows needed for salmonids and other
17 species in the area’s rivers and streams (ECY 68507); (2) that the 1993 Instream Flow
18 Incremental Methodology (IFIM) numbers established for the Dungeness River as minimum
19 instream flows, including the 180 c.f.s. July through September flow, should be adopted by
20 rule (ECY 68508); (3) that no surface water permits should be issued from small streams in
21 eastern Clallam County (*Id.*); and that new community systems should be metered.
22 ECY 68522.

23 _____
24 ⁶ The plan recognized a “substantial” gap between the needs of fish expressed by recommended instream
25 flows and the present instream flows after existing withdrawals for agriculture, municipal, business and future
26 growth. ECY 68248. This gap was considered to be amplified by poor fish habitat, a lack of conservation,
inefficient irrigation delivery systems, and was described as “likely to continue indefinitely.” *Id.* The group thus
developed a “gap strategy” to try to “bring the sides of the gap closer together.” *Id.*

1 **b. The 2005 Watershed Plan under the Watershed Planning Act**

2 The Legislature adopted the Watershed Planning Act in 1998. RCW 90.82. Local
3 planning efforts thus continued in the basin, culminating in the adoption of the Elwha-
4 Dungeness Watershed Plan (WRIA 18 Plan or Plan) in December 2004 (and amended in May
5 2005).⁷ ECY 69771–69772. The initiating governments for the WRIA 18 Plan included
6 Clallam County, Port Angeles, the Elwha-Klallam Tribe, the Jamestown S’Klallam Tribe,
7 Agnew Irrigation District, and Ecology. ECY 69771.⁸

8 The WRIA 18 Plan provides a comprehensive assessment of the watershed, its history,
9 its streams and rivers, and its people, while providing recommendations for flows and future
10 water allocations. ECY 69771–70306. In its chapter on instream flow recommendations, the
11 Plan notes that “[a] central purpose of watershed planning is to recommend instream flows for
12 streams and rivers within the WRIA.” ECY 70473. The Plan discusses the “extensive work”
13 that has been done in the Basin, including the IFIM study (*infra.*) and the DQ Plan (*supra.*) *Id.*
14 The Plan notes that “[s]everal streams in WRIA 18 have surface water rights exceeding natural
15 flows in some low flow seasons, and many streams probably have summer low flows impacted
16 by withdrawals from wells in hydraulic continuity with surface water.” *Id.* The Plan thus states:

17 These existing low stream flows and the potential for exacerbation of low flows
18 through development and further withdrawals reinforce the importance of
19 determining and setting instream flows. **Ecology will, through its rule-making
20 procedure, adopt instream flow levels and then use them in its management
21 of subsequent water rights applications for WRIA 18 streams.**

21 ⁷ Watershed Planning is not mandatory and may be initiated only with the concurrence of all counties
22 within the territory of the WRIA, the largest city or town in the WRIA, and the largest water purveyor in the
23 WRIA. ECY 6918; RCW 90.82.060(2). These “initiating governments” are required to invite Native American
24 tribes with reservation lands within the WRIA to participate, as well as those with federal fishing interests. If
25 tribes join, they are also considered an initiating government. RCW 90.82.060(2).

26 ⁸ The WRIA 18 Plan is recognized as being a “community plan, the result of many individuals and
organizations working together for more than five years on a consensus basis.” ECY 69773. The Plan notes that
the Dungeness watershed “has a long-established tradition of collaborative water resource and watershed
planning.” ECY 69824. The planning unit for the WRIA 18 Plan represents a diversity of interests, ranging from
tribes to citizens to state and local governments to local water users and environmental interests. ECY 69773–
69776.

1 ECY 70473 (emphasis added).

2 Here, Plan recommendations include that flows for all WRIA 18 streams be set to
3 protect flows adequate for all life stages of salmonids. ECY 70474. Those flows include the
4 recommended 180 c.f.s. July through September flow for the Dungeness River and are found in
5 Tables 3.4.1 and 3.4.2 of the WRIA 18 Plan. ECY 70477–70478. The Plan also recommends
6 seasonal closures for some flow limited streams and year round closure of unnamed tributaries.
7 *Id.* Further recommendations include supplementing flows as possible in the future to provide
8 for healthy salmonid stocks and the evaluation of large water rights in the basin to see if
9 voluntary agreements can be reached with water users to limit use. *Id.* The planning unit sought
10 to prioritize achievement and restoration of flows, as the Plan recommends that water
11 availability for future appropriations and growth be identified after instream flows are met in
12 rivers and streams. ECY 70476.

13 The Clallam County Commission approved the Plan on June 7, 2005, which obligated
14 Ecology to engage in rulemaking to implement the Plan’s recommendations. ECY 69772.

15 **c. The IFIM process for setting the Dungeness flows⁹**

16 Scientists arrived at the minimum flow recommendations for the Dungeness River
17 through the well-established IFIM, a methodology that optimizes fish habitat by establishing
18 recommended minimum flows.

19 The purpose of an IFIM study is to scientifically and technically answer the question of
20 how much water salmon need, recognizing that adequate flows are an essential factor in
21 salmon recovery. ECY 7990. What constitutes enough water for fish depends on many factors
22 that affect fish survival, for example, enough water to keep temperatures cool, sufficient flow
23 for adult and juvenile fish to move up and down the river, enough water moving over spawning
24 areas when eggs are in gravel, water in side channels where small fish take refuge, sufficient

25 ⁹ A summary of Ecology’s methodology and process for setting flows for the Dungeness is provided
26 below. For a more detailed description see ECY 71544–71579, Instream Flows for the Dungeness River.

1 | vegetation and insects to provide food for fish, and deep pools for fish to take cover from
2 | predators. ECY 7990. These requirements vary by season and are different for all species of
3 | fish at all life stages. *Id.* “[S]tudies to establish a set of recommended numbers for instream
4 | flows are thus very complex.” *Id.*

5 | Steps for the IFIM process for the Dungeness River included: (1) selecting study sites
6 | that represent different sections of the river; (2) the technical measurement of instream flow
7 | and fish habitat; (3) the running of a Physical Habitat Simulation (PHABSIM) model; and
8 | (4) the recommendation of instream flows month by month. ECY 7990–7991. Scientists
9 | selected one study site on the lower river where the river is confined to a single channel, and
10 | one on the upper river where the river is braided and contains side channels. ECY 7990. At
11 | both sites, scientists divided the river into incremental transects where detailed measurements
12 | of width, depth, velocity, temperature, and channel characteristics, such as type of gravel and
13 | vegetation, were taken at different times of year. *Id.* Scientists then fed that data into the
14 | PHABSIM model. When the model is run, it shows through graphs the incremental change of
15 | the “usable habitat area”¹⁰ for fish as stream flows increase or decrease. *Id.* Model results are
16 | then verified by biologists who snorkel the river. *Id.*

17 | For example, here PHABSIM model outputs display the usable habitat for spawning
18 | per amount of discharge for Chinook at the upper study site. The graph shows that habitat area
19 | for Chinook increases rapidly as flows increase until flows reach approximately 180 to
20 | 200 c.f.s. ECY 7991. A chart in the record shows this logical correlation. ECY 1856. The chart
21 | also shows that habitat does not necessarily increase between flows of 200 and 500 c.f.s., and
22 | then increases again after flows reach 500 c.f.s. This is because at that point additional side
23 | channels are wetted, adding habitat in those areas. ECY 7991. Whereas a flow in the 180 to
24 |
25 |

26 | ¹⁰ The usable habitat area for fish is referred to by scientists as the “weighted usable area.”

1 200 c.f.s. range for Chinook represents the minimum flow necessary for that species, a flow
2 above 500 c.f.s. represents a truly optimal flow, as more habitat is wetted. ECY 41267.

3 The output of the PHABSIM model results in dozens of graphs similar to that for
4 Chinook because every species has separate results and separate biological requirements.
5 Analyzing the results requires biologists who have local knowledge of salmon species and age
6 groups at different times of the year. *Id.* For the Dungeness, United States Fish and Wildlife
7 Service biologists reviewed the information with biologists who had local knowledge of the
8 Dungeness River from the National Marine Fisheries Service, Washington Department of Fish
9 and Wildlife (WDFW), Ecology, and the Jamestown S’Klallam Tribe.¹¹ *Id.* The biologists’ task
10 was to recommend an instream flow level for each month, one that best accommodates all
11 species and their respective life stages. *Id.*

12 For the Dungeness for the months of July through September, biologists concluded that
13 180 c.f.s. is the minimum level necessary to support viable fish runs and preserve and protect
14 instream values. ECY 7138. Biologists (and Ecology) chose the 180 c.f.s. IFIM flow as the
15 best balance between all the species and life stages. Biologists could not use the optimum flow
16 for Chinook on the Dungeness because the optimum spawning flows for Chinook at the two
17 study sites are 575 c.f.s. and 220 c.f.s, flows that rarely occur in late summer. *Id.* In recent
18 years, flows have been above the 180 c.f.s. minimum level for most of the dry months, and
19 data supports that the 180 c.f.s. flow is within the normal range of the river. ECY 7139.
20 Ecology and WDFW biologists have found that setting flows at low levels, such as the lowest
21 flow of historic record or at hydrologic base flow levels, do not adequately preserve and
22 protect fish habitat. ECY 41267. Flows must be high enough to protect existing resources and
23 allow for the different needs of fish species at different times of the year. ECY 7992.

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25 ¹¹ The interagency technical team that designed, implemented, and peer reviewed the IFIM study for the
26 Dungeness included scientists who all had several years of experience using this particular computer model on
rivers in Washington State to determine instream flows needed by salmonids. ECY 1857.

