



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**I. RELIEF REQUESTED**

The Center for Environmental Law & Policy, by and through the below-signed counsel, respectfully requests that this court Deny Plaintiffs’ Motion for Summary Judgment on the issue of whether the four-part test of RCW 90.03.290(3) is applicable to adoption of instream flows.

**II. INTRODUCTION**

Washington’s Water Code, and the subsequent Groundwater Code, declare that all waters of Washington are public resources. RCW 90.03.010; RCW 90.44.040. The Water Code also directs adoption of instream flows that will protect instream values including fish, game, birds, and recreational, aesthetic, and navigational values. RCW 90.54.020(3)(a); RCW 90.22.010.

An individual or entity may apply to Ecology for a permit to appropriate public water for beneficial use. RCW 90.03.250. In evaluating such an application, Ecology determines whether 1) water is available for 2) a “beneficial use,” and whether the proposed use of water would 3) impair existing rights or 4) be detrimental to the public welfare. RCW 90.03.290(3). This determination is known as the “four-part test.”

The process for establishing instream flows is different than the process for evaluating an application for a water right permit, and the two are governed by different statutes. No statute requires, and no court has ever held, that Ecology must make the determinations of RCW 90.03.290(3) when establishing instream flows under RCW 90.54.020(3)(a) or RCW 90.22.010. Petitioners now ask this court to take the

1 unprecedented step of finding that Ecology must apply the four-part test when  
2 establishing instream flow protections by rule. To understand why this is an improper  
3 request, it is important to understand the mechanisms by which instream flow rules, and  
4 water rights, are created.

5  
6 **A. What is an instream flow?**

7 An instream flow is a formal designation of the quantity of water that should  
8 flow in a river in order to protect one or more instream values or uses. In this case, the  
9 formal designation occurred via adoption of the “Water Resources Management  
10 Program” for the Dungeness River basin, Ch. 173-518 WAC. Substantive authority to  
11 adopt instream flows is found in the Water Resources Act of 1971, Ch. 90.54 RCW, and  
12 the Minimum Flows Act of 1969, Ch. 90.22 RCW. Specifically, RCW 90.54.020(3)(a)  
13 directs Ecology to retain flows in perennial rivers and stream of the state to preserve  
14 various instream uses, and RCW 90.54.040 authorizes Ecology to adopt or amend rules  
15 to this end.<sup>1</sup> RCW 90.22.010 also authorizes Ecology to establish “minimum water  
16 flows” to protect various instream uses, and RCW 90.22.020 directs the agency to do  
17 this through rulemaking. Procedurally, the instream flow rule process is governed by  
18 the Administrative Procedure Act, Ch. 34.05 RCW, which establishes uniform  
19 standards for adoption of state regulations.  
20  
21  
22

---

23 <sup>1</sup> Plaintiffs correctly note that an instream flow may also be formally designated through a  
24 recommendation from the Washington Department of Fish & Wildlife, via a hydropower license, or other  
25 means, however none of those means are at issue here. Further, these mechanisms are specific to single  
26 permits or licenses, and do not provide the programmatic protection afforded by the comprehensive  
instream flow rule-making process at issue in this lawsuit.

1           The Dungeness Water Resources Management rule (the Rule) establishes a  
2 comprehensive water management program for the basin, centered on instream flows  
3 established for the mainstem of the Dungeness River and eight of its tributaries. WAC  
4 173-518-040. The Rule also addresses basic water management requirements,  
5 including metering and reporting of water use, compliance and enforcement, rule  
6 review and appeals. Importantly, the Rule also addresses future (i.e., post-rule) water  
7 allocation, including mitigation requirements for new water rights. *See generally* Ch.  
8 173-518 WAC.<sup>2</sup> With respect to the instream flows established for the Dungeness and  
9 tributaries, the Rule identifies the quantity of water that should flow in the river. WAC  
10 173-518-040, Tables II.A and .B. Because river flow changes over the course of a year,  
11 the Rule designates flows on a month-by-month basis. *Id.* Instream flows also vary by  
12 location. Within the Dungeness watershed, smaller tributaries with designated flows of  
13 50 cfs or less discharge into the mainstem river, where flows are an order of magnitude  
14 higher.

17           Instream flows are established to protect non-consumptive water uses,  
18 specifically fish and wildlife needs, recreation, aesthetics, water quality, and navigation.  
19 RCW 90.54.020(3)(a); RCW 90.22.010. To achieve this mandate, Ecology engages in

---

23 <sup>2</sup> Although the details vary by river basin, this basic format for water resource management is  
24 found in instream flow rules around the state. E.g., Ch. 173-501 WAC (Nooksack River); Ch. 173-532  
WAC (Walla Walla River); Ch. 173-559 (Colville River).

1 scientific analysis to determine what quantity of water is required for each protected  
2 use. With respect to fisheries needs, this is often done through habitat analysis.<sup>3</sup>

3 Water flows also vary from year to year, so that when adopting an instream flow  
4 rule, Ecology must make a decision about what type of water year (i.e., high flow, low  
5 flow) will be protected. This decision is necessarily informed by the statutory mandate  
6 to “provide for preservation of wildlife, fish, scenic, aesthetic and other environmental  
7 values, and navigational values.” RCW 90.54.020(3)(a). In *Squaxin Island Tribe*, the  
8 Court described how Ecology does this: “Ecology notes that the flows for Johns Creek  
9 were set at a 50 percent exceedance level, which means that on any given day, there is  
10 only a 50 percent chance of the creek having that flow level.” 177 Wn.App. at 744,  
11 n.10.  
12

13  
14 Once adopted, an instream flow rule is a water right for the river, with a priority  
15 date as of the date of rule adoption.<sup>4</sup> RCW 90.03.345; *Swinomish Indian Tribal*  
16 *Comm’ty v. Dept. of Ecology*, 178 Wn.2d 571, 584, 311 P.3d 6 (2013). This priority  
17 date governs the interaction between instream flows and water right permits, in two  
18 ways. First, instream flows do not affect water rights with priority dates that pre-date  
19

20 \_\_\_\_\_  
21 <sup>3</sup> See *PUD No. 1 of Jefferson County v. Ecology*, 121 Wn.2d 179, 199-200, 849 P.2d 646 (1993)  
22 (reviewing scientific basis for minimum flow recommendations to protect salmon in the Dosewallips  
23 River); *Squaxin Island Tribe v. Ecology*, 177 Wn. App. 734, 737-38, 312 P.3d 766 (2013) (“Ecology  
24 specifically considered the needs of anadromous fish in setting the instream flows;” “Both Ecology and  
the Tribe agree that specific hydrogeological data and models are needed for informed decisions about  
managing and allocating water use and protecting surface flows in the Johns Creek basin;” “. . . additional  
information regarding the hydrology and hydrogeology of Johns Creek basin was needed before a  
comprehensive rule amendment could be undertaken.”).

1 the rule. The Dungeness Rule makes this explicit. WAC 173-518-010(3). Second, the  
2 instream flows become conditions on any water rights issued after the date of rule  
3 adoption. RCW 90.03.247; *Swinomish, supra*, at 578-79; *Hubbard v. Dept. of Ecology*,  
4 86 Wn. App. 119, 124-25 (1997). Therefore any water rights issued after January 2,  
5 2013 in the Dungeness watershed may be interrupted if the flows in the river or its  
6 tributaries fall below the quantities designated in the Rule.  
7

### 8 **B. What is the “four-part test”?**

9 The Washington Water Code sets forth procedural and substantive requirements  
10 governing how and whether a person or other entity may obtain an individual right to  
11 use waters of the state. The water allocation statutes provide detailed and specific  
12 requirements setting forth<sup>5</sup> the substantive criteria by which a water right may be issued  
13 by Ecology. In approving a water permit, Ecology must affirmatively find that (1)  
14 water is physically available from the proposed source of supply, (2) the proposed water  
15 use will not impair senior rights, (3) the proposed use is beneficial (i.e., an acceptable  
16 purpose and reasonably efficient), and (4) the proposed use is not detrimental to the  
17 public interest (informally known as the “four-part test”). RCW 90.03.290; *Hillis v.*  
18  
19

---

20  
21 <sup>4</sup> For the Dungeness Rule, this priority date is January 2, 2013. *See* WAC 173-518-010, statutory  
note.

22 <sup>5</sup> The statutes provide detailed and specific requirements for applying for a water right, providing  
23 public notice, reimbursing agency costs, assigning applications, constructing water works, and the steps  
24 by which an application for a water right may ripen into a permit and, finally, a certificate. *See* RCW  
90.03.250 through .340; RCW 90.44.060 (adopting surface water code procedures for groundwater rights  
and adding special procedures); WAC 508-12-090 through -250 (surface and groundwater appropriation  
procedures).

1 *Dept. of Ecology*, 131 Wn.2d 373, 384-85, 932 P.2d 139 (1997). Ecology conducts a  
2 “complex investigation” of both the condition of the proposed water source, and the  
3 proposed use. *Hillis*, 131 Wn.2d at 391-92, 394; *see also* Washington Lawyers Practice  
4 Manual at § 23.9.2. If Ecology finds each element of the four-part test is met, it may  
5 issue a water right permit with conditions necessary to ensure proper water  
6 management. *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 597-98, 957 P.2d 1241  
7 (1998).

9 Here, plaintiffs argue that the “water availability” and “public interest” elements  
10 of the four-part test must apply to adoption of instream flows.<sup>6</sup> MSJ at 3 (“Issue  
11 Raised”). Generally, unappropriated water must be available to satisfy a proposed new  
12 use before a water right may issue. Because all new water rights are “junior” to  
13 pre-existing rights (including previously established instream flows set by rule), a water  
14 right may issue when water is not available 100% of the time. In that circumstance, the  
15 water right is “interruptible” and will normally contain explicit conditions requiring the  
16 water user to cease use when water supply circumstances warrant. RCW 90.03.010 (“as  
17 between appropriators, the first in time shall be the first in right”); *Fort v. Ecology*, 133  
18 Wn. App. 90, 96-97, 135 P.3d 515 (2006) (junior user must curtail usage when water is  
19 not available for all water rights).

21 The “public interest” (also known as the “public welfare”) element of the  
22 four-part test is a wide-ranging element that is not defined in statute or rule. The public  
23

1 interest considerations associated with any given water right application will depend on  
2 the facts and circumstances of that application. The Supreme Court has held that  
3 Ecology must consider water quality impacts when evaluating the public welfare test for  
4 issuance of a new water right. *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109,  
5 117-19 (1973) (citing RCW 90.54.030). The PCHB has upheld Ecology’s use of the  
6 public interest test to deny water rights<sup>7</sup> Ecology has also used the public interest test  
7 as a basis to condition new water rights, e.g., to protect instream flows. *Hubbard*, 86  
8 Wn. App. at 125-26.

10 The “four-part test,” then, is the means by which the Legislature has designated  
11 evaluation of individual water right applications to ensure compatibility with the public  
12 and private interests.

### 13 C. Procedural Posture

14 This lawsuit is a declaratory judgment action that seeks to invalidate the  
15 Dungeness River Instream Flow Rule, WAC 173-518-010 et seq. As such, it involves  
16 review of the agency rulemaking record. Under Thurston County Local Civil Rule  
17 56(i), summary judgment may not be heard where reference to that record is required.  
18 Plaintiffs initially filed a Request for Special Setting, along with their Motion for  
19  
20

---

21 <sup>6</sup> Instream flows are designated as beneficial uses, RCW 90.54.020(1), and may not impair pre-  
22 existing water rights, RCW 90.03.345 (priority date of instream flows is date of rule adoption).

23 <sup>7</sup> See, e.g., *CPM Development v. Dept. of Ecology*, PCHB No. 03-071, Order on Summary  
24 Judgment at 7 (3-12-07) (upholding denial of water right based on public interest factors including  
25 uncertainty of mitigation plan and negative incentives associated with granting water rights based on de-  
vegetating landscape); *Squaxin Island Tribe v. Dept. of Ecology and Miller Land Co.*, PCHB No. 05-137,  
Modified Findings of Fact, Conclusions of Law, and Order at 49 (11-20-06) (upholding water right  
denial; negative impacts of water withdrawal on salmon and consequent limit on fish available to tribal  
members detrimental to public interest).