1 Regulatory flows are not necessarily available in all years, but are set based upon
2 historic flow records and the IFIM study to be available in enough years to protect and
3 preserve fish. Therefore biologists have concluded that you have to protect the high flow years
4 to preserve and protect fish populations. If fish do not have the opportunity to benefit from
5 good flow years, they will not be able to sustain their populations in the long-term. ECY 7992.
6 If instream flows are set at a low number so it could always be achieved during every summer,
7 including dry years, then salmon populations would drop because new uses, which could
8 further reduce stream flows, would be allowed.¹² ECY 7138.

9 The IFIM process for the Dungeness River commenced in 1988 and was completed in
10 1993 (shortly before commencement of the DQ Project, *supra*). ECY 7992. The agencies'
11 experts ultimately concluded that instream flows of 180 to 575 c.f.s. would be the minimum
12 flows necessary to protect salmonid habitat in the river. ECY 1859.

13 **d. Rulemaking and adoption of the Dungeness Rule**

14 Ecology took its first steps towards a formal rule in 2006 after adoption of the 2005
15 Watershed Plan. Ecology commenced the rule-making process by engaging with local
16 governments, tribes, business owners, environmental and civic organizations, and residents of
17 Clallam County to develop rule language. ECY 8161.

18 After multiple early drafts of the Rule and consideration of preliminary public
19 comments, Ecology suspended Rule development in 2010 so that local leaders could focus on
20 important issues beyond the Rule like water supplies for development, resource protection, and
21 flow restoration. ECY 8161. While rulemaking was on hold, in February 2011, local leaders
22 signed a "Cooperators Agreement," outlining their goals. *Id.* Signatories included the Chair of
23 the Clallam County Board of Commissioners, the President of the Sequim-Dungeness Water
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26 ¹² Water above minimum flows can be allocated to out of stream uses if the river is not closed.

1 Users Association, and Ted Sturdevant, Ecology's Director.¹³ ECY 19735. Goals of this
2 Agreement included: (1) preventing permanent reductions in the Dungeness River or small
3 streams due to new appropriations; (2) supplying adequate and reliable water for new uses;
4 (3) maintaining sustainable agriculture in the valley; (4) restoring flows in the main-stem
5 Dungeness and small streams, where feasible; and (5) having an instream flow rule in place
6 that protects instream resources and existing rights within 18 months after the agreement is
7 signed. *Id.*

8 During this "pause" period in rulemaking, a local leaders work group (LLWG) formed
9 that included the City of Sequim, the Clallam County PUD, the Clallam County Conservation
10 District, and some members of the public, and the Jamestown S'Klallam Tribe. *Id.* The LLWG
11 met for more than a year and issued a final report on March 5, 2015, that expressed support for
12 establishing the Dungeness Water Exchange and reiterated the shared commitment to rule
13 adoption. ECY 7369-7391.

14 Ecology initially sought bids for the establishment of a water exchange in 2008.
15 ECY 65923. The task was ultimately contracted out to the Washington Water Trust, who
16 developed a "Dungeness Water Exchange Mitigation Plan" in December 2012. ECY 71280-
17 71291. The purpose of the exchange was to generate mitigation credits through water right
18 purchases/leases, aquifer recharge, and/or changes in existing and future storage. ECY 71281-
19 71284.

20 On May 9, 2012, Ecology filed with the Office of the Code Reviser the proposed Rule.
21 ECY 8161, 71266. Key elements of the Rule include: (1) setting instream flow levels in the
22 watershed to protect aquatic resources, including habitat for threatened salmonids; (2) closing
23 surface waters to new withdrawals with the exception of seasonal water from the Dungeness
24 River; (3) requiring mitigation for all new consumptive use of water, including permit-exempt

25 ¹³ The Jamestown S'Klallam Tribe didn't sign this agreement but did provide a letter of support.
26 ECY 58643-58644.

1 groundwater withdrawals;¹⁴ (4) establishing reserves of water for future indoor domestic use;
2 (5) setting maximum allocations of water from the mainstem Dungeness during the open
3 period; (6) allowing storage projects; and (7) requiring measuring of new water uses.
4 ECY 71266, 71268.

5 During the course of Rule development Ecology prepared a Final Cost-Benefit and
6 Least Burdensome Alternative Analysis for the Rule, as well as a Small Business Economic
7 Impact Statement – Revised. ECY 2355–2449. Ecology’s Water Resources Program directed
8 its staff economist, Tryg Hoff, to develop an analysis based upon a similar baseline he had
9 used to develop an economic analysis for a rule for the Kittitas Basin, which was a baseline of
10 over-allocation. ECY 3323–3328, ECY 3329–3330.

11 Mr. Hoff conducted no formal analysis of his own and refused to do this assignment
12 based upon his own personal feelings regarding the legal baseline. ECY 3323–3328. Mr. Hoff
13 also asked to be removed from the assignment, a request his supervisors obliged. ECY 3329–
14 3330. Ecology’s top economist, Kasia Patora, thus prepared the Final Cost-Benefit and Least
15 Burdensome Alternative Analysis. ECY 2355–2429.

16 A summary of the economic analysis shows assigned costs of the Rule. ECY 2767.
17 Based on building permit growth, these costs were estimated to be \$7.7 million dollars, and
18 based on population growth, the costs were estimated to be \$23.1 million dollars. *Id.* This
19 summary also assigns benefits to the Rule. *Id.* Based on building permit growth, the benefits
20 are projected to be \$46.5 million dollars, and based on population growth, the benefits are
21 estimated to be \$94.1 million dollars. *Id.*

22
23 ¹⁴ The Rule contains a mitigation requirement and establishes small reservations of water for future
24 indoor domestic uses. The Rule defines “mitigation” as “action taken to offset impacts from future water
25 appropriations on closed surface water bodies or senior water rights, including the instream flow levels set in
26 WAC 173-518-040, as provided in WAC 173-518-070.” Mitigation can occur through the purchase of mitigation
credits through the Dungeness Water Exchange, or through Ecology’s approval of a mitigation plan. WAC 173-
518-070(3).

1 As part of its economic analysis, Ecology also conducted a “Least Burdensome
2 Alternative Analysis” where it considered alternatives to the Rule (such as no action, requiring
3 no mitigation, or lowering the flows). Ecology concluded that the Rule presented the least
4 burdensome approach to achieving the general goals and objectives of Ecology’s regulation.
5 ECY 2403–2429.

6 On November 16, 2012, Director Sturdevant signed the Rule, which went into effect on
7 January 2, 2013. ECY 71270. Ecology also entered into a “Memorandum of Understanding”
8 with Clallam County regarding Rule implementation in December 2012 that outlines the roles
9 and responsibilities of Ecology and the County with respect to implementation of the Rule.
10 ECY 71273–71277. The agreement outlines Ecology’s role with respect to administration and
11 enforcement of the state’s water resources laws, and the County’s role as a decision maker
12 regarding development permits premised on the availability of water under the Rule. *Id.*

13 Lastly, during the 2016 legislative session, the Legislature affirmed Ecology’s inclusion
14 of “reserves” in its Rule that establish a “limited allocation of water for future new uses not
15 subject to interruption when flows fall below the levels adopted in this rule.” The Legislature
16 enacted ESSB 6513, adding a new section to RCW 90.54 that declares the Dungeness Reserves
17 as “consistent with legislative intent” and specifically authorizing Ecology to “maintain and
18 implement” these reserves.

19 IV. STANDARD OF REVIEW

20 This case involves judicial review of an agency rule. Under the Administrative
21 Procedure Act (APA), Petitioners bear the burden to prove that the Rule is invalid.
22 RCW 34.05.570(1)(a). The Court may declare a rule invalid “only if it finds that: The rule
23 violates constitutional provisions; the rule exceeds the statutory authority of the agency; the
24 rule was adopted without compliance with statutory rulemaking procedures; or the rule is
25 arbitrary and capricious.” RCW 34.05.570(2)(c). Petitioners here assert all grounds other than
26 that the rule violates constitutional provisions.

1 In considering whether a rule “exceeds the statutory authority of the agency,” a duly
2 enacted rule will be upheld if it is reasonably consistent with the statute that it implements. *See*
3 *Wash. Pub. Ports Ass’n v. Dep’t of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). Rules are
4 presumed to be valid, and the burden is on the party attacking the validity of the rule to present
5 compelling reasons why the rule is in conflict with the intent and purpose of the statute being
6 implemented. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986).
7 The wisdom or desirability of a rule is not a question for the reviewing court. *St. Francis*
8 *Extended Health Care v. Dep’t of Social & Health Services*, 115 Wn.2d 690, 702, 801 P.2d
9 212 (1991).

10 Contrary to Petitioners’ assertion, courts “give the agency’s interpretation of the law
11 great weight where the statute is within the agency’s special expertise.” *Cornelius v. Dep’t of*
12 *Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). In *Port of Seattle v. Pollution Control*
13 *Hearings Board*, the Supreme Court specifically deferred to Ecology’s expertise in interpreting
14 water resources statutes. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568,
15 593, 90 P.3d 659 (2004).

16 Agency action is “arbitrary and capricious if it is willful and unreasoning and taken
17 without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Util.*
18 *& Trans. Comm.*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). This standard accords a great
19 degree of deference to agency decision-making and requires courts to uphold a rule that the
20 court deems erroneous as long as the rule was enacted with due consideration. *Id.* at 904. Thus,
21 the arbitrary and capricious standard allows for differences of opinion. *Rios v. Dep’t of Labor*
22 *& Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002). If “there is room for two opinions, an
23 action taken after due consideration is not arbitrary and capricious.” *Wash. Fed’n of State*
24 *Emps. v. Dep’t of Gen. Admin.*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009).¹⁵

25 ¹⁵ When a rule is challenged as arbitrary and capricious, the reviewing court must consider the relevant
26 portions of the rule-making file and the agency’s explanations for adopting the rule as part of its review in order to

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V. ARGUMENT

Petitioners attack the Dungeness Rule in three ways. They first argue that Ecology exceeded its statutory authority when it adopted flows, closed the basin to new appropriations, and established reserves of water for future use. Petitioners then challenge Ecology’s optional cost-benefit analysis. Finally, they allege that the Rule is arbitrary and capricious. Each of these challenges fails. The Rule is well within Ecology’s statutory authorities for setting flow rules, and its methodologies have been affirmed by the Supreme Court. Additionally, the record fully supports Ecology’s conclusion that the benefits of the Rule outweigh its costs. Lastly Petitioners fail to meet their high burden to demonstrate that the Rule is arbitrary and capricious.

A. The Dungeness Rule is consistent with Ecology’s statutory authorities (Issue A)

Petitioners argue that Ecology exceeded its statutory authority for a number of reasons. First, they argue as they did in their unsuccessful summary judgment motion that Ecology is required to conduct a “four-part-test” and “maximum net benefits” analysis when the agency adopts flows by rule. This argument fails because it fails to account for the legal requirements of the Watershed Planning Act and RCW 90.54 and RCW 90.22, Ecology’s actual rulemaking authorities. Petitioners then argue that the Rule is invalid because Ecology does not have authority to close surface water bodies by rule, that the Rule improperly determines that new permit exempt wells are subject to the Rule, and finally that the reservations in the Rule are invalid. Each of these arguments is overcome by controlling authorities that Petitioners do not acknowledge, let alone discuss, in their brief.

determine whether the agency’s action was willful and unreasoning and taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 906. The Court may affirm the validity of the rule on any ground supported by the record. *Wash. Fed’n of State Emps.*, 152 Wn. App. at 378 (citing *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986)).

1 **1. The Rule is consistent with Ecology’s instream flow rulemaking authorities**

2 Here, Ecology will first explain the statutes that authorize it to adopt instream flow
3 rules. Then, Ecology will discuss why, in the context of these authorities, Petitioners’ “four-
4 part-test” and “maximum net benefits” arguments fail.

5 **a. RCW 90.82, the Watershed Planning Act**

6 The 1998 Watershed Planning Act requires Ecology to adopt the flows recommended
7 by the 2005 Dungeness-Elwha Watershed Plan. The general purpose of the Act is “to develop a
8 more thorough and cooperative method of determining what the current water resource
9 situation is in each water resource inventory area of the state and to provide local citizens with
10 the maximum possible input concerning their goals and objectives for water resource
11 management and development.” RCW 90.82.005.

12 Under the Act, the Legislature pronounces that the local development of watershed
13 plans “serves vital local interests by placing it in the hands of people: Who have the greatest
14 knowledge of both the resources and the aspirations of those who live and work in the
15 watershed; and who have the greatest stake in the proper, long-term management of the
16 resources.” RCW 90.82.010. The Legislature also found that development of local watershed
17 plans serves the state’s vital interests “by ensuring that the state’s water resources are used
18 wisely, by protecting existing water rights, by protecting instream flows for fish, and by
19 providing for the economic well-being of the state’s citizenry and communities.” *Id.*

20 For state agencies and counties that participate in watershed planning, obligations
21 imposed by an adopted watershed plan are legally binding and those entities are obligated to
22 fulfill those obligations as soon as possible. RCW 90.82.130(3). Of direct import here, the Act
23 contains a section on the instream flow component of a watershed plan, RCW 90.82.080, that
24 requires Ecology to adopt the recommended flows of a watershed planning unit.
25 RCW 90.82.080(1)(a)(ii) specifically states, “[i]f minimum streamflows have not been adopted
26 by rule for a stream within the management area, *setting the minimum instream flows shall be a*

1 *collaborative effort between the department and members of the planning unit.* The department
2 must attempt to achieve consensus and approval among the members of the planning unit
3 regarding *the minimum flows to be adopted by the department.*” (Emphasis added).

4 This section of the Act thus contemplates that Ecology and members of a planning unit
5 are to work together if flows have not been set for a stream within the management area, as
6 was the case with the Dungeness Basin, to reach consensus on “flows to be adopted by the
7 department.” RCW 90.82.080(1)(a)(ii). Here, the planning unit and Ecology undisputedly
8 reached consensus on flow recommendations for the basin. Those recommendations are found
9 in the adopted 2005 Watershed Plan at ECY 70477. The Clallam County Commission adopted
10 the Watershed Plan by unanimous vote on June 7, 2005. ECY 69772. This cemented Ecology’s
11 legal obligation under the Act to codify recommended flows by rule: “[t]he department shall
12 undertake rule making to adopt flows under (a) of this subsection.” RCW 90.82.080(1)(b).

13 The fact that the Act imposed a legal requirement upon Ecology to adopt the flows
14 from the 2005 Watershed Plan should not come as a surprise to anyone, including the
15 Petitioners. Ecology repeatedly addressed this issue in the Concise Explanatory Statement for
16 the Rule. *See* ECY 1845 (“As a governmental agency that took part in watershed planning,
17 Ecology is obligated by RCW 90.82.130(3) to adopt a rule to implement a plan approved by
18 the watershed planning unit and adopted by the Clallam County Commission.”).¹⁶

19 In sum, the legal requirements of the Watershed Planning Act are entirely dispositive of
20 Petitioners’ claims that Ecology exceeded its statutory authorities by adopting flows without
21 conducting a four-part-test or maximum net benefits analysis. Regardless, as explained below,
22 the flows are also expressly consistent with Ecology’s rulemaking authorities.

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25 ¹⁶ *See also* ECY 1893 (“RCW 90.82.080 obligates Ecology to undertake rulemaking to adopt instream
26 flows recommended in an adopted Watershed Management Plan. The Clallam County Board of County
Commissioners adopted the Elwha-Dungeness Plan in June 2005.”); ECY 1912 (“Ecology has a duty to adopt
instream flows as recommended in the 2005 Elwha-Dungeness Watershed Plan.”).

1 **b. RCW 90.22 and RCW 90.54**

2 Ecology has exclusive authority for setting minimum flow rules. RCW 90.03.247.
3 Ecology's statutory authorities for establishing instream flows by rule include the Minimum
4 Water Flows and Levels, RCW 90.22 and the Water Resources Act of 1971, RCW 90.54.

5 The Water Resources Act, RCW 90.54.040(1), provides that:

6 The department [of Ecology], through the adoption of appropriate rules, is
7 directed, as a matter of high priority to insure that the waters of the state are
8 utilized for the best interests of the people, to develop and implement in
9 accordance with the policies of this chapter a comprehensive state water
10 resources program which will provide a process for making decisions on future
11 water resource allocation and use.

12 This statutory provision authorizes Ecology to adopt water management rules for
13 specific basins throughout the state. Under this authority, Ecology has established a statewide
14 water resources management program which includes water management rules for specific
15 basins, including the Dungeness Rule at issue in this case. WAC 173-500 (Water Resources
16 Management Program Established Pursuant to the Water Resources Act of 1971); WAC 173-
17 518-010. In its rulemaking for specific basins pursuant to RCW 90.54.040(1), Ecology then
18 exercises its authority under RCW 90.22 to establish instream flows in those basins.

19 Petitioners scarcely discuss RCW 90.22. Under RCW 90.22.010, "The department of
20 ecology may establish minimum water flows or levels for streams, lakes or other public waters
21 for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or
22 aesthetic values of said public waters whenever it appears to be in the public interest to
23 establish the same." RCW 90.22.020 then provides in relevant part, "[f]lows or levels
24 authorized for establishment under RCW 90.22.010 . . . shall be provided for through the
25 adoption of rules." Combined, these statutes charge Ecology with the responsibility to adopt
26 flow rules when it is in the public interest to do so, for the express purposes of protecting a
multitude of instream values, including fish.

1 The Legislature reaffirms the importance of protecting flows in the Water Resources
2 Act of 1971. Specifically, RCW 90.54.020(3)(a) states “[t]he quality of the natural
3 environment shall be protected and, where possible, enhanced as follows: Perennial rivers and
4 streams of the state shall be retained with base flows necessary to provide for preservation of
5 wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”

6 Under these authorities, when Ecology establishes flows by rule it does not rely on a
7 “four-part-test analysis” because, as explained below, application of that analysis, would not
8 and could not satisfy the statutory purposes of RCW 90.22 and RCW 90.54. Ecology also does
9 not engage in a maximum net benefits analysis when it sets flows as it would simply result in
10 frustrating the very purpose of the Rule to protect and preserve aquatic values. Instead, when
11 Ecology sets flows for rivers, it relies on the well-established IFIM/PHABSIM methodologies,
12 *supra*, to answer the scientific question of what flows are minimally required to preserve and
13 protect the listed statutory purposes in RCW 90.22 and RCW 90.54.

14 Ecology’s use of IFIM to set minimum flows was affirmed by our Supreme Court in
15 *Department of Ecology v. Public Utility District No. 1 of Jefferson County*, 121 Wn.2d 179,
16 202–203, 849 P.2d 646 (1993), *aff’d* 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994)
17 (*PUD No. 1 of Jefferson Cty. or Elkhorn*). In *Elkhorn*, the Supreme Court reversed a finding by
18 a lower tribunal that Ecology’s use of IFIM/PHABSIM to set flows in the Dosewallips River as
19 a condition to a water quality permit constituted “enhancement flows.”¹⁷ *PUD No. 1 of*
20 *Jefferson Cty.*, 121 Wn.2d at 204. After affirming Ecology’s authority to include the instream
21 flow condition on the permit, the Court held “Ecology’s intent was clearly to preserve, not to
22 enhance, the fishery in the Dosewallips, and the Board’s reasoning for its view that Ecology’s
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24 ¹⁷ Ecology imposed the condition on the water quality certificate to ensure compliance with
25 RCW 90.54.020(3)(a), which requires that streams retain base flows necessary to provide for preservation of
26 wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. *Elkhorn*, 121 Wn.2d at
189.