1 Summary Judgment on several issues, on April 2, 2015. Following Ecology’s  
2 response<sup>8</sup>, this court denied the motion for special setting and ruled that the motion  
3 could be re-filed after the administrative record was filed in this matter. Order on April  
4 24, 2015. Defendants were instructed at that time not to respond to plaintiffs’ motion  
5 unless so directed by the court. *Id.* at 2.  
6

7 On August 17, 2015, plaintiffs filed a “Motion for Summary Judgment on Legal  
8 Issues,” relating to the issues of 1) whether the four-part test in RCW 90.03.209(3) was  
9 applicable to instream flows, 2) whether Ecology exceeded its statutory authority in  
10 using the “overriding considerations of the public interest” exception in adopting  
11 reservations of water in the Rule, and 3) whether Ecology was required to determine the  
12 “maximum net benefits” associated with water use before adopting the Rule. As the  
13 court’s prior ruling had indicated that defendants were not to file responsive briefing  
14 unless so directed by the court, CELP and Ecology did not file response briefs. Rather,  
15 they responded by way of letters to the court indicating that, while they agreed that the  
16 first issue was purely one of law, the second and third necessarily involved reference to  
17 the record and therefore were inappropriate for summary judgment under LCR 56(i).  
18 Declaration of Dan J. Von Seggern (“Von Seggern Dec.”) at Exs. 1; 2. Plaintiffs sent a  
19 letter to the court in reply. *Id.* at Ex. 3. On September 25, 2015, the court responded to  
20 the parties via email, indicating that it would allow summary judgment to be heard on  
21 the first issue only. *Id.* at Ex. 4.  
22  
23  
24

---

25 <sup>8</sup> At the time that petitioners’ motion was initially filed, CELP was not a party to this case. CELP  
26 RESPONSE TO MOTION FOR SUMMARY JUDGMENT 9 Center for Environmental Law & Policy  
85 S. Washington St.  
Suite 301  
Seattle, Washington 98104  
206-829-8299

1 On October 12, 2015, following the Washington Supreme Court’s decision in  
2 *Foster v. Ecology et al.*, Washington Supreme Court No. 90386-7 (October 8, 2015),  
3 plaintiffs’ again wrote to the court, requesting that the issue of Ecology’s authority to  
4 use the Overriding Considerations of the Public Interest (“OCPI”) provision of RCW  
5 90.54.020(3) in reserving water for future use be added to the motion. Von Seggern  
6 Dec. at Ex. 5. CELP and Ecology again responded by letter. *Id.* at Exs. 6; 7. The court  
7 denied plaintiffs’ request in an October 28, 2015 email. *Id.* at Ex. 8. On November 18,  
8 2015, plaintiffs filed a new Motion for Summary Judgment focused on the four-part  
9 test. It is that Motion to which CELP responds.

11 Per the court’s September 25 and October 28 email rulings, the only issue now  
12 before the court is the question of whether Ecology must apply the four-part test of  
13 RCW 90.03.290(3) when establishing an instream flow pursuant to RCW 90.22.020  
14 and RCW 90.54.050.

### 16 III. STANDARD OF REVIEW

17 This is a review of an agency rule under the Administrative Procedure Act,  
18 RCW 34.05.510 *et seq.* The burden of demonstrating invalidity of the rule is on the  
19 party asserting invalidity. RCW 34.05.570(1)(a). A court will declare a rule invalid  
20 only if it finds that it “violates constitutional provisions; the rule exceeds the statutory  
21 authority of the agency; the rule was adopted without compliance with statutory  
22 rule-making procedures; or the rule is arbitrary and capricious.” RCW 34.05.570(2)(c).  
23

---

25 was granted intervener status on July 1, 2015.

1 The extent of an agency’s authority is a question of law and is reviewed *de*  
2 *novo*. *Ass’n of Wash. Business v. Department of Revenue*, 121 Wn. App. 766, 770, 90  
3 P.3d 1128 (2004) (citing *Wash. Public Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d  
4 637, 645, 62 P.3d 462 (2003)). Administrative rules adopted pursuant to a legislative  
5 grant of authority are presumed to be valid, and an agency does not exceed its statutory  
6 authority where the rule is “reasonably consistent with the controlling statutes.” *Wash.*  
7 *Public Ports*, 148 Wn.2d at 646.

9 Because this is a motion for summary judgment, the summary judgment  
10 standard is overlaid onto the APA review standard. Summary judgment is to be granted  
11 only where there is no genuine issue of material fact and the moving party is entitled to  
12 judgment as a matter of law. CR 56(c); *Verizon Northwest v. Wash. Emp. Sec. Dep’t*,  
13 164 Wn.2d 909, 9167, 194 P.3d 255 (2008); *see also City of Union Gap v. Dept. of*  
14 *Ecology*, 148 Wn. App. 519, 525-28, 195 P.3d 580 (2008).

#### 16 IV. ARGUMENT

##### 17 A. Plaintiffs’ argument rests on a false equivalence between instream 18 flows and reservations of water.

19 Plaintiffs attempt to construct a rationale for imposing the four-part test on  
20 adoption of instream flows, based on the Washington Supreme Court’s 2013 decision in  
21 *Swinomish*.<sup>9</sup> Beginning from the premise that both instream flows and reservations of  
22

---

23 <sup>9</sup> The issue in *Swinomish* was Ecology’s use of the “overriding considerations of the public  
24 interest” exception in RCW 90.54.020(3) to impair *existing* instream flows. *Swinomish* did not address  
25 adoption of instream flows. Also, *Swinomish* did not invalidate the instream flow rule in the Skagit River  
as Plaintiffs’ suggest. MSJ at 2. Rather, *Swinomish* invalidated Ecology’s subsequent reservation of water

1 water for future beneficial uses are defined as “appropriations” in RCW 90.03.345,  
2 plaintiffs cite to a single sentence in *Swinomish* for the proposition that because  
3 reservations must “meet the same requirements as any appropriations of water under  
4 the Water Code,” so, too, must instream flows, and that the four-part test is one of these  
5 “same requirements.” MSJ at 7. This argument fails, as described below.  
6

7 The observation that both reservations of water for future use and instream  
8 flows are given the status of “appropriations” under RCW 90.03.345 is the foundation  
9 of plaintiffs’ argument. However, RCW 90.03.345 states only that reservations of  
10 water under RCW 90.54.050(1) or minimum flows under RCW 90.22.010 or 90.54.040  
11 “constitute appropriations.” It does not mean that they become appropriations through  
12 the same process. Plaintiffs then ask the court to infer that, because instream flows and  
13 reservations of water are treated alike by RCW 90.03.345, they are to be treated in  
14 exactly the same way by all other statutes, including RCW 90.03.290.  
15

16 But RCW 90.03.345 neither makes all “appropriations” equivalent, thereby  
17 imposing the same requirements for their establishment, nor makes any reference to the  
18 four-part test. Plaintiffs’ cherry-picking of a single statutory reference ignores the large  
19 number of instances in which the Water Code treats reservations and water right  
20 appropriations made via the permit process quite differently from instream flows<sup>10</sup> (see  
21

---

22 for out-of-stream uses that permanently impaired the instream flow. *Swinomish Indian Tribal Community*  
23 *v. Dept. of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013).

24 <sup>10</sup> Plaintiffs are not just cherry-picking the term “appropriation,” but they are also cherry-picking the four-  
25 part test. The water permit processes set forth in RCW 90.03.250 through 90.03.340 explicitly establish a  
statutory “infrastructure” for individual permits, of which the four-part test is one component. Plaintiffs  
do not argue that this structure is also applicable to instream flows, because that would not make sense.

1 Sections IV.B – IV.F, *infra*). These differences demonstrate that the Legislature did not  
2 intend instream flows and reservations to be precisely equivalent. Because they are not  
3 equivalent, there is no requirement that the four-part test be applied to creation of  
4 instream flows by rule.

5  
6 **B. The statutory bases for water permits, reservations and instream flows  
are different.**

7 The differences between reservations of water and instream flows begins with  
8 their respective authorizing statutes. Reservations of water are authorized as part of  
9 Chapter 90.54 RCW, the Water Resources Act of 1971. Ecology *may* make  
10 reservations of water for future beneficial use, but is not *required* to do so: “the  
11 department *may* by rule adopted pursuant to chapter 34.05 RCW: (1) Reserve and set  
12 aside waters for beneficial utilization in the future . . .” RCW 90.54.050 (emphasis  
13 added).  
14

15 Instream flows, on the other hand, are authorized by a different section of the  
16 Water Resources Act, which *requires* that instream flows be protected: “[p]erennial  
17 rivers and streams of the state *shall* be retained with base flows necessary to provide for  
18 preservation of wildlife, fish, scenic, aesthetic and other environmental values, and  
19 navigational values.” RCW 90.54.020(3) (emphasis added). The Minimum Water  
20 Flows and Levels Act, Chapter 90.22 RCW, gives Ecology further authority to establish  
21 instream flows, but does not speak to reservations of water:  
22

23  
24  
25  
26  

---

Rather, plaintiffs select one component from this statutory scheme, and impermissibly ignore the  
statutory whole. When considering the Water Code, the Court must consider the entire scheme, not just  
one single piece of the pie.

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

6 RCW 90.22.010.

7 **C. Instream flows and permit-based appropriations are established by  
8 different mechanisms.**

9 As well as flowing from different statutory authority, instream flows are  
10 established by very different procedures than are permit-based appropriations of water.

11 First, and most obviously, there is no permit application required for establishment of  
12 an instream flow. Rather, the process is initiated by Ecology under the statutory  
13 authority provided by the Water Resources Act and the Minimum Flows and Levels  
14 Act. RCW 90.54.020; RCW 90.22.010. Neither statute makes any mention of the four-  
15 part test. Establishment of instream flows is to be done by “adoption of rules,” and a  
16 public hearing is required. RCW 90.22.020.

17 In contrast, individual water users must apply for a permit from Ecology. RCW  
18 90.03.250, .260; *Swinomish*, 178 Wn.2d at 583. Application for a water permit invokes  
19 the procedure of RCW 90.03.290, which expressly requires the four-part test for  
20 issuance of the permit, even where the water proposed for appropriation has been  
21 reserved under RCW 90.54.050. *Swinomish*, 178 Wn.2d at 588-89. And beneficial use  
22 of water from a reservation also implicates the four-part test. For example, WAC  
23 Chapter 173-591 reserves certain quantities of groundwater in Thurston County for  
24 future beneficial use. WAC 173-591-070(4). A permit issued for withdrawal and  
25

1 beneficial use of water under the reservation has a priority date of the effective  
2 regulation. WAC 173-591-070(5). Such permits are to be “issued pursuant to RCW  
3 90.03.290,” which subjects proposed new water permits to the four-part test.

4 **D. Instream flows and reservations of water are established for different**  
5 **purposes and operate differently once established.**

6 Reservations of water under RCW 90.54.050 are set aside to allow for future  
7 beneficial uses, and typically contemplate that those future uses will be out-of-stream,  
8 consumptive uses.<sup>11</sup> Such out-of-stream uses are subject to the four-part test of RCW  
9 90.03.290. When creating a reservation, Ecology is making a present-day  
10 determination that water will be available in the future for water rights, and establishing  
11 a present-day priority date for those future rights, thus addressing the “water  
12 availability” and “no impairment of existing rights” prongs of the four-part test at the  
13 time the reservation is established in rule.<sup>12</sup>

14 Instream flows are not analogous to reservations of water, because they are not a  
15 prelude to a future appropriation, but are permanent, non-consumptive appropriations  
16 dating from the date of rule adoption. *See Swinomish*, 178 Wn.2d at 577, 311 P.3d 6.  
17 They are adopted with the intent that the quantity of water designated by the instream  
18  
19  
20

21 \_\_\_\_\_  
22 <sup>11</sup> See, e.g., WAC 173-518-080 (Dungeness River - reserves of water “for domestic use only”);  
23 WAC 173-545-090(1)(c)(i) (Wenatchee River - reserves of water for “domestic purposes, irrigation  
24 associated with a residence, potable domestic water requirements associated with municipal, commercial,  
25 and industrial purposes, and stock water”); WAC 173-546-070(1)(c) (Entiat River - water for “domestic,  
26 stock watering, commercial agriculture, and commercial/light industrial uses”).

<sup>12</sup> As the *Swinomish* decision makes clear, a permit to use water from the reservation may be  
issued only upon satisfaction of the four-part test, including the “beneficial use” and “public interest”  
prongs. *Swinomish*, 178 Wn.2d at 588-89.

1 flow rule will not be further appropriated, but will remain in the river, to preserve  
2 instream values and uses. RCW 90.22.010; RCW 90.54.020(3)(a).

3 **E. A variety of statutes specifically protect instream flows but not**  
4 **reservations of water or water permits.**

5 Instream flows are specifically protected by several statutes that apply to neither  
6 reservations of water nor permit-based appropriations.<sup>13</sup> For example, RCW 90.03.247  
7 requires that water permits must be conditioned to protect established instream flows.  
8 *Hubbard, supra.* RCW 90.22.030 specifically provides that no right to divert or store  
9 public waters is to be granted in “conflict with regulations adopted pursuant to RCW  
10 90.22.010 and 90.22.020 establishing flows and levels.

11 Further, the Minimum Flows and Levels Act specifically requires that the  
12 Department of Ecology establish a statewide list of priorities for evaluation of instream  
13 flows. RCW 90.22.060. There is no comparable statutory obligation to establish a  
14 priority list of reservations of water for future domestic or municipal use.

15  
16 The overriding consideration of the public interest (“OCPI”) exception that was  
17 at issue in *Swinomish* also distinguishes instream flows from other appropriations.  
18 RCW 90.54.020(3) states that withdrawals of water that would conflict with instream  
19 flows may be authorized “only where it is clear that overriding considerations of the  
20 public interest will be served.” This OCPI exception is narrowly construed in order to  
21 provide a high degree of protection for instream flows, as explained by recent Supreme  
22 Court decisions. *Foster*, slip. op. at \*12 (exception is narrow and allows only  
23

1 temporary impairment of instream flows); *Swinomish*, 178 Wn.2d at 585 (narrow OCPI  
2 exception is not a device for water reallocation). Importantly, there is no equivalent  
3 statute (or associated body of case law) that specifically protects reservations of water  
4 made under RCW 90.54.050, or that applies any sort of OCPI-like exception to allow  
5 impairment of such reservations or of permitted withdrawals of water. Each of these  
6 statutory provisions would be superfluous if instream flows were treated identically to  
7 reservations of water or to permitted water withdrawals.  
8

9 **F. The statutes providing for establishment of instream flows are more**  
10 **recent and specific than the application-based procedure in RCW**  
11 **90.03.290.**

12 The central question here is whether the procedure for appropriation of water  
13 through a permit application contained in RCW 90.03.290 must be applied to instream  
14 flow setting. A basic principle of statutory construction is that the more recently  
15 enacted and specific statute will control over an older, more general law. *Tunstall ex*  
16 *rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (preference given to  
17 “more specific and more recently established statute”), *citing Estate of Little*, 106  
18 Wn.2d 269, 283, 721 P.2d 950 (1986). Here, the statutes providing for establishment of  
19 instream flows are both more recent *and* more specific than the law governing  
20 appropriations of water by permit (including use of water set aside by reservation).  
21

22 Appropriations based on permit applications, including appropriation of water  
23 that was reserved for future use under RCW 90.54.050, must meet the requirements of  
24

1 RCW 90.03.290. *Swinomish*, 178 Wn.2d at 589-90. The language of RCW 90.03.290,  
2 providing for examination of an application for a permit to beneficially use water and  
3 setting forth the four-part test, has remained essentially unchanged since 1917:

4       If [the state hydraulic engineer] shall find that *there is water available for*  
5       *a beneficial use*, and the appropriation thereof as proposed in the  
6       application will *not impair existing rights or be detrimental to the public*  
7       *welfare*, he shall issue a permit stating the amount of water to which the  
8       applicant shall be entitled and the beneficial use or uses to which it may be  
9       applied.

10 Laws of 1917, Ch. 117, section 31 (emphasis added). The language of current RCW  
11 90.03.290(3) is identical, except for the insertion of “for appropriation” before “for a  
12 beneficial use” and substitution of the Department of Ecology for the hydraulic  
13 engineer. RCW 90.03.290.

14       Both statutes providing for instream flows, RCW 90.54.020 (part of the Water  
15 Resources Act of 1971) and RCW 90.22.010 (part of the 1969 Minimum Flows and  
16 Levels Act), were enacted long after RCW 90.03.290. Neither of these statutes requires  
17 that an application for a permit be filed or the four-part test be performed, and RCW  
18 90.22.020 specifically states that instream flows are to be established by rulemaking. If  
19 the Legislature had wanted to make instream flow setting subject to the four-part test, it  
20 could have done so. The legislators who enacted the instream flow statutes would  
21 surely have been aware of the appropriations mechanism of RCW 90.03.290, yet chose  
22 to prescribe different methods, including different procedural requirements, for setting  
23 instream flows.

---

24  
25 appropriations of water generally under Washington’s first-in-time” scheme. RCW 90.03.010.

1 RCW 90.22.020 is also more specific than RCW 90.03.290’s general scheme for  
2 appropriation, as it deals with only a single kind of water appropriation.

3 **G. Contrary to plaintiffs’ assertion, *Swinomish Indian Tribal Community v.***  
4 ***Ecology* does not hold that the four-part test applies to instream flows.**

5 The second part of plaintiffs’ argument is their claim that *Swinomish* requires  
6 that the four-part test be met for all appropriations. They are wrong. Their statement  
7 that “*Swinomish* applies to the Dungeness Rule because it establishes that [instream  
8 flows] and reservations are appropriations of water that, like all other appropriations of  
9 water, must meet the four-part test at RCW 90.03.290(3)” is flatly incorrect. MSJ at 9.  
10 *Swinomish* says no such thing. Plaintiffs cannot (and do not) cite a passage that actually  
11 makes this holding.<sup>14</sup>

13 *Swinomish* observes that reservations of water under RCW 90.54.050 are  
14 appropriations, citing RCW 90.03.345. *Swinomish*, 178 Wn.2d at 588. *Swinomish* also  
15 says that reservations “must therefore meet the same requirements as any appropriation  
16 of water under the water code.” *Id.* But plaintiffs read far too much into this statement.  
17 This passage from *Swinomish* does not speak to instream flows, does not say what “the  
18 same requirements as any appropriation of water” are, and certainly does not say that  
19 the requirements for “any appropriations” include the four-part test. *Swinomish*  
20 mentions the four-part test only in discussing a permit to appropriate water, which has  
21 nothing to do with instream flow setting. *Swinomish*, 178 Wn.2d at 588-89 (*citing*  
22  
23

24 \_\_\_\_\_  
25 <sup>14</sup> Plaintiffs also misstates *Swinomish*’s holding in claiming that “the Supreme Court held that  
because reservations, *like MIFs*, are given the status of water right appropriations . . . Ecology must make

1 *Postema v. Poll. Cont. Hrgs Bd.*, 148 Wn.2d 68, 79, 11 P.3d 726 (2000)).<sup>15</sup> With  
2 respect to instream flows, then, the discussion cited by plaintiffs is irrelevant.

3 **H. Instream flows are established in a process which amply considers the**  
4 **public interest.**

5 Plaintiffs argue that a “permanent allocation of water” such as an instream flow  
6 must pass a public interest evaluation, and propose that this “evaluation” must take the  
7 form of the “public welfare” element of the four-part test for water right applications.<sup>16</sup>  
8 MSJ at 11. This line of argument ignores the significant requirements for consideration  
9 of the public interest that are imposed by the Administrative Procedure Act (APA):<sup>17</sup>  
10

11 When an agency proposes a rule, it must state its reasons for the rule, its  
12 purpose, and its anticipated effects. RCW 34.05.320. "The rules it adopts  
13 should be justified and reasonable, with the agency having determined,  
14 based on common sense criteria established by the legislature, that the  
obligations imposed are truly in the public interest[.]" RCWA 34.05.328  
Legislative Findings, 1995 ch. 403(1)(b).

15 *Hunter v. Univ. of Washington*, 101 Wn. App. 283, 292, 2 P.3d 1022 (2000).

16 Instream flows are established by APA rulemaking, providing public  
17 involvement opportunities far beyond what is required for issuance of an ordinary water  
18

---

19 findings under the four-part test of RCW 90.03.290 before adopting them. . .” MSJ at 2 (emphasis  
20 added). The Swinomish holding simply does not address adoption of instream flows.

<sup>15</sup> *Postema*'s reference to the four-part test is also in the context of an application for a permit to  
21 appropriate water: “[w]hen a private party seeks to appropriate groundwater, Ecology must investigate  
pursuant to RCW 90.03.290.” *Postema*, 142 Wn.2d at 79.

<sup>16</sup> This argument is embedded in plaintiffs’ discussion of “maximum net benefits” (MNB). CELP  
22 expressly does not concede that the MNB issue is properly before this court for purposes of this motion.  
Further, whether or not MNB applies to instream flow rules is a contested issue in this lawsuit, and  
23 petitioners’ assumption that it does apply is premature. See Section IV.I, *infra*.

<sup>17</sup> To the extent that plaintiffs rely on any specific objection to the manner in which the public  
24 interest was considered in the case of the Dungeness Rule, the objection could only be met by reference  
to the administrative record. That of course would bar resolution of this motion on summary judgment  
25 under LCR 56(i).

1 right. APA rulemaking procedures require extensive public notice, beginning with  
2 soliciting public comment before issuing a notice of proposed rulemaking. RCW  
3 34.05.310; RCW 34.05.320. This “prenotice inquiry” has the stated purpose “[t]o meet  
4 the intent of providing greater public access to administrative rule making and to  
5 promote consensus among interested parties.” RCW 34.05.310(1)(a). The agency must  
6 maintain a publicly available docket containing extensive information relating to the  
7 rulemaking. RCW 34.05.315. A public hearing, with opportunities for written and oral  
8 submission of public comments, is required. RCW 34.05.325. Further, RCW  
9 90.22.020 also contains a specific requirement for public notice and hearings before an  
10 instream flow is established.  
11

12 RCW 90.03.290, on the other hand, sets forth significantly fewer requirements  
13 before issuance of a permit-based appropriative right.<sup>18</sup> For ordinary water permits,  
14 public involvement is generally limited to public notice in local newspapers, an  
15 application protest period, and opportunity to review and comment on draft Reports of  
16 Examination prior to issuance of new water rights. See Ecology Policy PRO-1000.<sup>19</sup>  
17 Von Seggern Dec. at Ex. 9. Public interest in this context is served by the public  
18 interest determination conducted by Ecology as one element of the four-part test. RCW  
19 90.03.290. Consideration of the overall scheme for setting instream flows by rule  
20  
21

22 \_\_\_\_\_  
23 <sup>18</sup> While reservations are also established by rulemaking, it is clear from *Swinomish* that non-  
24 exempt use of water from the reservations requires an application for a permit, triggering the four-part  
25 test. *Swinomish*, 178 Wn.2d at 583. There is no similar requirement relating to adoption of an instream  
26 flow.

<sup>19</sup> Available at <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pro1000.pdf> (last accessed  
Dec. 27, 2015).

1 demonstrates that if anything, the public interest is given more stringent consideration  
2 than when an individual permit to appropriate water is considered.<sup>20</sup>

3 **I. Plaintiffs’ argument regarding Maximum Net Benefits is an improper**  
4 **attempt to inject an issue that is not before the court.**

5 Under this court’s September 25, 2015 ruling, the MNB issue is not now before  
6 the court. Plaintiffs’ argument that the “maximum net benefits” (MNB) provisions of  
7 RCW 90.54.020 and RCW 90.03.005 should apply to setting of instream flows is  
8 improper and is the subject of CELP’s Motion to Strike. This section of plaintiffs’  
9 briefing should be disregarded by the court and stricken from the record.  
10

11 **J. The argument regarding consequences of the Rule on development**  
12 **in the Dungeness Basin improperly requires reference to the**  
13 **administrative record.**

14 Plaintiffs’ Motion makes numerous unsupported statements about the possible  
15 impact of the Dungeness Rule. It is claimed that “properties in the Dungeness basin  
16 could also be permanently stranded, unbuildable, and unusable.” MSJ at 14. Plaintiffs  
17 also argue that mitigation to make water available for new uses may be “impossible to  
18 achieve in most areas of basins with new MIF water rights,” and that Ecology has  
19 “painted itself into a corner with the Dungeness Rule by adopting MIFs first and  
20 avoiding the public interest evaluation for that appropriation of water.” *Id.* These  
21 statements are clearly intended to suggest to the court that the Dungeness Rule will  
22  
23

---

24 <sup>20</sup> As noted above (see Section II.B, supra), the statutes regarding instream flows contain  
25 provisions analogous to the “impairment of existing rights” and “beneficial use” elements of the test.

1 foreclose development in the Dungeness Basin, and further that mitigation for future  
2 water use will not be available.

3         These statements, along with the parade of horrors that they invoke, should be  
4 disregarded. First, this line of argument is irrelevant. This motion was limited by this  
5 court's prior order to the *legal* issue of whether the four-part test is applicable to  
6 establishing instream flows. Von Seggern Dec. at Exs. 4, 8. That legal question deals  
7 with the interplay between various sections of the Water Code, and does not depend on  
8 the *factual* issue of what the impacts of any particular instream flow rule would or  
9 would not be. To the extent that plaintiffs contend that any of these purported "factual"  
10 assertions (CELP does not concede their truth) is material to resolution of the question,  
11 then they by definition create a question of material fact and summary judgment should  
12 be denied. CR 56(c).  
13  
14

15         Second, each of these statements is (at a minimum) fairly debatable and  
16 evaluating their truth can only occur in the context of the full administrative record.<sup>21</sup>  
17 Assertions regarding the ultimate effect of the Rule on water availability necessarily  
18 implicate its provisions for mitigation of water use, as well as Ecology's interpretations  
19 of how those provisions would be applied. WAC 173-518-070. If petitioners believe  
20 that these factors are in any way dispositive of this motion, then they have raised not  
21 only a question of material fact but one whose truth or falsity can only be determined  
22 based on reference to the administrative record. For that reason, too, it would be  
23  
24

1 improper to resolve this issue at summary judgment. CR 56(c); LCR 56(i). On the  
2 other hand, if resolution of the legal issue before the court does *not* depend on the  
3 Rule’s impact on water use, then this section of petitioners’ brief is irrelevant and  
4 should be disregarded.