1 flows would enhance the fishery is unsupportable. Therefore we hold that the Board’s finding
2 that Ecology’s [IFIM] instream flow rates are an enhancement flow is clearly erroneous.” *Id.*

3 *Elkhorn* directly contradicts Petitioners’ position here—that IFIM results in
4 “enhancement” rather than preservation flows. The same biologists who conducted the IFIM at
5 issue in *Elkhorn* include the same biologists who conducted the Dungeness IFIM study.¹⁸ The
6 setting of instream flows is a complex technical matter that involves scientists considering
7 multiple variables for multiple species at any one given time. Deference to Ecology is thus
8 warranted. *Port of Seattle*, 151 Wn.2d at 593.

9 **c. The four-part-test and maximum net benefits (MNB) analyses do**
10 **not apply to the setting of flows by rule**

11 While the explanation of authorities, above, demonstrates that Ecology did not exceed
12 those authorities when it set flows for the Dungeness River, Ecology nevertheless addresses
13 Petitioners’ rehashed argument that Ecology must apply the “four-part-test” when it sets flows,
14 as well as conduct a MNB analysis when it sets flows by rule.¹⁹ Ecology incorporates by
15 reference its earlier argument on this issue as well as its briefing on summary judgment, and
16 provides this additional analysis.

17 **(1) Four-part-test**

18 The four-part-test is part of the comprehensive scheme the Legislature established for
19 people to obtain rights to make use of the state’s water resources. *See* RCW 90.03.250–.340.
20 The test inquires: (1) whether water is available; (2) whether the proposed use is beneficial;
21 (3) whether the proposed use will impair existing rights; and (4) whether the proposed use will

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23 ¹⁸ Dr. Hal Beecher with WDFW and Brad Caldwell with Ecology worked on both of these studies. *See*
Elkhorn., 121 Wn.2d at 202, n.2.

24 ¹⁹ In January 2016, this Court denied Petitioners’ summary judgment motion that Ecology must, as a
25 matter of law, apply the “four-part-test” when it sets instream flows. The Court ruled that “Petitioners have not
26 met their burden of demonstrating that they are entitled to judgment as a matter of law that the four-part-test is
always required prior to establishing instream flow appropriations by rule.” *See* Order Den. Pet’rs’ Mot. for
Summ. J. at 2.

1 prove detrimental to the public welfare. If an application meets each of these criteria, Ecology
2 will issue a permit to the applicant that must then be developed with diligence or be cancelled.
3 RCW 90.03.290(3), .320.

4 Petitioners have again failed to meet their burden of demonstrating that the four-part-
5 test is a legal requirement for instream flow rulemaking. In Ecology’s rulemaking authorities,
6 RCW 90.82, RCW 90.22, and RCW 90.54, the Legislature does not include a four-part-test.
7 Unlike consumptive rights that require application, RCW 90.03.250, issuance of a permit,
8 RCW 90.03.290(3), development with due diligence, RCW 90.03.320, and certification upon
9 perfection, RCW 90.03.330, the establishment of instream flow rights involves an entirely
10 different process. And it is no surprise that the Legislature chose not to include the four-part-
11 test in Ecology’s rulemaking authorities, as the water right permitting and instream flow
12 rulemaking authorities plainly serve different purposes.

13 Petitioners rely heavily on RCW 90.03.345 and the *Swinomish Indian Tribal*
14 *Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) decision to support
15 their argument. Neither is useful to their position. RCW 90.03.345 reads, “[t]he establishment
16 of reservations of water for agriculture, hydroelectric energy, municipal, industrial, and other
17 beneficial uses under RCW 90.54.050(1) or minimum flows or levels under RCW 90.22.010 or
18 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates
19 as of the effective dates of their establishment.” This means only that reserves of water and
20 flows are entitled to protection for impairment from subsequent users and have a priority date
21 *once they are established*. But that statute says nothing about *how* flows are established.

22 In *Swinomish*, following a discussion of a litany of acts dating back to 1955 wherein the
23 Legislature expressed intent to retain stream flows to support fish populations and other
24 instream values, the Court stated:

25 This broad statement of overall goals—the public health, the state's economic
26 well-being, and *preservation of natural resources and aesthetic values*—shows
 the legislature continued to recognize that retention of waters instream is as

1 much a core principle of state water use as the other goals, including economic
2 well-being.

3 *Swinomish*, 178 Wn.2d at 594.

4 If Ecology were to attempt to apply the four-part-test to the establishment of an
5 instream flow, it is a certainty that Ecology could not satisfy the Legislature's expressed intent
6 through these Acts, including RCW 90.22 and RCW 90.54, to protect and preserve instream
7 resources. This is because the four-part-test asks if any amount of water is available for a
8 proposed use of water, a farmer's crop for example, whereas Ecology's statutory instream flow
9 authorities ask the very different technical question of what flow is scientifically necessary to
10 preserve and protect instream values, including fish. Petitioners' arguments do not harmonize
11 these separate statutory Acts. They selectively dispose of legislative mandates under
12 RCW 90.22 and RCW 90.54 and render these Acts meaningless. "Statutes must be interpreted
13 and construed so that all the language used is given effect, with no portion rendered
14 meaningless or superfluous." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

15 Under RCW 90.22.010 and RCW 90.54.020(3)(a), Ecology has an obligation to set
16 flows at minimal levels to preserve and protect multiple values, including fish. It is the IFIM
17 process, as affirmed in *Elkhorn*, and not the four-part-test, that answers the technical question
18 of what flows are necessary to protect and preserve listed values. Petitioners' four-part-test
19 argument therefore fails again.

20 **(2) Maximum net benefits**

21 Petitioners' argument that there is a "mandate" that Ecology conduct a MNB analysis
22 when Ecology sets flows also fails. The primary thrust of Petitioners' argument is that MNB is
23 a procedural requirement under RCW 90.54.020(2) and RCW 90.03.005 that must be
24 performed before flows are set, lest it be too late to weigh the public's interests in the resource.
25 *See Pet'rs' Br.* at 27-28.

1 RCW 90.54.020(2) states, “[a]llocation of waters among potential uses and users shall
2 be based generally on the securing of the maximum net benefits for the people of the state.
3 Maximum net benefits shall constitute total benefits less costs including opportunities lost.”
4 This provision is one in a long list of general fundamentals for water management in the state
5 that also includes RCW 90.54.020(3)(a), the mandate that the state preserve and protect
6 instream values. RCW 90.54.020(2) states that allocation of waters “shall be based generally”
7 on securing the MNB for the people of the state. It does not state “*shall always be based,*” thus
8 making clear that consideration of MNB confers a general policy, not a procedural requirement
9 when the agency adopts flow rules. Petitioners’ argument also fails to recognize that an
10 instream flow is not an “allocation” of water, as is a consumptive water right, but is a
11 scientifically recommended minimum flow number needed to satisfy other statutory
12 obligations, *supra*.²⁰

13 The only other place MNB is found in our statutes is in the Water Code at
14 RCW 90.03.005, which reads in part that:

15 It is the policy of the state to promote the use of the public waters in a fashion
16 which provides for obtaining maximum net benefits arising from both
17 diversionary uses of the state’s public waters and the retention of waters within
streams and lakes in sufficient quantity and quality to protect instream and
natural values and rights.

18 The statute goes on to state that consistent with this *policy intention*, the state supports the
19 “development of physical facilities” and preclusion of “wasteful practices.” *Id.* On its face,
20 RCW 90.03.005 makes clear that MNB is a legislative policy preference, and not a procedural
21 requirement.

22
23
24 ²⁰ If a MNB analysis is required any time Ecology “allocates water” then presumably every water right
25 issued under the four-part-test in the state is invalid, as Ecology does not conduct the analysis when it issues those
26 rights. Petitioners’ MNB argument, if accepted, could lead to this absurd result. Courts avoid a reading that
produces absurd results because “it will not be presumed that the legislature intended an absurd result.” *J.P.*,
149 Wn.2d at 450.

1 Petitioners argue that Ecology’s reading of these statutes renders them meaningless
2 because the agency allocates all remaining water in the basin to instream flows to the detriment
3 of potential subsequent users without weighing the public interest. The law and the record here
4 demonstrate again that flow rules do not “allocate” water, and that the public interest in this
5 basin and its water resources have been weighed publically for more than two decades. *See*
6 *Sec. III.A.3., supra.* Petitioners’ argument that two statutes that declare general water resource
7 policy preferences impose a procedural requirement upon Ecology when it engages in
8 rulemaking is thus plainly absurd. RCW 90.82.010 states, “[t]he legislature finds that the local
9 development of watershed plans for managing water resources and for protecting existing
10 water rights is vital to both state and local interests. The local development of these plans
11 serves vital local interests by placing it in the hands of people:” and RCW 90.22.010 calls for
12 the establishment of flows “whenever it appears to be in the public interest.” Petitioners’
13 argument that MNB imposes a procedural requirement to ensure the weighing of the public’s
14 interest before it is too late thus fails.

15 The Rule also does not allocate all remaining water in the basin to the river. The 1924
16 adjudication allocated all the water in the basin from the river. *See Sec. III.A.2., supra.*
17 Instream flow rules do not “allocate” water to the river or require that the water be there.
18 ECY 7136–7139. Rather, the record explains why flows are set at levels that will not always
19 be met. If instream flows were set at such a low number that they could always be met in the
20 summer, then “we could expect the salmon population to drop as new water uses reduced
21 flows.” ECY 7138. Instream flows set a regulatory number, “a threshold used to draw a line to
22 determine when water is available for new withdrawals that will not hurt fish or other instream
23 resources.” *Id.* An instream flow rule therefore is not an “allocation” that triggers a MNB
24 analysis.