5  
6 Finally, petitioners’ contention that it will be “too late” to consider water  
7 availability and the public interest if the Dungeness Rule is upheld is nonsense. This  
8 contention, too, may only be addressed by reference to the administrative record. That  
9 record (which is not available for purposes of this motion) is replete with evidence  
10 showing consideration of these factors. To the extent that petitioners feel their motion  
11 requires consideration of this point, summary judgment is inappropriate.<sup>22</sup>

## 12 V. CONCLUSION

13  
14 Plaintiffs ask that this court make the unprecedented ruling that adoption of  
15 instream flows is subject to the four-part test of RCW 90.54.020(3). The argument for  
16 this is based solely on the misconception that all “appropriations” of water (including  
17 instream flows and reservations of water for future use) are to be treated as equivalent  
18 for all purposes. To the contrary, instream flows and reservations of water are  
19 established by very different procedures, under different statutory authorities, and for  
20 different purposes. Once established, while both are “appropriations” of water, they  
21 have different statutory protections, and operate differently. Neither statute, *Swinomish*  
22

---

23  
24 <sup>21</sup> CELP understands that water is being made available for mitigation in the Dungeness  
25 watershed, and no basin-wide closure has resulted or is threatened. However, in all fairness, CELP  
cannot respond to petitioners’ argument on this point without citing to material contained in the record.

1 v. *Ecology*, nor any other court decision requires that they be treated identically or that  
2 the four-part test must be applied to instream flows. Plaintiffs' Motion for Summary  
3 Judgment on this point should be Denied.

4                   Respectfully submitted this 28<sup>th</sup> day of December, 2015.

5  
6 /s/ Dan J. Von Seggern /s/

7 \_\_\_\_\_  
8 Dan J. Von Seggern, WSBA #39239  
9 Center for Environmental Law & Policy  
10 85 S. Washington St., Suite 301  
11 Seattle, WA 98104  
12 T: (206) 829-8299  
13 Email: [dvonseggern@celp.org](mailto:dvonseggern@celp.org)  
14 Attorney for Intervener

15 /s/ Lindsey Schromen-Wawrin  
16 Lindsey Schromen-Wawrin, WSBA #46352  
17 Shearwater Law PLLC  
18 306 West Third Street  
19 Port Angeles, WA 98362  
20 T: (360) 406-4321  
21 F: (360) 752-5767  
22 Email: [lindsey@world.oberlin.edu](mailto:lindsey@world.oberlin.edu)  
23 Attorney for Intervenor

24  
25 <sup>22</sup> Here, too, if the information in the record regarding consideration of the public interest is  
26 material to disposition of this Motion, then LCR 56(i) bars summary judgment.

1  
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that on the 28th day of December, 2015 I served one true and  
4 correct copy of the foregoing Response in Intervention on the following individuals via  
5 e-mail service per the parties' agreement:

6 Thomas M. Pors  
7 1700 7<sup>th</sup> Ave, Suite 2100  
8 Seattle, WA 98101  
9 T: (206) 357-8570  
10 Email: [tompors@comcast.net](mailto:tompors@comcast.net)  
11 Attorney for Petitioners

12  
13 Stephen H. North  
14 Email: [Stephen.North@atg.wa.gov](mailto:Stephen.North@atg.wa.gov)

15  
16 Travis H. Burns  
17 Email: [Travis.Burns@atg.wa.gov](mailto:Travis.Burns@atg.wa.gov)

18  
19 Washington State Attorney General's Office  
20 Ecology Division  
21 PO Box 40117  
22 Olympia, WA 98504-0117  
23 T: (360) 586-6770  
24 Attorneys for Respondent  
25 State of Washington, Department of Ecology

26 /s/ Dan J. Von Seggern /s/

---

27 Dan J. Von Seggern  
28 85 S. Washington St., Suite 301  
29 Seattle, WA 98104  
30 T: (206) 829-8299  
31 Email: [dvonseggern@celp.org](mailto:dvonseggern@celp.org)  
32 Attorney for Intervener  
33 Center for Environmental Law & Policy

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

<input type="checkbox"/> <b>EXPEDITE</b> <input type="checkbox"/> No hearing is set <input checked="" type="checkbox"/> Hearing is set: Date: January 8, 2016 Time: 9:00 AM _____ Judge/Calendar: Hon. Gary R. Tabor
---

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON**

MAGDALENA T. BASSETT;  
DENMAN J. BASSETT; JUDY  
STIRTON; and OLYMPIC  
RESOURCE PRESERVATION  
COUNCIL,

Plaintiffs,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent,

and

CENTER FOR ENVIRONMENTAL  
LAW & POLICY,

Intervener

No. 14-2-02466-2

DECLARATION OF DAN J. VON  
SEGGERN IN SUPPORT OF  
RESPONSE TO PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT AND MOTION TO  
STRIKE

1 Dan J. Von Seggern states and declares as follows:

- 2 1. I am over the age of 18 and competent to testify in this matter.
- 3 2. Attached to this Declaration as Exhibit 1 is a true and correct copy of a letter to  
4 the court from me on behalf of CELP, dated August 24, 2015.
- 5 3. Attached to this Declaration as Exhibit 2 is a true and correct copy of a letter to  
6 the court from Ecology's attorneys, Stephen North and Travis Burns, dated  
7 August 19, 2015.
- 8 4. Attached to this Declaration as Exhibit 3 is a true and correct copy of a letter to  
9 the court from Plaintiffs' attorney Tom Pors, dated August 31, 2015.
- 10 5. Attached to this Declaration as Exhibit 4 is a true and correct copy of a  
11 September 25, 2015 email from the court to the parties' counsel.
- 12 6. Attached to this Declaration as Exhibit 5 is a true and correct copy of a letter to  
13 the court from Plaintiffs' attorney Tom Pors, dated October 12, 2015.
- 14 7. Attached to this Declaration as Exhibit 6 is a true and correct copy of a letter I  
15 wrote to the court on behalf of CELP, dated October 15, 2015.
- 16 8. Attached to this Declaration as Exhibit 7 is a true and correct copy of a letter to  
17 the court from Ecology's attorneys, Stephen North and Travis Burns, dated  
18 October 14, 2015.
- 19 9. Attached to this Declaration as Exhibit 8 is a true and correct copy of an October  
20 28, 2015 email from the court to the parties' counsel.
- 21
- 22
- 23
- 24

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

10. Attached to this Declaration as Exhibit 9 is a true and correct copy of the Washington Department of Ecology’s Policy PRO-1000.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Seattle, Washington, this 28th day of December, 2015.

/s/ Dan J. Von Seggern /s/

---

Dan J. Von Seggern

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 28th day of December, 2015 I served one true and  
3 correct copy of the foregoing Declaration and attached Exhibits on the following  
4 individuals via e-mail service per the parties' agreement:  
5

6 Thomas M. Pors  
7 1700 7<sup>th</sup> Ave, Suite 2100  
8 Seattle, WA 98101  
9 T: (206) 357-8570  
10 Email: [tompors@comcast.net](mailto:tompors@comcast.net)  
11 Attorney for Petitioners

12 Stephen H. North  
13 Email: [Stephen.North@atg.wa.gov](mailto:Stephen.North@atg.wa.gov)

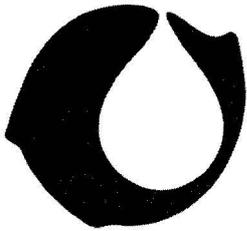
14 Travis H. Burns  
15 Email: [Travis.Burns@atg.wa.gov](mailto:Travis.Burns@atg.wa.gov)

16 Washington State Attorney General's Office  
17 Ecology Division  
18 PO Box 40117  
19 Olympia, WA 98504-0117  
20 T: (360) 586-6770  
21 Attorneys for Respondent  
22 State of Washington, Department of Ecology

23 /s/ Dan J. Von Seggern /s/

24 \_\_\_\_\_  
25 Dan J. Von Seggern  
26 Attorney for Intervener  
Center for Environmental Law & Policy

# EXHIBIT 1



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**  
911 Western Ave, Suite 305  
Seattle, WA 98104

August 24, 2015

The Hon. Judge Gary Tabor  
Thurston County Superior Court, Room 204  
200 Lakeridge Dr SW, Bldg 2  
Olympia, WA 98502-6045

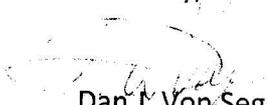
RE: *Bassett et al. v. Dep't of Ecology*, Thurston County Cause No. 14-2-02466-2; Petitioners' Motion for Summary Judgment, filed August 18, 2015.

Dear Judge Tabor:

The Center for Environmental Law & Policy (CELP), through this letter, responds to Petitioners' renewed Motion for Summary Judgment on Legal Issues, filed with the court August 17, 2015. CELP was not a party to this case when Petitioners' Motion was originally filed on April 2, 2015, and therefore did not file a brief in response. CELP does, however, generally concur with the reasoning of the Department of Ecology's April 8, 2015 Response brief. CELP also agrees that Petitioners' Issue (1), namely whether Ecology was required to follow the four-part test of RCW 90.03.290 when setting the Dungeness River Instream Flows, is a pure issue of law. However, Petitioners' Issues (2) and (3) will require reference to the administrative record, and CELP respectfully submits that under Thurston County Local Rule 56(i), they should be addressed through this court's normal procedures, rather than being heard on summary judgment.

Given the complexity of this case, and the number of issues raised by Petitioners, CELP respectfully suggests that judicial economy would be best served by addressing Issue (1) along with the remaining issues.

Sincerely,

  
Dan J. Von Seggern  
WSBA #39239  
(206) 829-8299

Cc: Tom Pors, Stephen H. North, Travis H. Burns

# EXHIBIT 2



Bob Ferguson  
**ATTORNEY GENERAL OF WASHINGTON**

Ecology Division  
2425 Bristol Court SW 2nd Floor • Olympia WA 98502  
PO Box 40117 • Olympia WA 98504-0117 • (360) 586-6770

August 19, 2015

The Honorable Judge Gary Tabor  
Thurston County Superior Court, Room 204  
2000 Lakeridge Drive SW, Bldg. 2  
Olympia, WA 98502-6045

RE: Petitioners' Motion for Summary Judgment, *Magdalena T. Bassett, et al. v. Department of Ecology, Thurston County Superior Court Case No. 14-2-02466-2*

Dear Judge Tabor:

The State of Washington, Department of Ecology, submits this letter in response to the Motion for Summary Judgment on Legal Issues filed by Petitioners in this matter on August 17, 2015. In filing their motion, Petitioners cite to this Court's Pretrial Order Denying Summary Judgment for Special Setting for Summary Judgment Motions wherein you rule:

After the record is filed, Plaintiffs may file a motion for summary judgment, however Defendant shall not be required to respond under Civil Rule 56 unless directed by the Court to do so. The Court reserves the right to strike any issues raised in the motion if it determines that they would violate LCR 56(i), and reserves the right to specially set the motion for oral argument.

Petitioners raise three issues in their motion that they maintain are purely legal and do not require reference to the administrative record. Paraphrased, these issues are (1) Whether Ecology was required to apply the "four part test" in RCW 90.03.290 in setting the Dungeness River Instream Flows in WAC 173-518; (2) Whether Ecology exceeded its statutory authority in applying "overriding considerations of the public interest" under RCW 90.54.020(3)(a) to establish reservations of water for future use in WAC 173-518; and (3) Whether the rule is invalid because Ecology did not employ the "maximum net benefits" test in RCW 90.54.020(2) before establishing instream flows in WAC 173-518.

Consistent with Ecology's earlier filing in opposition to Plaintiffs' Motion for a Pretrial Conference and for Special Setting of a Motion for Summary Judgment on Legal Issues, Ecology believes that this case is best heard upon the administrative record and that the court should stick



ATTORNEY GENERAL OF WASHINGTON

The Honorable Judge Gary Tabor  
August 19, 2015  
Page 2

with well-established processes for hearing challenges to administrative rules, i.e., that the court establish a briefing and hearing schedule and decide the case upon the administrative record.

With respect to the three issues upon which Petitioners seek summary judgment and upon review of Petitioners' motion, Ecology concedes that only the first issue is purely legal. Issues two and three are complicated issues of law and fact and will require reference to the administrative record, meaning summary judgment on those issues cannot be heard under LCR 56(i). Ecology would not object to this court establishing a briefing and hearing schedule for summary judgment on issue (1) only, whether Ecology must employ the "four part test" under RCW 90.03.290 when it establishes regulatory instream flows. However, Ecology believes that bifurcating this issue from the remainder of issues in the case will likely result in judicial inefficiency.

Sincerely,



STEPHEN H. NORTH  
Assistant Attorney General  
(360) 586-3509



TRAVIS H. BURNS  
Assistant Attorney General  
(360) 586-3513

cc: Tom Pors  
Dan Von Seggern  
Tom Loranger, Department of Ecology  
Ann Wessel, Department of Ecology

# EXHIBIT 3

Law Office of Thomas M. Pors

---

August 31, 2015  
File no. 14140/ORPC

The Honorable Judge Gary Tabor  
Thurston County Superior Court, Room 204  
2000 Lakeridge Drive SW, Bldg. 2  
Olympia, WA 98502-6045

*Re: Magdalena Bassett, et al. v. Dept. of Ecology, Thurston County Superior  
Court Case No. 14-2-02466-2*

Dear Judge Tabor:

I strongly disagree with several unsupported statements in the August 19, 2015 letter to you from counsel to the Department of Ecology and the August 24, 2015 letter from counsel to CELP in this matter. I consulted with your assistant Tonya on the appropriate way to respond and she informed that a letter to you, cc'd to the other parties, was appropriate.

The immediate issue is whether to set the motion for summary judgment for hearing and/or to strike one or more issues raised in the motion for violating LCR 56(i). Counsel for Ecology and CELP admit that one issue (whether Ecology was required to apply the "four-part test" of RCW 90.03.290) is a purely legal issue. However, counsel for Ecology incorrectly, and without any demonstration or support, asserts that the other two issues are "complicated issues of law and fact and will require reference to the administrative record," and assert that this means they cannot be heard under LCR 56(i).

After reading the motion, I am confident that you will agree that no factual issues are raised in the motion for summary judgment that will require examination of the administrative record on these issues. While Ecology could reference the record in its response to the motion, that is not enough to constitute a violation of the spirit and intent of LCR 56(i), which states:

**LCR 56 SUMMARY JUDGMENT**

(i) Appeals from Administrative and Industrial Insurance Rulings. Summary judgment motions will not be heard in administrative review cases or industrial insurance appeals if reference to the administrative record or transcript of the administrative proceedings is required. (Emphasis added).

First, a bare assertion that reference could be made to the record is not the same as demonstrating that reference to the record is "required." Ecology's assertions are conclusory and do not make such a demonstration. Second, as argued in the Motion for Special Setting earlier this year, LCR 56(i) by its terms applies to appeals of

The Honorable Judge Gary Tabor

August 31, 2015

Page 2

administrative “rulings”, not to declaratory judgment actions challenging the validity of a rule under the APA. This is an original action challenging the validity of a rule, not an appeal of an administrative case with a record before an administrative tribunal. The record filed by Ecology in this matter is a rule-making record, not an administrative record of a ruling by an administrative tribunal like the Pollution Control Hearings Board. In that type of case, legal arguments and summary judgment motions would have been made in the administrative case and hearing below, but that is not the case when Ecology adopts a rule and that rule is challenged under the APA.

The purpose of summary judgment as a procedure for narrowing issues and disposing of cases that do not require trials has not yet been served in this case, and I do not interpret LCR 56(i) as an override of the State Supreme Court’s intent and purpose to allow motions for summary judgment under CR 56, unless that opportunity was already available in the administrative case being appealed. Nevertheless, in response to your earlier ruling, great care was taken in the Plaintiffs’ Motion for Summary Judgment on Legal Issues to eliminate any factual issues requiring reference to the administrative record in this case.

On behalf of the Plaintiffs in this matter, I respectfully request that you review the motion and set all three purely legal issues for hearing under CR 56.

Very truly yours,

A handwritten signature in black ink, appearing to read 'T. Pors', with a long horizontal line extending to the right.

Thomas M. Pors

Encls.

Cc: Stephen H. North  
Travis H. Burns  
Dan J. Van Seggern  
Lindsey Schromen-Wawrin

# EXHIBIT 4

**From:** [Tonya Moore](#)  
**To:** [Tom Pors](#)  
**Cc:** ["North, Stephen \(ATG\)"; "Burns, Travis \(ATG\)"; "Holden, Deborah \(ATG\)"; \[dvonseggern@celp.org\]\(mailto:dvonseggern@celp.org\); \[lindsey@world.oberlin.edu\]\(mailto:lindsey@world.oberlin.edu\)](#)  
**Subject:** RE: Magdalena T. Bassett, et al. v. Department of Ecology, Thurston County Superior Court Case No. 14-2-02466-2  
**Date:** Friday, September 25, 2015 3:08:36 PM

---

Counsel,

Judge Tabor is going to allow a summary judgment to be scheduled regarding the 1<sup>st</sup> issue only. Once that matter has been heard and depending on the rule, the administrative review hearing will be scheduled. Below are the dates Judge Tabor has available to hear the summary judgment:

December 4  
December 11  
December 18  
January 8  
January 15  
January 22

The time would be 9:00 for any of the dates above.

*Tonya S. Moore*  
**Judicial Assistant to  
Judge Gary Tabor  
Judge Mary Sue Wilson  
Arbitration Coordinator  
360.754.4405**

---

**From:** Tom Pors [<mailto:tompors@comcast.net>]  
**Sent:** Monday, August 31, 2015 2:23 PM  
**To:** Tonya Moore <[mooret@co.thurston.wa.us](mailto:mooret@co.thurston.wa.us)>  
**Cc:** 'North, Stephen (ATG)' <[StephenN@ATG.WA.GOV](mailto:StephenN@ATG.WA.GOV)>; 'Burns, Travis (ATG)' <[TravisB@ATG.WA.GOV](mailto:TravisB@ATG.WA.GOV)>; 'Holden, Deborah (ATG)' <[DeborahH1@ATG.WA.GOV](mailto:DeborahH1@ATG.WA.GOV)>; [dvonseggern@celp.org](mailto:dvonseggern@celp.org); [lindsey@world.oberlin.edu](mailto:lindsey@world.oberlin.edu)  
**Subject:** RE: Magdalena T. Bassett, et al. v. Department of Ecology, Thurston County Superior Court Case No. 14-2-02466-2

Ms. Moore:

Please find attached my letter to Judge Tabor responding to letters from the respondent and intervenor relating to Plaintiffs' motion for summary judgment. The original is being mailed today to Judge Tabor, and electronic service on all parties is being made with this email.

Thank you,

Thomas Pors

Law Office of Thomas M. Pors  
1700 Seventh Ave., Suite 2100  
Seattle, WA 98101  
(206) 357-8570  
(866) 342-9646 fax  
[tompors@comcast.net](mailto:tompors@comcast.net)  
[www.porslaw.com](http://www.porslaw.com)



This email has been checked for viruses by Avast antivirus software.

[www.avast.com](http://www.avast.com)

# EXHIBIT 5

Law Office of Thomas M. Pors

---

October 12, 2015  
File no. 14140/ORPC

The Honorable Judge Gary Tabor  
Thurston County Superior Court, Room 204  
2000 Lakeridge Drive SW, Bldg. 2  
Olympia, WA 98502-6045

*Re: Magdalena Bassett, et al. v. Dept. of Ecology, Thurston County Superior  
Court Case No. 14-2-02466-2*

Dear Judge Tabor:

Last week, in accordance with instructions delivered by your judicial assistant, I filed a notice of issue for hearing Plaintiffs' Motion for Summary Judgment on December 18, 2015. I anticipated refiling the motion focused on issue one on or before November 20, 2015 consistent with Civil Rule 56(c).

A few days later, the Supreme Court issued a significant new decision that has direct bearing on this case and the summary judgment motion. In *Sara Foster v. Department of Ecology and City of Yelm* (Case No. 90386-7), the Supreme Court rejected the OCPI-based authority Ecology relied on to adopt reservations for future uses in the Dungeness Rule. A copy of the decision is enclosed.

This letter respectfully requests your permission to include a restated issue two regarding Ecology's OCPI authority in the motion for summary judgment, as a consequence of this new controlling precedent. The refiled motion would be filed on or before November 20<sup>th</sup> and remain on the December 18, 2015 motion calendar subject to filing and service of responsive papers per Civil Rule 56(c).

The Supreme Court's new interpretation of OCPI in the *Foster* case unequivocally interprets the OCPI exception in a manner that eliminates Ecology's authority to use it for adopting reservations or issuing water rights, both of which constitute permanent appropriations of water that would otherwise impair minimum instream flows. With this new interpretation of OCPI as authorizing only temporary withdrawals in extraordinary circumstances (such as drought year emergencies), the question of Ecology's authority to adopt permanent OCPI-based reservations is now only a legal question, not a mixed question of fact and law, and the *Foster* decision is controlling law on this issue.

Issue two would be restated as follows: "Does Ecology have authority to use the OCPI exception to create reservations of water for future permanent water uses that would otherwise impair minimum instream flow water rights?" As restated, this issue does not require review of the administrative record.

1700 Seventh Avenue  
Suite 2100  
Seattle, WA 98101

Phone: (206) 357-8570  
Fax: (866) 342-9646  
Email: [tompors@comcast.net](mailto:tompors@comcast.net)

The Honorable Judge Gary Tabor  
October 12, 2015

Ecology is expected to take the position that the reservations in the Dungeness Rule were created simultaneously with and as exceptions to the minimum instream flow water rights, distinguishing the reservations in the Dungeness Rule with the reservations in the Skagit rule that the Supreme Court invalidated in the *Swinomish* case. The *Foster* decision, however, focuses on the permanent nature of appropriations and determined that OCPI does not authorize Ecology to create permanent appropriations to the detriment of minimum flow water rights. Reservations fall within the Supreme Court's interpretation of "appropriations" in *Foster*.

The Supreme Court has now reversed Ecology in two separate cases involving the use of OCPI since the Dungeness Rule was adopted. Determining the effect of those cases on Ecology's statutory authority could avoid a hearing in this case, or at least focus the hearing on factual issues related to this clarified and limited statutory authority. I firmly believe that allowing issue two, as restated above, in the summary judgment motion will advance the interests of justice and lead to a more efficient resolution of this case. Thank you for your consideration.

Very truly yours,



Thomas M. Pors

Encls.

Cc: Stephen H. North (via email)  
Travis H. Burns (via email)  
Dan J. Van Seggern (via email)  
Lindsey Schromen-Wawrin (via email)

# EXHIBIT 6



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**

October 15, 2015

The Hon. Judge Gary Tabor  
Thurston County Superior Court, Room 204  
200 Lakeridge Dr SW, Bldg 2  
Olympia, WA 98502-6045

RE: *Bassett et al. v. Dep't of Ecology*, Thurston County Cause No. 14-2-02466-2; Petitioners' October 12 letter request to add issue for hearing on Summary Judgment.

Dear Judge Tabor:

The Center for Environmental Law & Policy (CELP), through this letter, responds to Petitioners' letter of October 12, 2015, requesting permission to add an issue to the summary judgment hearing scheduled for December 18. Petitioners once again ask to have their argument regarding Ecology's use of RCW 90.54.020(3)(a)'s "overriding considerations of the public interest" (OCPI) exception heard at summary judgment. Granting this request would violate Thurston County Local Civil Rule 56(i).

Petitioners initially filed a motion to have several issues that they alleged to be pure questions of law, including the OCPI issue, be set for summary judgment. This court denied that motion in April 2015, in a pretrial order that stated in part that petitioners could refile the motion but that the other parties did not need to respond unless notified by the court. Petitioners refiled the summary judgment motion on August 17, 2015. Following responsive letters from Ecology and from CELP, you determined that only Petitioners' Issue One, the question of whether an instream flow must meet the four-part tests of 90.03.010, would be scheduled for summary judgment. The parties were notified of this determination in a September 25, 2015 email. Hearing was set for December 18, 2015, and a briefing schedule established.

Petitioners now argue that the Washington Supreme Court's recent decision in *Foster v. Dep't of Ecology et al.*, No. 90386-7 renders the OCPI issue a question of law only. But *Foster* did not (and could not) change the facts of this case, the record in this case, or the fact that resolving this question requires reference to that record.

The language of WAC Chapter 173-518 (the Dungeness Rule) regarding reservations of water is substantially different from the language of all other Washington instream flow rules.<sup>1</sup> No administrative body or court has yet examined this language. Exactly how the Dungeness Rule's unique reservations would affect instream flows, and whether the Rule's language passes muster under *Foster*, is a mixed question of law and fact that can only be resolved by reference to the record.

Finally, CELP concurs with Ecology's position that Petitioners are actually seeking an order allowing a new issue to be heard on summary judgment, which requires that a motion be set and argued per CR 7(b)(1). The motion procedure allows for an orderly briefing schedule, rather than submission of ad hoc letters by the parties, and Petitioners should be required to follow it in seeking any requested relief.

Sincerely,



Dan J. Von Seggern  
WSBA #39239  
85 S. Washington Street  
Suite 301  
Seattle, WA 98104  
(206) 829-8299  
[dvonseggern@celp.org](mailto:dvonseggern@celp.org)

Cc: Tom Pors, Stephen H. North, Travis H. Burns

---

<sup>1</sup> See Chapters 137-501 through 173-564 WAC

# EXHIBIT 7



Bob Ferguson  
**ATTORNEY GENERAL OF WASHINGTON**

Ecology Division  
2425 Bristol Court SW 2nd Floor • Olympia WA 98502  
PO Box 40117 • Olympia WA 98504-0117 • (360) 586-6770

October 14, 2015

The Honorable Judge Gary Tabor  
Thurston County Superior Court, Room 204  
2000 Lakeridge Drive SW, Bldg. 2  
Olympia, WA 98502-6045

RE: ***Magdalena T. Bassett, et al. v. Department of Ecology, Thurston County Superior Court Case No. 14-2-02466-2***

Dear Judge Tabor:

The purpose of this letter is to respond to correspondence submitted directly to you on October 12, 2015, by the Petitioners. Through that correspondence, Petitioners improperly seek permission of the Court to have an additional issue heard on summary judgment based on new authority. As explained herein, Petitioners must bring a motion for the Court to consider the relief they are seeking and for Ecology to properly respond.