25 Ecology’s rationale as to why flows must be set before other water allocation decisions
26 can be made is explained in the Concise Explanatory Statement for the Rule:

1 **2. Petitioners' additional arguments that Ecology exceeded its authority also fail**

2 **a. Ecology acted within its statutory authority by requiring future**
3 **permit-exempt water uses to comply with the Dungeness Rule**

4 Petitioners argue that the priority date for exempt wells is determined by the common
5 law relation back doctrine, and that Ecology therefore exceeded its authority by making the
6 Rule applicable to permit-exempt groundwater uses that had not been established by putting
7 water to use by the time the Rule became effective. Pet'rs' Br. at 18–20. The pertinent Rule
8 language states, “this chapter shall not affect . . . [e]xisting groundwater rights established
9 under the groundwater permit-exemption where beneficial use began before the effective date
10 of this chapter.” WAC 173-518-010(3)(b). Petitioners' argument fails because it is rooted in
11 the nonsensical proposition that an agency exceeds its statutory authority when it opts to
12 exclude *common law* from a rule, and ignores that the Rule language is expressly consistent
13 with RCW 90.03.247, which subjects all new appropriations of water, including exempt
14 groundwater uses, to instream flow rules.

15 First, Petitioners' contention that Ecology exceeded its statutory authority by not
16 following a common law principle makes no sense at all because a rule cannot exceed an
17 agency's *statutory* authority under RCW 34.05.570(2)(c) by not including common law
18 principles.

19 Next, in considering whether a rule “exceeds the statutory authority of the agency,” a
20 duly enacted rule will be upheld if it is reasonably consistent with the statute that it
21 implements. *See Wash. Pub. Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 645–646, 62 P.3d
22 462 (2003). Ecology's position is expressly consistent with the law that does apply,
23 RCW 90.44.050, which contains the permit exemptions for certain small uses. The pertinent
24 language in this statute states, “to the extent that it is regularly *used beneficially*, [permit-
25 exempt use] shall be entitled to a right equal to that established by a permit.” RCW 90.44.050
26 (emphasis added). This is nearly identical to the language in the Rule stating “this chapter

1 shall not affect . . . [e]xisting groundwater rights established under the groundwater permit-
2 exemption where *beneficial use began* before the effective date of this chapter.” WAC 173-
3 518-010(3)(b) (emphasis added). Under RCW 90.44.050, the beneficial use of water is the
4 touchstone for establishing a water right, and the Rule is expressly consistent with that
5 standard.

6 Lastly, Petitioners’ common law argument that emphasizes the “relation back doctrine”
7 lacks merit. Under the common law relation back doctrine, the priority date of a water right
8 “relates back” to the date that a party first expressed overt intent to use water. *Hunter Land Co.*
9 *v. Laugenour*, 140 Wash. 558, 565, 250 P. 41 (1926). RCW 90.44.050 is silent as to whether
10 and how the relation back doctrine applies to exempt wells, whereas, in contrast, for water
11 permits, the Legislature codified this doctrine by stating that the priority date for a permitted
12 water right relates back to the date of filing of the application. RCW 90.03.345. The
13 Legislature thus chose not to codify the doctrine for exempt wells when it adopted
14 RCW 90.44.050. And it would be legally inconsequential in the context of instream flows even
15 if the priority date for a permit-exempt right does relate back to some earlier date.
16 RCW 90.03.247 expressly conditions new uses of water to flows that were adopted prior to
17 approval of the new uses.²² Under RCW 90.03.247, Ecology is mandated to protect instream
18 flows against future uses from the same source, regardless of earlier intent or priority date. And
19 the same applies to permit-exempt users who are entitled to a “right equal to that established by
20 permit” under RCW 90.44.050. *See also Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1,
21 17 n.8, 43 P.3d 4 (2002) (“RCW 90.44.050 itself provides that a right acquired under the
22 exemption is to be treated as all other rights.”). Thus, Ecology acted entirely within its
23 authority to adopt WAC 173-518-010(3)(b) to make the flows established by the Rule

24 ²² The relevant provision of RCW 90.03.247 states, “[w]henver an application for a permit to make
25 beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or
26 levels have been adopted and are in effect at the time of approval, the permit shall be conditioned to protect the
levels or flows.”

1 applicable to permit-exempt uses that were not put to beneficial use prior to the effective date
2 of the Rule, even if the priority date would be earlier than the effective date of the Rule under
3 the relation back doctrine.

4 **b. Ecology has authority to close basins by rule**

5 Petitioners' argument that Ecology does not have authority to close basins by rule is
6 contrary to Supreme Court precedent. In WAC 173-518-050, Ecology closes certain surface
7 water bodies in the basin based on "recommendations in the watershed plan, historical and
8 current low stream flows, and the need to protect existing rights." Because of these things,
9 Ecology reasonably concludes that "water is not reliably available for new consumptive uses
10 from the [listed] streams and tributaries in the Dungeness River watershed." *Id.*

11 Citing to RCW 90.54.050(2), Petitioners argue that Ecology only has authority to close
12 water resources when sufficient information for sound decision making is lacking, not due to
13 unavailability. The statute states that Ecology may withdraw or set aside waters from
14 appropriation "[w]hen sufficient information and data are lacking to allow for the making of
15 sound decisions . . . until such data and information are available."

16 In *Postema v. Pollution Control Hearings Board*, the Supreme Court directly concluded
17 that:

18 Ecology is required to protect surface waters in order to preserve the
19 natural environment, in particular "base flows necessary to provide for
20 preservation of wildlife, fish, scenic, aesthetic and other environmental values,
21 and navigational values." RCW 90.54.020(3)(a). Ecology also has authority to
22 close streams to further appropriation. *See* RCW 43.21A.064(9) (authorizing
23 promulgation of rules governing administration of Chapter 90.03 RCW);
24 RCW 43.27A.090(7), (11) (authority to promulgate rules respecting future
25 water use); RCW 90.54.040 (authority to adopt rules related to future allocation
26 decisions to implement intent of Water Resources Act of 1971);
RCW 90.03.247 (Ecology with authority to set minimum flows, levels, or
restrictions). Pursuant to this authority, Ecology has adopted rules closing
certain streams following a determination that water is unavailable from the
surface water source. . . .

Stream closures by rule embody Ecology's determination that water is
not available for further appropriations.

1 *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 94–95, 11 P.3d 726 (2000).

2 Regardless of Petitioners’ reasons for neglecting (yet again) to discuss relevant
3 authority, *Postema* is dispositive of their argument that Ecology lacks closure authority due to
4 a lack of availability of water.

5 **c. “Reserves of water” adopted in the Rule are valid as a matter of law**

6 Petitioners offer hypertechnical and unpersuasive arguments as to why the reserves of
7 water for future domestic use in the Rule are invalid, and therefore exceed Ecology’s statutory
8 authority. Pet’rs’ Br. at 38–39. The Rule includes “reserves” of water for domestic use that are
9 intended to satisfy a limited amount of domestic need without being subject to the instream
10 flows. WAC 173-518-080. Ecology justified these impacts to the instream flows through a
11 finding that the “public interest advanced by these limited reserves clearly overrides the
12 potential for negative impacts on instream resources [OCPI].” *Id.*

13 ESSB 6513 states:

14 The department shall act on all water rights applications that rely on the
15 reservations of water established in WAC 173-518-0808 or 173-545-090, as
16 those provisions existed on the effective date of this section. The legislature
17 declares that the reservations of water established in WAC 173-518-080 and
18 173-545-090, as those provisions existed on the effective date of this section,
19 are consistent with legislative intent and are specifically authorized to be
20 maintained and implemented by the department.

21 ESSB 6513, 64th Leg., Reg. Sess. (2016).

22 Petitioners first argue that the bill only applies to applications for water rights based
23 upon the first sentence of the bill. This ignores the plain language of the last clause in the
24 statute that expressly declares the reservations of water in WAC 173-518-080 to be “consistent
25 with legislative intent” and specifically authorizing them “to be maintained and implemented
26 by the department.” The first sentence does not establish an “application” condition that carries
over to the second sentence.

 Petitioners also raise a vague separation of powers argument, again citing to other cases
like *Swinomish*; but Petitioners have asserted no constitutional claims here. Regardless, the

1 validity of ESSB 6513 is not before the Court. ESSB 6513 expressly states that reservations in
2 the Rule are consistent with legislative intent and that Ecology is directed to maintain and
3 implement them. This law is thus binding on the Court, there being no prior judicial holding
4 pertaining to the Dungeness Rule that conflicts with the Legislature’s prerogative to clarify its
5 intent and pronounce that the Rule’s reservation provisions are squarely within Ecology’s
6 statutory authority. ESSB 6513 expressly affirms the Dungeness reserves, and Petitioners’
7 arguments to the contrary fail.²³

8 **B. Ecology’s Cost-Benefit Analysis is Valid and Supported by the Law and the**
9 **Record (Issue B)**

10 Petitioners attack the veracity of Ecology’s optional cost-benefit analysis (CBA),
11 alleging that the analysis is erroneous and inadequately analyzed alternatives to the Rule.
12 Pet’rs’ Br. at 2–9, 20–24. Petitioners miscast their attack on the CBA as a procedural violation
13 of the APA.²⁴ This attack is miscast because Ecology did not fail to comply with “procedural
14 requirements” under the APA by preparing a CBA here because it was not even required to do
15 one in the first place. And if the Court disagrees with Ecology’s position that the analysis was
16 not required, Ecology complied with the procedural requirement because it performed a CBA
17 here. Petitioners challenge the *substance* of the analysis itself. Challenging the substance of the
18 analysis is no different than challenging whether any other part of the administrative record
19 supports the Rule, and so the appropriate standard of review here is whether the analysis itself
20

21 ²³ ESSB 6513 also disposes of Petitioners’ argument that the Rule’s mitigation requirement is invalid
22 because the mitigation bank is seeded with irrigation rights. Pet’rs’ Br. at 23. Petitioners argue based upon the
23 Supreme Court’s 2015 *Foster* decision that year round domestic uses cannot be mitigated with seasonal irrigation
24 rights. *Foster v. Dep’t of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015). However, through ESSB 6513, the
25 Legislature has fully affirmed the reserves and everything they are based upon. If Petitioners maintain that
26 mitigation is legally inadequate under *Foster*, then they should challenge a decision to issue a building permit
issued based upon a mitigation credit from the exchange. As it stands, their challenge to the mitigation
requirement here is (1) disposed of by ESSB 6513, and (2) premature.