This case is an administrative challenge to WAC 173-518, the Dungeness Instream Flow Rule. Although rule challenges are typically heard following the filing of the administrative record, and a briefing and hearing schedule, here you allowed Petitioners to bring a summary judgment motion, reserving the right to allow Ecology to respond.<sup>1</sup> The administrative record is **on file** with the Court. On August 17, 2015, Petitioners filed a summary judgment motion on three legal issues in this case, steadfastly insisting that these issues could be heard without reference to the administrative record.<sup>2</sup> Local Court Rule 56(i) does not allow for summary judgment proceedings in administrative cases if reference to the administrative record is required.

---

<sup>1</sup> See Pretrial Order Denying Motion for Special Setting for Summary Judgment Motions, attached hereto.

<sup>2</sup> To refresh your recollection, these issues are: (1) Whether Ecology was required to apply the “four part test” in RCW 90.03.290 in setting the Dungeness River Instream Flows in WAC 173-518; (2) Whether Ecology exceeded its statutory authority in applying “overriding considerations of the public interest” under RCW 90.54.020(3)(a) to establish reservations of water for future use in WAC 173-518; and (3) Whether the rule is invalid because Ecology did not employ the “maximum net benefits” test in RCW 90.54.020(2) before establishing instream flows in WAC 173-518.



ATTORNEY GENERAL OF WASHINGTON

Judge Gary Tabor  
October 14, 2015  
Page 2

On September 25, the parties received an e-mail from the Court indicating that the Court would allow a summary judgment hearing on **issue one** only. The hearing is now set for December 18 and all that remains is responsive and reply briefing and then the hearing.<sup>3</sup>

On October 8, 2015, the Supreme Court issued a decision in *Foster v. Dep't of Ecology*, No. 90386-7. Based on this new case, and through their letter to you, Petitioners once again argue that the Court should hear issue two on summary judgment rather than upon the record. A motion is required for Petitioners to seek this relief:

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

CR 7(b)(1). Petitioners' letter to you effectively seeks an order allowing a new issue to be heard on summary judgment. Under CR 7(b)(1), a motion is plainly required.

Despite Petitioners' arguments in their letter, Ecology strongly disagrees that the *Foster* decision is legally dispositive of issue two. Cases new and old are distinguished on their facts, and here the facts that distinguish the *Foster* decision **are found in the administrative record**. Issue two involves mixed questions of law and fact that cannot be resolved on summary judgment under LCR 56(i).

Sincerely,

  
STEPHEN H. NORTH  
Assistant Attorney General  
(360) 586-3509

  
TRAVIS H. BURNS  
Assistant Attorney General  
(360) 586-3513

SHN:THB:JLD

Enclosure

cc: Tom Pors  
Dan Von Seggern  
Tom Loranger, Department of Ecology  
Ann Wessel, Department of Ecology

F:\ACTIVE\CASES\NORTH\ACTIVE SUP CT\BASSETTDUNGENESSRULE\CORR\TABORLETTER2RESJISSUE2.DOCX

---

<sup>3</sup> Petitioners letter to you indicates that they intend to "refile" their summary judgment motion on issue one. This is not necessary as their motion is filed and set for hearing. If Petitioners intend to file a *new* brief on issue one, then, as is the case with issue two, Petitioners must seek leave of the Court through a motion to file a new brief on issue one.

FILED

APR 24 2015

Superior Court  
Linda Myhra Entow  
Thurston County Clerk

<input type="checkbox"/> EXPEDITE <input type="checkbox"/> No Hearing Set <input type="checkbox"/> Hearing is Set: Date: Time: Judge Gary R. Tabor
---

SUPERIOR COURT OF STATE OF WASHINGTON  
FOR THURSTON COUNTY

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

NO. 14-2-02466-2

[PROPOSED] PRETRIAL ORDER  
DENYING MOTION FOR SPECIAL  
SETTING FOR SUMMARY JUDGMENT  
MOTIONS

Plaintiffs,

vs.

WASHINGTON STATE DEPARTMENT OF  
ECOLOGY,

Defendant.

THIS MATTER came before the Court on a motion brought by Plaintiffs for a pretrial conference and to specially set a summary judgment motion. Oral argument was held by the Court and counsel for the parties on April 10, 2015. The Court considered the arguments of counsel and the following submittals:

1. Motion for a Pretrial Conference and for Special Setting of a Motion for Summary Judgment on Legal Issues, filed by counsel for Plaintiffs on April 3, 2015;
2. Declaration of Thomas M. Pors in Support of Motion for a Pretrial Conference and for Special Setting, filed by counsel for Plaintiffs on April 3, 2015;

- 1 3. [Proposed] Pretrial Order Setting Motion for Summary Judgment, filed by counsel for
- 2 Plaintiffs on April 3, 2015;
- 3 4. State of Washington Department of Ecology's Response in Opposition to Petitioners'
- 4 Motion and Declaration of Brooke E. Badger; and
- 5 5. Plaintiffs' Reply to Ecology's Response.

6 Under CR 16 and Thurston County LR 16, the Court may hold a pretrial conference and  
7 enter a pretrial order scheduling pretrial proceedings, including motions for summary judgment.

8 This Court being fully advised of the matter, the Court DENIES Plaintiff's Motion for  
9 Special Setting. The Court ORDERS that Respondent file the administrative rule making file in  
10 this case on May 1 as currently scheduled. After the record is filed, Plaintiffs may file a motion  
11 for summary judgment, however Defendant shall not be required to respond under Civil Rule 56  
12 unless directed by the Court to do so. The Court reserves the right to strike any issues raised in  
13 the motion if it determines that they would violate LCR 56(i), and reserves the right to specially  
14 set the motion for oral argument.

15 The Trial Setting in this matter on May 1, 2015 may subsequently be amended by the  
16 Court or on motion of the parties following the Court's special setting, if any, or ruling on a  
17 motion for summary judgment, if any.

18  
19 DATED this 24 day of April, 2015.

GARY R. TABOR

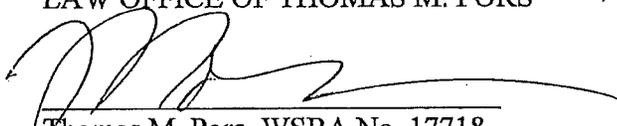
20  
21 

---

JUDGE GARY R. TABOR

22 Presented by:

23 LAW OFFICE OF THOMAS M. PORS

24   
25 

---

Thomas M. Pors, WSBA No. 17718  
26 Attorney for Plaintiffs

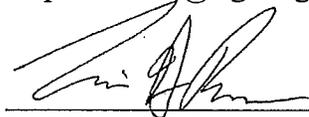
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

ROBERT W. FERGUSON  
Attorney General



---

STEPHEN H. NORTH, WSBA #31545  
Assistant Attorney General  
Stephen.North@atg.wa.gov



---

TRAVIS H. BURNS, WSBA #39087  
Assistant Attorney General  
Travis.Burns@atg.wa.gov

Attorneys for Respondent  
State of Washington, Department of Ecology  
(360) 586-6770

# EXHIBIT 8

**From:** [Tonya Moore](#)  
**To:** [Dan Von Seggern](#)  
**Cc:** [tompors@comcast.net](mailto:tompors@comcast.net); [Burns, Travis \(ATG\)](#); [stephenn@atg.wa.gov](mailto:stephenn@atg.wa.gov); "[Holden, Deborah \(ATG\)](#)"; [lindsey@world.oberlin.edu](mailto:lindsey@world.oberlin.edu)  
**Subject:** RE: Bassett et al. v. Ecology, Thurston County Superior Court No. 14-2-02466-2  
**Date:** Wednesday, October 28, 2015 12:40:19 PM

---

Judge Tabor is keeping with his original ruling with allowing a motion for summary judgment on the 1<sup>st</sup> issue only.

*Tonya S. Moore*  
**Judicial Assistant to  
Judge Gary Tabor  
Judge Mary Sue Wilson  
Arbitration Coordinator  
360.754.4405**

---

**From:** Dan Von Seggern [mailto:[dvonseggern@celp.org](mailto:dvonseggern@celp.org)]  
**Sent:** Thursday, October 15, 2015 4:20 PM  
**To:** Tonya Moore <[mooret@co.thurston.wa.us](mailto:mooret@co.thurston.wa.us)>  
**Cc:** [tompors@comcast.net](mailto:tompors@comcast.net); Burns, Travis (ATG) <[TravisB@ATG.WA.GOV](mailto:TravisB@ATG.WA.GOV)>; [stephenn@atg.wa.gov](mailto:stephenn@atg.wa.gov); 'Holden, Deborah (ATG)' <[DeborahH1@ATG.WA.GOV](mailto:DeborahH1@ATG.WA.GOV)>; [lindsey@world.oberlin.edu](mailto:lindsey@world.oberlin.edu)  
**Subject:** Bassett et al. v. Ecology, Thurston County Superior Court No. 14-2-02466-2

Dear Ms. Moore-

Please find attached CELP's letter to Judge Tabor, in response to Petitioners' letter dated October 12, 2015. All parties are being served via this email. A hard copy to the court will follow.

Thank you.

Dan J. Von Seggern  
Staff Attorney  
**[Center for Environmental Law & Policy \(CELP\)](#)**  
**85 South Washington St., Suite 301**  
**Seattle, WA 98104**  
**[dvonseggern@celp.org](mailto:dvonseggern@celp.org) | 206-829-8299**

Your communications with CELP, including this email message, do not and are not intended to create an attorney-client relationship, and you should not act or rely on any information in this message without seeking the advice of an attorney. If you communicate with CELP regarding a matter in which CELP does not represent you, your communication may not be treated as privileged or confidential, nor shall such communication alone establish an attorney-client relationship with CELP.

# EXHIBIT 9

PRO-1000 WATER RIGHTS PROCESSING PROCEDURES

Effective Date: 10-23-90

Revised: 03-30-2015

Resource Contact: Program Development and Operations Support

References: RCW 43.21, RCW 90.03, RCW 90.14, RCW 90.16, RCW 90.42, RCW 90.44, RCW 90.54, RCW 90.66, RCW 90.90, WAC 173-152, WAC 173-165, WAC 173-173, WAC 197-11, WAC 508-12

**WATER RIGHTS PROCESSING PROCEDURES**

---

Purpose: To provide guidance and to ensure relevant factors are considered in pre-application conferences and in the processing of applications to appropriate water and applications for change or transfer of existing water rights.

Application: This procedure applies to all applications to appropriate water and applications for change or transfer of water rights, pursuant to Chapters 90.03 and 90.44 RCW.

CHAPTER ONE: PRE-APPLICATION CONFERENCES .....4

CHAPTER TWO: PROCESSING NEW AND CHANGE APPLICATIONS.....5

    I.    ACCEPTANCE OF APPLICATIONS.....5

    II.   PUBLIC NOTICE AND PROTESTS.....6

        Public Notice.....6

        Affidavit Review.....7

        Protests and Concerns.....7

    III.  APPLICATION REJECTION OR WITHDRAWAL.....7

        Withdrawal.....7

        Rejection.....7

        Application Reinstatement.....8

    IV.   ASSIGNMENT OF APPLICATIONS .....8

    V.    APPLICATION INVESTIGATION.....8

        Applications for a Water Right Permit .....8

        Applications for Change or Transfer of Existing Water Right.....10

CHAPTER THREE: REPORT OF EXAMINATION (ROE) .....13

    I.    INVESTIGATOR’S REPORT .....13

    II.   COVER SHEET/ORDER.....14

    III.  REVIEW AND POSTING OF DRAFT REPORT OF EXAMINATION .....15

    IV.   SIGNATURES AND POSTING OF FINAL REPORT OF EXAMINATION.....15

    V.    DISTRIBUTION OF REPORT OF EXAMINATION .....15

    VI.   Amendment of Report of Examination .....15

CHAPTER FOUR: WATER RIGHT PERMITS.....17

    I.    ISSUANCE OF PERMITS .....17

    II.   PERMIT MAINTENANCE.....17

        Beginning of Construction.....17

        Completion of Construction .....17

        Proof of Appropriation .....17

        Permit Extensions.....18

        Cancellation of Permits .....18

    III.  ASSIGNMENT OF PERMITS .....18

IV. PROOF EXAMINATION.....19

CHAPTER FIVE: CERTIFICATES AND SUPERSEDING DOCUMENTS .....20

I. CERTIFICATES.....20

II. CORRECTIONS TO PERMITS OR CERTIFICATES .....20

III. SUPERSEDING DOCUMENTS.....20

## CHAPTER ONE: PRE-APPLICATION CONSULTATION

Department of Ecology (Ecology) Water Resources staff offer pre-application consultations to help prospective water right applicants better understand the challenges they may incur when seeking a new water right, or a change or transfer to an existing water right. This technical assistance provides an opportunity to educate applicants about water supply, water law, and the water rights process. Perhaps, most importantly, staff can help applicants gain an understanding of the water availability in their particular basin.

A pre-application consultation is often the best time to discuss issuing a preliminary permit ([POL 1030](#)) if the applicant proposes to drill a well for their project ([RCW 90.03.290](#) and [RCW 90.44.060](#)). Staff can also discuss whether the proposed project might qualify for priority processing ([WAC 173-152-050](#)), may be processed through a water conservancy board, the cost-reimbursement process, or by some other means.