²⁴ See Petition for Declaratory Judgment Regarding the Validity of a Rule (RCW 34.05.570(2)) at 8 (First
Cause of Action—Improper or Inadequate Procedural Compliance for Significant Legislative Rules
(RCW 34.05.328)).

1 is “arbitrary and capricious” under RCW 34.05.570(2)(c). Agency action is “arbitrary and
2 capricious” if it is “willful and unreasoning and taken without regard to the attending facts and
3 circumstances.” *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 905,.

4 There is nothing willful and unreasoning about Ecology’s analysis and the quantified
5 estimates Ecology used to form its conclusions. Petitioners’ arguments are contradicted by the
6 record and ignore the intrinsic, unquantified, value of instream flows that further supports
7 Ecology’s economic conclusions. Ecology voluntarily conducted a cost-benefit analysis,
8 demonstrating the probable impacts of its Rule through an in-depth analysis. The record
9 demonstrates that Ecology followed accepted economic methodologies and factored a
10 multitude of potential impacts, all of which support a conclusion that the Rule’s probable
11 benefits likely outweigh estimated costs. ECY 2355–2429.

12 Moreover, the Petitioners’ focus on quantified economic estimates as a purported basis
13 for invalidating the Rule is misleading. Competing future uses that may have a higher
14 quantified value are legally incapable of subordinating the inherent or qualitative value of
15 instream flows. *Swinomish*, 178 Wn.2d at 599 (“The high value placed on minimum flows is
16 not overcome just because economically advantageous uses could be made of the water
17 necessary to satisfy the minimum flow rights.”). Ecology’s analysis is thus well reasoned and
18 fully supported by the record.

19 **1. Ecology’s economic analysis in support of the Dungeness Rule was done**
20 **voluntarily and was not procedurally required**

21 Petitioners are mistaken that the Dungeness Rule is a significant legislative rule that
22 requires a CBA. Ecology could have chosen to adopt the Dungeness Rule without performing
23 an economic analysis because the Rule was adopted subsequent to watershed planning under
24 RCW 90.82. In this instance, RCW 90.82 allows for streamlined rulemaking because many of
25 the goals of APA rulemaking, such as notice and opportunity for input, are achieved through
26 the watershed planning process. Once a watershed plan is adopted, RCW 90.82.080(1)(b)

1 provides that Ecology “may adopt the rules either by the regular rules adoption process
2 provided in chapter 34.05 RCW, the expedited rules adoption process as set forth in
3 RCW 34.05.353, or through a rules adoption process that uses public hearings and notice
4 provided by the county legislative authority to the greatest extent possible.” The statute then
5 states, “[s]uch rules do not constitute significant legislative rules as defined in RCW 34.05.328,
6 and do not require the preparation of small business economic impact statements.”

7 The Legislature thus expressly prioritized consensus-based watershed planning and
8 deemed any resulting codification by Ecology sufficient for purposes of compliance with the
9 APA. In contrast, agency actions deemed to be “significant legislative rules” require additional
10 transparency and process, including more stringent notice, inter-agency coordination, and
11 evaluation of economic impacts.²⁵ RCW 34.05.328(1)(a)–(i). Thus, while Ecology’s economic
12 projections indeed support the Dungeness Instream Flow Rule, they were nonetheless
13 procedurally optional because the Rule was developed as a result of watershed planning.
14 Ecology explains this important distinction in its Concise Explanatory Statement, stating,
15 “Ecology was not required to do the Cost-benefit Analysis (CBA). Ecology chose to perform
16 the CBA, like we do with virtually all our rulemaking, because we want to know and want the
17 public to know the costs and benefits of our rules.” ECY 2251.

18 In sum, Petitioners’ challenge to the CBA fails because it was not procedurally
19 required.
20
21
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23

24 ²⁵ Under the APA, a “significant legislative rule” is “a rule other than a procedural or interpretive rule
25 that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which
26 subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or
standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes
significant amendments to, a policy or regulatory program.” RCW 34.05.328(5)(c)(iii).

1 **2. Ecology's economic reports are supported in the record, based upon**
2 **accepted methodologies, and well-reasoned**

3 Petitioners' challenge to the CBA also fails to refute the overwhelming evidence in
4 support of Ecology's economic conclusions and projections. They therefore fail to demonstrate
5 that the Rule is "willful and unreasoning and taken without regard to the attending facts and
6 circumstances." *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 905.

7 Ecology performed a CBA, estimating the effect of the Rule in terms of economic costs
8 and benefits likely to result during Rule implementation. ECY 2355-2428. The CBA also
9 assesses potential alternatives through a "Least Burdensome Alternative Analysis," including
10 assessing the effect of no action under the current baseline in the Dungeness Watershed.²⁶
11 ECY 2403-2407.

12 The authors of the CBA assessed impacts based upon review of the Rule's most
13 significant provisions that result in changes deserving analysis. ECY 2367-2379. Benefits and
14 costs were discussed, explained in detail, and where possible, quantified. Costs were based
15 upon multiple sets of data to assess projected population growth and building permit approvals
16 for the next twenty years, and values were assigned to Rule impacts that affected the growing
17 community. A range of values were then assigned to costs associated with specific Rule
18 impacts, including the following: (1) compliance with Rule requirement to install well meters
19 and report water use; (2) fish loss that may occur in minor geographic areas where the Rule
20 allows use when mitigation is unavailable (WAC 173-518-080); (3) securing mitigation to
21 comply with the Rule for new domestic groundwater users; (4) county and state administration
22 of the new mitigation market; and (5) foregone development and construction that may result
23 from higher costs imposed by mitigation requirement. ECY 2380-2392.

24 _____
25 ²⁶ Ecology also completed a Small Business Economic Impact Statement (SBEIS). ECY 2432-2449.
26 However, the Watershed Planning Act similarly exempts the SBEIS requirement, RCW 90.82.080(1)(b), and the
Petitioners do not challenge Ecology's voluntary SBEIS.

1 Benefits were similarly identified, explained, and assigned either a quantitative or
2 qualitative value. Potential benefits included the following: (1) avoided fish losses due to
3 regulation of new domestic water uses throughout the watershed; (2) increased certainty in
4 development, which before the Rule would be vulnerable to a water use being regulated or
5 curtailed, or lawsuit initiated by an adjudicated or non-adjudicated senior water user;
6 (3) avoidance of legal costs associated with a large long-term lawsuit filed by the federal
7 government or tribes; (4) water supply improvements, resulting from storage project that are
8 authorized by Rule (WAC 173-518-095); (5) water service consolidation, resulting from Rule
9 requirement for new users to connect to a public water supply when connecting is timely and
10 reasonable (WAC 173-518-070(2)); (6) additional data and early discovery of leaks, resulting
11 from metering requirement (WAC 173-518-060); and (7) protection of existing habitat
12 restoration efforts that rely upon streamflow to fully function. ECY 2393–2399.

13 These factors were compared and evaluated, ECY 2400–2402, resulting in the
14 following conclusion: “[b]ased on qualitative and quantitative assessment of the likely costs
15 and benefits, Ecology concludes that there is reasonable likelihood that estimated benefits of
16 the Rule exceed its costs.” ECY 2400. The analysis relied upon 21 total references; including
17 federal and fishery valuation models, local water use reports, sales records, and economic
18 methods for estimating housing demand. ECY 2408–2409. The report is not only rational, it is
19 highly credible, and Petitioners offer nothing in the way of contrary data to attack the veracity
20 of the analysis.

21 Petitioners cannot credibly claim “the ‘litigation prevention’ values assigned to the
22 Dungeness Rule lack any semblance of credibility.” Pet’rs’ Br. at 3–4. Indeed the Rule avoids
23 the type of basin-wide adjudication that the regulation was designed to prevent.²⁷ See

24
25 ²⁷ The Petitioners reference the litigious history of other rules to attack Ecology’s valuation of litigation
26 avoidance. Pet’rs’ Br. at 4 n.4. However, those other rules are not being challenged here and are distinguishable
by their facts.

1 ECY 68264–68269 (DQ Plan discussing Tribes’ decision to follow process leading up to the
2 Rule as an alternative to taking federal water right claims to court). The record reflects that the
3 agency thoroughly contemplated and reasonably considered the threat of litigation in the basin
4 as an appropriate cost that would be avoided by adoption of the Rule. *See, e.g.,* ECY 23717–
5 23621, ECY 30159.

6 There are certainly limitations to any economic projecting of impacts, and in fact
7 Ecology recognizes those limitations in its analysis; however, Petitioners have offered nothing
8 concrete to counter the analysis that satisfies their heavy burden of demonstrating that the
9 analysis is arbitrary and capricious. Instead, the Petitioners attempt to minimize the estimated
10 benefits by speculating that *future* mitigation will fail during Rule implementation. Pet’rs’
11 Br. at 21–23. But this does not satisfy the Petitioners’ burden, and volumes of evidence in the
12 record contradict their best guess and unsupported pessimism. ECY 7369–7390 (Summary
13 Report and Recommendations, LLWG); ECY 71280–71291 (Dungeness Water Exchange
14 Mitigation Plan); ECY 2785–2829 (Draft Mitigation Strategy); ECY 18330–18369 (Water
15 Exchange Feasibility Analysis). In fact, Petitioners go to great lengths to speculate that
16 property value will plummet as a consequence of the “interruption” of future domestic use.
17 Pet’rs Br. at 20–22. This disregards the fact that domestic water rights are already subject to
18 potential curtailment without the Rule, as evidenced by the “gap” concept recognized as far
19 back as 1994 in the DQ Plan. ECY 68248. This further ignores the fact that the Rule provides
20 for an uninterruptible source of domestic water. WAC 173-518-080.

21 Petitioners’ speculative claims about plummeting property values also entirely
22 disregard Ecology’s reasonable expectation that a water exchange that provides mitigation to
23 allow new water uses would be in place subsequent to Rule adoption. This has in fact occurred,
24 as Ecology formally approved the Washington Water Trust’s Water Mitigation Plan in 2012.
25 ECY 71280–71291. Ecology’s expectation for mitigation was not arbitrary or capricious; it
26 was based upon actual experience, collaboration, and commitments by local leaders.

1 Petitioners’ expressed fear of a building moratorium, Pet’rs’ Br. at 23, is thus completely
2 unfounded and belied by the record here that shows the investment parties have made in
3 pursuing and implementing mitigation options.²⁸

4 Because Ecology’s economic analysis presents a well-reasoned projection of costs of
5 the Rule, and irrefutably demonstrates that the benefits of the Rule likely outweigh those costs,
6 Petitioners fail to demonstrate that the CBA is arbitrary and capricious.

7 **3. Petitioners’ least burdensome alternative claim fails**

8 As part of their attack on the CBA, Petitioners also attack Ecology’s Least Burdensome
9 Alternative Analysis. Pet’rs’ Br. at 7–8. This challenge also fails. Petitioners argue that this
10 analysis is flawed because it failed to consider alternatives that realtors and county officials
11 would prefer—unfettered access to a resource that is over-allocated. Petitioners do not even
12 disguise their desire, stating that “[l]ess burdensome alternatives to the rule would have
13 Ecology reserve enough water for future domestic uses without requiring mitigation, because
14 the individual impact to flows was negligible.” *Id.* at 8 The Court can summarily reject this
15 charge. First, no regulation would ever be passed if it could simply be avoided as a result of the
16 preference by the regulated community (that of no regulation). Second, their argument again
17 ignores the record and applicable law.

18 RCW 34.05.328(1)(e) provides “[t]hat the rule being adopted is the least burdensome
19 alternative for those required to comply with it that will achieve the general goals and specific
20 objectives stated under (a) of this subsection.” One of the three stated objectives of Ecology’s
21 rule includes, “[p]rotecting the quality of the natural environment, including retaining base
22 flows in rivers and streams to preserve fish, wildlife, and other environmental values.”
23 ECY 2403. It does not matter that the Petitioners would prefer Ecology to “reserve enough
24

25 ²⁸ To the extent Petitioners argue that the Rule is invalid because mitigation is ineffective to offset
26 impacts to flows, such a challenge is premature. *See* n.23, *supra*.

1 water for future domestic uses without requiring mitigation.” Pet’rs’ Br. at 8. Their preference
2 directly conflicts with the very purpose of the Rule.²⁹

3 Furthermore, their preference for an alternative of access to domestic water without a
4 mitigation requirement because domestic impacts on flows are “negligible” is contrary to law.
5 The Supreme Court has reaffirmed repeatedly that even “de minimis” impacts on instream
6 flows are not permissible. *Swinomish*, 178 Wn.2d at 590 (citing *Postema*, 142 Wn.2d at 90).
7 Petitioners are thus advocating for a less burdensome alternative that is contrary to law. Boiled
8 down, Petitioners merely have a difference of opinion regarding what they think the least
9 burdensome alternative to the Rule should be. However, if there is room for two opinions, an
10 action taken after due consideration is not arbitrary and capricious. *Wash. Fed’n of State*
11 *Emps.*, 152 Wn. App. at 378.

12 **4. The quality of the economic analysis is not discredited by contrary views**
13 **expressed by Ecology staff**

14 While it is true that Ecology staff member, Tryg Hoff, disagreed with the agency’s
15 decision to adopt the Rule, Mr. Hoff’s unsubstantiated opinions do nothing to discredit the
16 agency’s final work product. Petitioners’ emphasis on Mr. Hoff’s criticism merely exposes
17 Ecology’s deliberative process. Pet’rs’ Br. at 4–6, 20. Before the economic analysis was
18 commenced, Mr. Hoff demanded he be allowed to conduct his own “legal analysis” and
19 warned the agency would be violating the law if he were denied the opportunity. ECY 3329.
20 His request was denied and he was instructed to follow legal advice and provide an analysis
21 based upon the same baseline he had used in the Kittitas Basin. ECY 3331. Mr. Hoff refused.

22
23 ²⁹ The Petitioners also suggest that Ecology could provide “regional mitigation to flows in a more
24 efficient and less complex manner, such as purchasing and relinquishing additional water rights.” Pet’rs’ Br. at 8.
25 However, this suggestion is already being implemented. The Rule incorporates a water exchange to accomplish
26 regional mitigation through purchase of existing rights. WAC 173-518-070(3)(a)(i); ECY 71280–71291.
Petitioners likewise suggest a “water bank” should be established prior to Rule adoption. Pet’rs’ Br. at 8. That too
has been accomplished. ECY 71280–71291.

1 Because Mr. Hoff is not a lawyer and because of his disagreement with his management, peers
2 and attorneys, management accepted his proposal to be voluntarily removed from the
3 assignment. ECY 3323, 3329.

4 Though Petitioners hang their hats heavily on Mr. Hoff's angry email messages, they
5 disregard the fact that Mr. Hoff never performed an economic analysis here that was peer
6 reviewed, as was the final cost-benefit analysis. ECY 25805. His preliminary economic
7 estimates aren't even substantiated. Rather, he developed them under a legal baseline that he
8 himself imagined, against the legal advice of his attorneys and direction of his managers. In
9 sum, Mr. Hoff's email messages do nothing to undermine the final economic analysis.

10 **5. The legal baseline used by Ecology's economists is well supported in the**
11 **record and consistent with law**

12 Ecology's legal baseline for its economic analysis is one of overappropriation.
13 Petitioners claim this baseline fails to recognize an "expectation" for the unfettered future use
14 of permit-exempt wells by people who have not yet established the right to use water in the
15 basin. Pet'rs' Br. at 20. However, there is no legal right to water under RCW 90.44.050 until
16 water is "regularly beneficially used." See Sec. V.A.2.a., *supra*. The Dungeness Basin is
17 adjudicated, overappropriated, and water rights are no longer being issued. See Sec. III.A.2.,
18 *supra*. Without mitigation, new uses of water are interruptible in favor of senior rights under
19 the doctrine of prior appropriation. This applies to permitted or permit-exempt uses alike.
20 *Swinomish*, 178 Wn.2d at 598 (permit-exempt groundwater uses cannot "jump to the head of
21 the line" in priority); *Campbell & Gwinn*, 146 Wn.2d at 17 n.8 ("RCW 90.44.050 itself
22 provides that a right acquired under the exemption is to be treated as all other rights, and thus is
23 subject to the prior appropriation doctrine's first in time first in right principle.").

24 Despite the indisputable history of overappropriation in the basin, Petitioners
25 incredulously blame the Rule for their inability to have unfettered access to water forevermore.
26 They maintain that future permit-exempt well users are being denied "free access to

1 groundwater” and that “the rule eliminates the legal right of the groundwater permit
2 exemption.” Pet’rs’ Br. 5, 20. The days of free unfettered water use in the Dungeness Basin are
3 long gone, regardless of the purpose or amount of use. The bucket in the basin is empty.
4 Petitioners assert in error that “[t]he Legislature struck a balance with the exemption,
5 guaranteeing at least a minimal amount of water to make reasonable use.” Pet’rs’ Br. at 21.
6 There is no such guarantee in the water code or its interpretation by courts that water will
7 always be available. *Fox v. Skagit Cty.*, 193 Wn. App. 254, 268, 372 P.3d 784 (2016) (“there
8 are hardships attendant to *any* water right with a later priority date and too little water to satisfy
9 all rights.”).

10 Although Petitioners might unreasonably expect that they will always have access to
11 the groundwater exemption, Ecology, as manager of the state’s water resources, cannot
12 consider expectations that are not legally tenable. It is irrelevant that Clallam County issued
13 building permits prior to the Rule’s adoption. Pet’rs’ Br. at 22. Building or no building, water
14 use on those properties is still subject to interruption in favor of senior water users without the
15 Rule; and here, Petitioners disregard the comprehensive mitigation scheme that Ecology and
16 others worked to put in place when the Rule was adopted to *ensure* that people like the
17 Petitioners would continue to have access to *uninterruptible* domestic supplies of water
18 ECY 71280–71291. Indeed, the record shows that Ecology sought a 2013-2015 capital budget
19 request of over two million dollars to develop mitigation options and assist in hydrating the
20 water exchange.³⁰ ECY 18373–18374. The benefits of an uninterrupted water supply—
21 *particularly one paid for by the state* and that is mitigated by senior water rights clearly
22 outweigh the costs associated with the risk of future interruption absent the Rule.

23 Petitioners thus fail in their burden to demonstrate that Ecology’s baseline for the
24 economic analysis is not rational or otherwise supported by the record.

25 _____
26 ³⁰ The Legislature funded this request.

1 **6. Ecology’s economic conclusion in favor of instream flows was effectively**
2 **affirmed by the Supreme Court in *Swinomish***

3 Ecology’s cost-benefit analysis takes into account both the *qualitative and quantitative*
4 benefits and costs and *specific directives of the statute being implemented*. ECY 2362 (citing
5 RCW 34.05.328 (emphasis added)). As demonstrated, the record supports Ecology’s estimated
6 quantified benefits that favor Rule adoption. But if there was any doubt, *Swinomish* now
7 confirms that the qualitative (or intrinsic) value of instream flows provides a benefit that far
8 outweighs minor cost to development.

9 In the *Swinomish* case, the Supreme Court invalidated rule amendments to the Skagit
10 Basin Rule that established reservations of water for future use to the detriment of previously
11 adopted instream flows. After a lengthy examination of legislative intent, the Court announced:

12 The overall statutory scheme does not support the proposition that the economic
13 value of a new use justifies encroachment on *existing* uses, including minimum
14 flows set by rule. The **high value** placed on minimum flows **is not overcome**
15 **just because economically advantageous uses could be made** of the water
16 necessary to satisfy the minimum flow rights.