Pre-application consultation requests are received electronically, by mail, telephone, or in person. If an applicant is seeking a pre-application consultation, Ecology staff should:

- A. Contact the applicant and determine the type and location of the project.
- B. Request that the applicant submit the Water Right [Pre-Application Consultation Form](#) *via email* to support tracking of the number of applicants requesting this service.
- C. Schedule a time for a telephone or in-office consultation and provide the applicant with relevant materials to help them prepare for the meeting.
- D. Review the appropriate internal pre-application consultation checklist for new applications or change applications. (Links to the checklists are located on the left hand side of the [Water Right Application Processing Sharepoint](#) page.)
- E. Conduct the pre-application consultation and enter tracking information on the SharePoint site, or current tracking procedures. (Pre-application tracking instructions are located at the top of the [Pre-Application Consultation Sharepoint](#) page).

## CHAPTER TWO: PROCESSING NEW AND CHANGE APPLICATIONS

Anyone seeking a new water right must first submit a water right application to Ecology's Water Resources Program. Applications to change or transfer a water right are submitted to Ecology or to the local county water conservancy board. Ecology permit writers process most of the applications filed with Ecology. They also review the applications and decisions of the conservancy boards, and the work of contractors when the cost reimbursement program is used.

Application processing normally involves office and field examinations to determine whether the application should be recommended for approval or denial. Other permitting considerations may also be explored at the discretion of the regional office.

### I. ACCEPTANCE OF APPLICATIONS

The following processes and considerations apply to water right applications received by Ecology:

- A. The applicant must submit the statutory minimum fee before Ecology may accept their application. If an additional exam fee is required, Ecology must make the request within five (5) days of receiving the application (RCW 90.03.470 and WAC 508-12-140).
- B. Applications receive a date stamp for the day received, which generally becomes the priority date ( RCW 90.03.270, RCW 90.03.340).
- C. Headquarters staff scan each application received at Cashiering and distribute them electronically to the appropriate regional office (for sending procedure, see Scanning Water Rights to Sharepoint page).
- D. Prior to accepting the application, regional staff review the application (see Receiving Instructions).
  - a. An application is assigned a number, according to Water Rights Tracking System (WRTS) procedures, when received by the Region and entered into WRTS, even if the application is not considered complete.
  - b. The application must contain sufficient information to prepare a proper public notice (see Section II. Public Notice and Protests), or contact the applicant for clarification.
  - c. For applications requesting a new appropriation, check the list of closed sources and possible existing rights attached to the proposed place of use before accepting the application. If the source is closed to the proposed use, the applicant may be contacted with a letter of explanation describing the unlikelihood of approving the application. At the applicant's request, Ecology will accept the application for a formal determination to preserve due process and retain the priority date.
  - d. For applications to change or transfer a water right, compare information on the application to the existing certificate, permit, or claim proposed for change/transfer (quantities, use, legal descriptions, etc.).

- e. All applications must include the signature(s) of the applicant(s) and the legal landowner(s) of the place of use for new applications and the proposed place of use for transfers. (GUID 2040).
- E. If the application is not complete, contact the applicant by phone or email, or return the application with a request for the needed information, including additional fees. The applicant's response is due within 60 days of filing the application to retain the original priority date.
- F. The applicant must file an application for each separate source of water, with a few exceptions (WAC 508-12-110, WAC 508-12-220). A separate application must also be filed for each permit, certificate, or claim that the applicant proposes to change or transfer.
- G. Check status with regard to State Environmental Policy Act (SEPA). Details can be found in RCW 43.21C and Chapter 14 of the Water Right Investigator's Manual.
- H. To accept an application once it is complete and the required fees are paid, fill in the priority date, initial the application as accepted, and enter the WRTS data. Assigned staff will then create a paper file for the application, then scan it for electronic distribution.
- I. The application is mapped using GIS software showing the proposed location of the diversion or withdrawal and the place of use.
- J. Send notice to the program Listserv, which contains the email addresses of agencies, Tribes, and other interested parties wishing to review applications Ecology has accepted. Regions may also have special lists of stakeholders that request to be contacted when applications are accepted.
- K. Under limited circumstances, applications may be amended at the request of the applicant or permit writer.

## II. PUBLIC NOTICE AND PROTESTS

Prior to issuing the ROE, the applicant must publish public notice for the application to give the public an opportunity to comment or protest.

### Public Notice

The regional office prepares the public notice, which is then sent to the applicant for publication in a newspaper of general circulation in each county containing the proposed point(s) of withdrawal/diversion, or storage site, or any place of use (refer to regional approved lists of newspapers). The public notice must appear once a week for two consecutive weeks. The public notice should contain the following information:

- A. Applicant's name and city of residence.
- B. Application number and priority date.
- C. Proposed source water body (e.g., river name or well). For surface water, list source and tributaries, if applicable.
- D. Purpose(s) of use.
- E. Rate and/or quantity of withdrawal, diversion, or storage .
- F. Period of use (year-round or seasonal).

- G. Project location (e.g. county, city).
- H. Location of withdrawal, diversion, or storage.
- I. Place of use description.
- J. For change applications, include narrative description of the existing right and proposed change(s).
- K. Manner and time limit for the filing of protests or objections to the application.

#### **Affidavit Review**

After publication of the public notice, the newspaper will issue an affidavit of publication. The applicant must send the original affidavit to the regional office. Staff will check each affidavit to ensure it is an original document with a notary stamp, contains the required information, and there are no errors. If errors are found, the applicant must republish the public notice at their own expense.

#### **Protests and Concerns**

Parties wishing to formally protest a specific application must submit it in writing, together with a \$50 filing fee, to Ecology's cashiering section. To be considered a formal protest, Ecology must receive the protest within 30 days of the last date of publication of notice. No fee is required to submit a comment, by mail or otherwise, regarding an application. Protests are placed in the application file along with the cashiering receipt and are entered into the WRTS file. Ecology responds to the protestant with a letter, and the applicant is sent a copy of both the protest and the response letter.

All other comments received after the 30 days since last date of public notice, or without the required fee, are treated as concerns. Concerns are also added to the application file, but may or may not be addressed in the report of exam. No fees are required to submit concerns.

### **III. APPLICATION REJECTION OR WITHDRAWAL**

Even after applications are accepted, rather than being processed through a Report of Examination, they may be rejected or withdrawn. Withdrawal of an application is initiated by the applicant, whereas Ecology initiates a rejection prior to public notice. The difference between these two actions are explained below.

#### **Withdrawal**

An applicant may withdraw an application by notifying Ecology of their intent in writing. The withdrawal request may be submitted at any time prior to Ecology issuing the Report of Examination. Application fees should not be refunded ([RCW 90.03.470](#)).

#### **Rejection**

Prior to public notice, Ecology may reject an application for a number of reasons including, but not limited to:

- A. The applicant did not provide requested information within the required time.
- B. The applicant failed to pay applicable fees.
- C. Ecology never received the original Affidavit of Publication.
- D. The applicant refused access to land for the field examination.

- E. For change/transfer applications, a finding that the applicant has no standing to make the change or transfer.
- F. Ecology was unable to contact or locate applicant.

If errors are discovered with the application after public notice, Ecology should consult with the applicant to correct those errors and republish public notice, if necessary.

To reject an application:

- A. Send a letter requesting information or compliance and warning of possible rejection of their application if they do not comply within the specified time period.
- B. Send a rejection letter if the applicant does not respond by the due date.
- C. Retain all returned mail records (undeliverable, moved, etc.)
- D. Ensure update of WRTS entry.
- E. Wait an additional 30 days before processing the application file for archiving.

#### **Application Reinstatement**

If an applicant shows good cause for failing to respond during the application rejection process, the regional office has the discretion to reinstate the application as long as the information is provided within a reasonable time (RCW 90.03.270). Reinstated applications retain the original priority date.

#### **IV. ASSIGNMENT OF APPLICATIONS**

An application may be assigned to another person or persons by the applicant, upon written consent of the department, using Ecology's Assignment of Application or Permit to Appropriate or Store Water form. No such assignment(s) shall be binding unless properly filed with Ecology along with the appropriate fee (RCW 90.03.310). Assignments are noted on either the application or permit.

Assignment is not required when an applicant or permit holder changes his/her name (e.g. due to marriage, divorce, or corporate name change). In these cases, a memorandum to the file is made and a ministerial amendment is made to the document.

#### **V. APPLICATION INVESTIGATION**

When processing a water right application, a permit writer will investigate specifics of the proposed water right to determine whether it should be recommended for approval or denial. An applicant may submit a new application for new appropriation of water, or an application for change or transfer to an existing water right.

#### **Applications for a Water Right Permit**

When processing a new application, permit writers assess the application to verify that the proposed water use meets the four part test:

1. Water is available;
2. The use will not impair existing rights;
3. The proposed use is a beneficial use of water; and

4. The use will not be detrimental to the public interest.<sup>1</sup>

New applications must pass all four tests in order for Ecology to issue a water right permit (RCW 90.03.290)<sup>2</sup>. The permit writer takes the following steps to answer the four part test<sup>3</sup>:

A. Office Examination

- a. Verify the accuracy of the published public notice and expiration of 30 day protest period.
- b. Review all protests and comments submitted by agencies, Tribes, and other interested parties.
- c. Research existing rights, local hydrogeology, nearby well locations, and other pertinent information.
- d. For groundwater, obtain well report and well development data if available.
- e. Research potential for seawater intrusion for coastal wells, hydraulic continuity with closed or limited surface waters, etc.
- f. If the Family Farm Act applies, ensure correct information has been provided (RCW 90.66).
- g. For all irrigation uses determine maximum and average water requirements. See the Washington Irrigation Guide (available from the National Resources Conservation Service) to determine irrigation needs in that area for the proposed crop type(s).
- h. Determine SEPA status of project for which the water right is requested – request assistance from the regional office SEPA coordinator if needed.
- i. If the application has been protested, acknowledge receipt of protest by informing the applicant and protestant.

B. Field Examination

- a. Contact the applicant to set up a site visit, verify intentions, and collect any other data that may be pertinent to the application (meet applicant on site if possible).
- b. Interview/meet with protestants.
- c. Note any existing project development.
- d. Assess physical availability of water:
  - i. Measure or estimate flow of surface water source.
  - ii. Check static water level of well(s), if accessible (obtain owner's permission).
  - iii. Describe the diversion/withdrawal/storage system and distribution system.
  - iv. Verify pump size.
  - v. Visually confirm compliance with well construction standards.
- e. Take GPS coordinates of the point of withdrawal or diversion or storage site.

---

<sup>1</sup> Additional guidance for processing new and change applications can be found in the draft Water Right Investigators Manual.

<sup>2</sup> If sufficient information is not available, Ecology may issue a preliminary permit per POL 1030.

<sup>3</sup> Additional guidance for processing new and change applications can be found in the draft Water Right Investigators Manual.

- f. Verify that actual point of withdrawal or diversion locations are consistent with the locations in the public notice.
- g. Verify legal description with actual or proposed place of use.
- h. For irrigation, determine the number of acres feasible for irrigation; type of crop; period of use; irrigation infrastructure; and/or any other factors related to irrigation.
- i. Determine the number and type of units or estimate the population to be served if for domestic/municipal purposes; refer to Water System Plan, if available (this can also be done in the office prior to the field visit).
- j. Note the location of other wells or nearby diversions from the same source (this can also be done in the office prior to the field visit).
- k. Observe and describe local geology, vegetation, and other environmental factors that may impact proposed and existing water use and water rights, including stream flows.
- l. Take photographs of relevant water intakes, wells, and other identifying structures.
- m. Check any existing onsite wellheads for an Unique Ecology Well ID Tag. Follow regional procedure for getting the well owner into compliance if no ID tag exists.

If additional information is required prior to making a permit decision, a preliminary permit may be issued to the applicant. The preliminary permit allows the applicant to conduct studies, surveys, and investigations necessary to provide information needed to properly assess their application (POL 1030).

#### **Applications for Change or Transfer of Existing Water Right**

Applications for change or transfer are requests to alter an attribute of an existing water use as documented by a recorded water right certificate, permit, claim, or previously issued certificate of change (RCW 90.03.380). Change applications are processed similarly to new applications (above), but require additional analysis as outlined in the Program's policy on evaluating changes or transfers to water rights (POL 1200).

Changes to a water right's attributes that can be considered include:

- A. Changing the place of use.
- B. Changing or adding purpose(s) of use.
- C. Adding irrigated acres or new uses (POL 1210).
- D. Changing or adding point(s) of diversion or withdrawal.
- E. Changing season of use (typically combined with a change of purpose of use).
- F. Changing the source of supply from surface water to groundwater and vice versa (may be accepted under certain circumstances; see POL 2010).
- G. Consolidating exempt wells with an existing water right.
- H. Placing water into Trust.

Some of the more notable restrictions on changes or transfers to *surface water rights* include:

- A. No unperfected portion of a surface water permit may be considered for transfer or change (RCW 90.03.380), except as authorized under RCW 90.03.397 or RCW 90.03.570.  
(Unperfected portions of groundwater permits are eligible for changes to the point of withdrawal, place of use, and the manner of use (RCW 90.44.100(1)).
- B. The purpose of use of any unperfected permit may not be transferred or changed.
- C. The public interest test is not applicable to changes or transfers of surface water rights, except as described in RCW 90.42.040.
- D. Transfers or changes of water rights under the Family Farm Water Act (RCW 90.66).