17 *Swinomish*, 178 Wn.2d at 599 (bold emphasis added).

18 Thus, under *Swinomish*, the economic value quantified for future uses of water can
19 never override the intrinsic or qualitative value of an instream flow use. Not only is the
20 Dungeness Rule supported by quantified economic benefits, the qualitative value of protecting
21 flows necessary for aquatic use is also immeasurably significant. Thus, the Rule benefits
22 clearly outweigh costs on both a quantitative and qualitative basis.

23 In sum, with respect to all of Petitioners’ arguments respecting Ecology’s CBA, not one
24 of them refutes the reasonable conclusion that the CBA is well reasoned and that the likely
25 benefits of the Rule outweigh its costs. Petitioners’ challenge to the CBA therefore fails.
26

1 **C. The Rule is not Arbitrary and Capricious (Issue C)**

2 Petitioners' final argument in support of their efforts to invalidate the Dungeness Rule
3 is that the rule is "arbitrary and capricious."³¹ Petitioners' burden to demonstrate that the Rule
4 is arbitrary and capricious is necessarily quite high. Once again, they have not overcome their
5 burden of showing that Ecology's Rule adoption was a willful and unreasoning action taken
6 without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at
7 905.

8 Petitioners' argument that the Rule is arbitrary and capricious rehashes their arguments
9 that Ecology exceeded its authority in adopting the Rule. It is also in plain disregard of the fact
10 that Courts defer to agencies on technical matters, which would include the setting of instream
11 flows. *Port of Seattle*, 151 Wn.2d at 593. Petitioners argue again that Ecology should have
12 conducted a MNB analysis and weighed the public interest through a four-part-test analysis
13 because the Rule appropriates more water for fish than there is in the Basin. Pet'rs' Br. at 43.
14 Petitioners' position is that Ecology acted in a "willful and unreasoning manner" because
15 Ecology can only protect "minimum instream water resources for various environmental
16 purposes" and is also responsible "for protecting adequate water supply for domestic uses." *Id.*

17 Petitioners arguments here fail for all the reasons that the same arguments fail to
18 demonstrate that Ecology exceeded its statutory authorities. The record plainly reflects that the
19 Rule does not "optimize" flows and that it provides a management framework to ensure
20 adequate water supply for domestic needs (one that was initially even funded by the state).
21 Ecology did not barrel ahead with a rule here. Pet'rs' Br. at 44. Instead, the record
22 demonstrates a multi-decade collaborative process that most importantly was *developed*
23 *locally*. Ecology did not impose the Rule on the people of Clallam County out of the blue. The
24 people of Clallam County, its citizens, its governments, its water users, obligated Ecology to

25 ³¹ As discussed above, Petitioners' challenge to the CBA is also reviewed under the arbitrary and
26 capricious standard of review.

1 adopt the Rule when they adopted their Watershed Plan in 2005 with the recommended flow
2 levels that are in the Rule. The record shows that Ecology has worked tirelessly over the years
3 not only to adopt locally recommended flows but also to ensure citizens have access to water
4 for growth.

5 Petitioners also argue that Ecology did nothing to account for improvements to stream
6 flows prior to the Rule through the purchase of senior water rights. This argument is somewhat
7 confounding as restoration efforts make it even more likely that flows will be satisfied and
8 even more likely that Ecology will revisit the flow levels to determine if they need to be
9 adjusted. *See* WAC 173-518-120(2). Petitioners thus benefit from flow restoration work.
10 Further, although there has been restoration work in the basin, including agreements with
11 senior irrigators to put some of their water rights into the State's Trust Water Rights Program,
12 (ECY 3230-3273), the record still makes plain that the basin is over-allocated and that a
13 minimum flow of 180 c.f.s. remains necessary to preserve and protect salmon.

14 Petitioners again argue that impacts from future domestic uses in the basin would have
15 negligible impact on flows, but once again, negligible impacts on scientifically-determined
16 minimum flows are not allowed under the law. *Swinomish*, 178 Wn.2d at 590. The record
17 shows that even with restoration efforts in the basin, that if flows were not set at 180 c.f.s.
18 during the critical low flow period, four things would happen: (1) Ecology would not satisfy its
19 legal obligation under the Watershed Planning Act to adopt the recommended flows from the
20 2005 Dungeness-Elwha Watershed Plan; (2) Ecology would not be in compliance with its legal
21 obligations to preserve and protect resources under RCW 90.22 and RCW 90.54; (3) lower
22 flows would not be defensible in court because they would ignore 20 years of extensive, peer-
23 reviewed scientific, biological, and hydrologic studies on the habitat requirements of ESA-
24 listed species; and (4) millions of dollars spent on flow restoration might be wasted.
25 ECY 71579.

1 In sum, Petitioners' argument that the Rule is arbitrary and capricious is woefully
2 ignorant of the factual situation in the basin and contradicted by the comprehensive
3 administrative record that supports the Rule here. Local planners and governments and citizens
4 have recognized since at least the early 1990s that endangered fish are in trouble and that the
5 basin's water resources are over-allocated. When these local interests recognized this problem,
6 they did not cover their eyes, pretend there is no problem, and demand unfettered access to
7 water for growth, as the Petitioners do here. Instead, they, along with Ecology, came together,
8 sat down at a table for the first of many times, had hard and frank discussions, evaluated
9 science, and spent more than the next two decades working to solve a significant problem—
10 preserving and protecting flows for fish needs while also providing some water for future
11 growth. In a nutshell, the Dungeness Rule accomplishes both of these goals. The Rule is
12 anything but arbitrary and capricious.

13 VI. CONCLUSION

14 For the reasons stated herein, Ecology respectfully requests the Court fully affirm the
15 Dungeness Rule and dismiss Petitioners' rule challenge with prejudice.

16 DATED this 9th day of September 2016.

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BegDoc	EndDoc	Date	Title
Binder 1			
ECY 1830	ECY 2354	11/2012	Concise Explanatory Statement
ECY 2355	ECY 2429	11/2012	Final Cost-Benefit and Least Burdensome Alternative Analyses
ECY 2430	ECY 2449	11/2012	Small Business Economic Impact Statement
ECY 2767	ECY 2769		Summary of Dungeness Economic Analyses
ECY 2785	ECY 2829	11/2011	The Dungeness Water Exchange and the Exchange Mitigation Strategy
ECY 2959	ECY 2961	1/31/2005	Policy 2025
ECY 3230	ECY 3273	5/2011	A Review of the Implementation of the 1998 MOU between the Department of Ecology and the Dungeness Water Users Assoc.
ECY 3323	ECY 3328	3/21/2012	Email string re: Direction for Dungeness Economic Analysis
ECY 3329	ECY 3335	3/22/2012	Email string re: Direction for Dungeness Economic Analysis
ECY 6256	ECY 6300		Presentation re: Elements of the Draft Dungeness Instream Flow and Water Management Rule
ECY 6610	ECY 6613	9/19/2011	Dungeness Watershed Stream Flow Restoration Project – Pre-proposal Form
ECY 6811	ECY 6928		Response to Comments
ECY 7136	ECY 7139	1/2012	Ecology Focus Sheet – Setting and protecting flows in the Dungeness River
ECY 7369	ECY 7391	3/5/2012	Summary Report and Recommendations on Water Management in the Dungeness Watershed (Local Leaders Water Management Work Group)
ECY 7984	ECY 7987	1/2012	Dungeness Water Watch
ECY 7990	ECY 7992	3/2012	Dungeness Water Watch
ECY 8161	ECY 8166		Ecology web page re: Dungeness Water Management Rule Background
ECY 18330	ECY 18369	4/2009	Feasibility Analysis for a Dungeness Water Exchange
ECY 18373	ECY 18374	11/14/2012	Ecology letter re: water bank

BegDoc	EndDoc	Date	Title
ECY 19735	ECY 19735	2/15/2011	WRIA 18 East – Dungeness Watershed, Guiding Principles for Managing Water
ECY 23716	ECY 23728	4/16/2012	Email string re: Water right senior calls
ECY 25805	ECY 25806	11/8/2012	Email string re: Review of version 2 Dungeness
ECY 30159	ECY 30169	1/24/2013	Email string re: Mark Couhig request
ECY 31904	ECY 31906	5/31/2012	Email string re: Dungeness Water Rule: What are the benefits?
ECY 41263	ECY 41271		Ecology Response to Senator Hargrove’s Questions about Flows in WRIA 18
ECY 41291	ECY 41297		Specific Responses to Dr. Crittenden’s Analysis
ECY 58643	ECY 58644	2/4/2011	Letter from Jamestown S’Klallam Tribe re: Cooperator’s Agreement, WRIA 18 East
ECY 64235	ECY 64245	2/20/1986	Charles B. Roe, AAG, memorandum re: Instream Flow Statutes – Chapters 90.22 and 90.54
ECY 65923	ECY 65949	6/13/2008	Request for Proposal ECY WR 0831, Dungeness River Water Exchange
Binder 2			
ECY 68233	ECY 68844	6/30/1994	The Dungeness-Quilcene (DQ) Plan
Binder 3			
ECY 69771	ECY 70954	5/2005	Elwha-Dungeness Watershed Plan
ECY 71216	ECY 71219	6/2010	Ecology Focus Sheet – Dungeness Watershed
ECY 71266	ECY 71267	5/7/2012	CR-102
ECY 71268	ECY 71269	6/2012	Rule Proposal Notice
ECY 71270	ECY 71272	11/16/2012	CR-103
ECY 71273	ECY 71277	12/21/2012	Memorandum of Understanding Between Clallam County and Ecology Regarding Implementation of WRIA 18
ECY 71278	ECY 71291	12/3/2012	Dungeness Water Exchange Mitigation Plan
ECY 71460	ECY 71497		Presentation re: Elements of an Instream Flow and Water Management Rule
ECY 71544	ECY 71579		Presentation re: Instream Flows for the Dungeness River