The use of development schedules on changes should be consistent with POL-1280 and evaluated on a case-by-case basis.

In addition to the considerations for processing a new application, examinations for change or transfer applications may include additional elements:

Office Examination:

- A. Availability of metering information.
- B. Analysis of full or partial relinquishment.
- C. Aerial photo analysis of acreage, crop types, etc.
- D. Review file history for compliance and correspondence.
- E. Date of first use for changes to claims.

Field Examination:

- A. Verify existing water right provisions have been complied with.
- B. Verify that a meter is installed and functioning.
- C. Ensure current use is consistent with existing rights.

**Other Potential Requirements for New or Change/Transfer Applications**

The permit writer should advise the applicant whether any other permitting requirements may be needed and include the appropriate proviso on the permit, if necessary. Other permitting requirements may include:

- A. Hydraulic Project Approval (HPA) or appropriate screening provisions from the Department of Fish and Wildlife.
- B. Other approvals from Ecology. The permit writer should consult with the appropriate program(s) to identify required permits.
- C. Special Use Permits.
- D. Other local, state, or federal approvals.
- E. Approval from Department of Health (DOH). When DOH water system approval is necessary:
  - a. Consult regional office files to determine if DOH has approved a water system plan.

- b. If water system plan has not been approved, issue permit with a proviso stating that DOH approval of the water system plan is required prior to issuance of a certificate.
- F. Approval from Federal Energy Regulatory Commission (FERC) for hydropower development:
  - a. Determine if applicant has submitted Request for Jurisdiction Determination to FERC.
  - b. Determine if annual power license fees are required (RCW 90.16.050). If so, add proviso on ROE to indicate annual fees.
  - c. Inform the applicant, if appropriate, that annual power license fees are required at the time the permit is issued and on or before January 1 of each year thereafter.
- G. State Environmental Policy Act (SEPA): Check with the regional SEPA coordinator to determine SEPA requirements for the proposal. If the city or county will be the SEPA lead agency, but currently has no application to act on, discuss options with them on SEPA compliance. If SEPA is required but the water right permit is exempt (WAC 197-11-800 (4) and RCW 43.21C.035), it may only be issued prior to completion of SEPA if the lead agency agrees that it would not limit the choice of reasonable alternatives (WAC 197-11-070). In all other cases where SEPA is required, Ecology must wait to issue the permit until after the SEPA process is complete.
- H. Family Farm Act: If the application is for irrigated agriculture, determine which classification is applicable and ensure appropriate provisions are explicit in the report of exam (RCW 90.66.050).

## CHAPTER THREE: REPORT OF EXAMINATION (ROE)

Permit writers document their findings and recommendations in an ROE. The ROE may recommend approval that a water right permit be issued on the application, or may recommend that the application be denied. An application is subject to denial, Ecology may issue a formal order of denial rather than a ROE. Before issuing the formal order of denial, the permit writer should first provide a letter to the applicant justifying the decision.

ROEs can be produced using currently accepted templates (e.g. ActiveDocs wizards) and consist of the Investigator's Report and the Cover Sheet/Order (see the [ROE Tool Box](#) for additional guidance and templates). The draft ROE is posted on Ecology's website for public review and comment before Ecology issues the final ROE. Additional guidance can be found in the [Water Right Investigator's Manual](#).

### I. INVESTIGATOR'S REPORT

The investigator's report documents the findings of the permit writer's investigation of the application. The report should address the following:

- A. Background Information
  - a. Proposal description
  - b. Project background
  - c. Legal authorization for processing (e.g. authority under chapters 90.03, 90.14, 90.42, 90.44, or 90.90 RCW)
  - d. Public notice
  - e. Any protests or concerns
  - f. SEPA status
  - g. Consultation with the Department of Fish and Wildlife
- B. Investigation
  - a. Identify the date and who performed the field exam.
  - b. References used in office research.
  - c. Name(s) of person(s) interviewed.
  - d. Determination of priority date.
  - e. Observations:
    - i. Source location(s) (absolute and relative)
    - ii. Well depth (compare to well report; look for the Unique Well ID#)
    - iii. Water availability
    - iv. Observed or measured surface water flows
    - v. Feasible irrigable acreage
    - vi. Other water rights appurtenant to proposed place of use
    - vii. Other water rights near proposed place of use
    - viii. Source characteristics
    - ix. Proposed or existing distribution system description.

- x. Geology-hydrology
- xi. Hydraulic continuity
- xii. Sea water intrusion assessment
- xiii. Instream flow assessment
- xiv. History of water use in area.
- f. Other region-specific concerns.
- g. General use of stream or aquifer(s).
- h. Hydrogeologic technical analysis (including but not limited to):
  - i. evaluation of groundwater flow regime
  - ii. surface water/groundwater hydraulic continuity
  - iii. well pumping effects on both surface water and groundwater wells.
- C. Consideration of objections and discussion of protest(s) (WAC 508-12-170).
- D. Conclusions<sup>4</sup>:
  - a. Availability of water for appropriation.
  - b. Estimate of effect on existing rights.
  - c. Beneficial use (RCW 90.54.020 and RCW 90.14.031).
  - d. Whether proposed use is detrimental to public interest.
  - e. Assessment of points raised by protestant(s) or commentor(s).
- E. Recommendations:
  - a. Denial; partial denial; approval.
  - b. Proposed beneficial use(s).
  - c. Additive or non-additive (POL 1040) for each proposed use.
  - d. Quantities (instantaneous and annual, or maximum storage limit).
  - e. Acreage irrigated.
  - f. Number of proposed housing units to be served.
  - g. Period of use for each proposed use (year-round or seasonal).
  - h. Whether the water use is consumptive or non-consumptive (POL 1020).
  - i. Reference to the provisions listed with the cover sheet.
  - j. Place of Use Map

## II. COVER SHEET/ORDER

The cover sheet is an Administrative Order that provides a summary of key water right parameters in Ecology's decision to approve or deny the application. The cover sheet/Order should include the following items at a minimum:

- A. Name and address of applicant
- B. Priority date

---

<sup>4</sup> Legal considerations may differ for changes or transfer of existing water rights and changes to Trust Water rights. For procedures in changes and transfers of water right, refer to POL 1200. For changes to Trust Water Rights, refer to GUID 1220.

- C. Application number
- D. Source of water
- E. Quantities (instantaneous and annual)
- F. Period of use (year-round or seasonal)
- G. Purpose(s)
  - a. Irrigated acreage
  - b. Public water system information
  - c. Clarifying terms of the water right (for example: primary, additive, stand-by/reserve, non-additive, consumptive, non-consumptive, and so on; see [POL 1040](#)).
- H. Source limitations
- I. Source location(s) of point(s) of diversion or withdrawal
- J. Place of use (including legal description)
- K. Proposed works
- L. Development schedule (determined in consultation with the applicant)
- M. Cumulative quantity of water use (If the water right is part of a portfolio of rights, consider listing all the rights and the total quantities authorized in the portfolio.)
- N. Any provisions:
  - a. necessary to satisfy identified concerns and agency objectives
  - b. required by rules (such as water use measurement provisions per [WAC 173-173](#))
  - c. addressing regionally specific conditions (see the [ROE Tool Box](#))
- O. Current appeal language (use agency standards on [Compliance and Enforcement Intranet](#))
- P. Signature block for appropriate regional section manager.

### **III. REVIEW AND POSTING OF DRAFT REPORT OF EXAMINATION**

Draft ROEs undergo an internal review and approval process, before being posted to the internet for a 30-day comment/review period (see [Posting of Draft and Final Reports of Examination](#)). The permit writer and section manager/permit unit supervisor should evaluate the comments received during the review period and incorporate them into the ROE as appropriate.

### **IV. SIGNATURES AND POSTING OF FINAL REPORT OF EXAMINATION**

When the draft ROE has been approved, clerical staff prepare the final document. The final investigator's report is signed by the permit writer, and the cover page Order is signed by the section manager. The final ROE is then scanned and posted to the internet.

### **V. DISTRIBUTION OF REPORT OF EXAMINATION**

ROEs are sent by certified mail to both the applicant(s) and any protestant(s). There is a 30 day appeal period. It starts upon applicant's or protestant's receipt of the ROE ([RCW 43.21B.310](#)).

### **VI. AMENDMENT OF REPORT OF EXAMINATION**

Ecology may amend an ROE to make any necessary correction(s) to the original ROE. Corrected errors in an amended ROE should be administrative and/or clerical in nature and not alter the approval or denial

of the original ROE. The permit writer will prepare a memorandum to describe the reason for the amendment, which is made a permanent part of the file.

## CHAPTER FOUR: WATER RIGHT PERMITS

A water right permit grants the permittee a legal authorization to begin putting water to beneficial use. Permits are typically issued with a number of provisions and deadlines. As identified in the development schedule, the permittee is responsible for providing Ecology with notice when they begin and complete construction of their project, and when they have fully applied the water to the proposed beneficial use(s).

### I. ISSUANCE OF PERMITS

For new applications, a permit is generally issued after the 30-day appeal period has passed. Ecology has discretion to issue a permit even if appeals are received, but generally waits until the appeal is resolved.

For change applications, a superseding document may be issued after the appeal period, or according to the development schedule ([POL 1280](#)).

### II. PERMIT MAINTENANCE

The period during which a permittee initiates and appropriates water under the water right permit is known as permit development. During this time, the permittee is obligated to meet specific milestones. Permit maintenance is the process by which water resources staff periodically evaluates the permittee's progress on these milestones. Applicants not in compliance with their development schedules may face permit cancellation or other compliance actions.

#### **Beginning of Construction**

Beginning of construction may include, but is not limited to, actions such as well drilling or development of the diversion or the distribution system. The permittee should submit a Begin Construction Notice to Ecology by the date designated on their development schedule.

#### **Completion of Construction**

In order to demonstrate completion of construction, all proposed and required infrastructure and measuring devices must be in place, including the water distribution system. If the appropriation is from groundwater, ensure that a well report has been received. The permittee should complete these steps and submit a Complete Construction Notice to Ecology by the designated date on their development schedule.

#### **Proof of Appropriation**

Upon establishing full beneficial use of the water under the terms of the permit, or any lesser amount, the permittee must submit a notarized proof of appropriation form to the appropriate regional office. Staff must confirm that the form is notarized.

A field proof examination may be necessary to demonstrate beneficial use. If so, the permit writer sends a letter instructing the permittee to secure the services of a Certified Water Rights Examiner, see [WAC 173-165](#).

### Permit Extensions

Extensions for any phase of the development schedule may be approved by the issuing regional office on a case-by-case basis (RCW 90.03.320 and POL 1050). Extensions shall be based on a showing of good cause, due diligence, and good-faith effort by the permittee, through submission of a written request for the extension with the proper statutory extension fee [RCW 90.03.470(6)]. Extensions may be granted based on the size and the scope of the project. Submission of an application for change, or other issues raised by the permittee, are not sufficient reason to avoid extension fees.

### Cancellation of Permits

If the terms of the permit are not pursued with due diligence, a letter warning of permit cancellation may be sent. The letter provides a 30-day response period. If the response to the warning letter is inadequate, Ecology should send a 60-day "show cause" letter by certified mail. The permittee then has 60 days from receipt to provide justification for their failure to abide by the agreed development schedule. Ecology may grant an extension for just cause, or the letter may be followed by an Order of Cancellation. Cancellation can also be requested at any time by the permittee.

Types of cancellation may include:

- Type 1 Cancellation: Request by permittee before or after 60-day show-cause letter sent.
- Type 2 Cancellation: No response to the 60-day show cause letter.
- Type 3 Cancellation: A response to show cause letter is submitted, but determined to be inadequate.

The following need to be in the file when preparing an Order of Cancellation:

- When requested by the permittee (Type 1, as defined above): Written documentation from the permittee specifically requesting that the permit be canceled.
- At agency discretion (Type 2 or Type 3, as defined above): Copies of the 30-day warning letter and the 60-day show cause letter, as well as any response(s) received

The following items should be considered when preparing to issue an Order of Cancellation:

- A. An Order of Cancellation resulting from noncompliance with the development schedule should indicate the specific facts in the case that warrant permit cancellation.
- B. If it is believed or known that any stage(s) of permit development have been completed, telephone or personal contact with the applicant should be made before proceeding further. A site visit may be appropriate if the permittee cannot be located.
- C. In all cases where a 60-day show cause letter has been sent, ensure that the 60 days has elapsed before preparing the Order of Cancellation (except in cases where the permittee has already requested cancellation).

## III. ASSIGNMENT OF PERMITS

A permit is considered personal property and can be assigned to another person or person(s) by the permittee, with Ecology's written consent. Refer to "Assignment of Applications" (page 8) for applicable

procedures. Once assigned, a superseding document is issued which retains all necessary provisions contained in the original document. Assignments to multiple parties may be made so long as no enlargement occurs.

#### **IV. PROOF EXAMINATION**

Proof examinations shall be completed by a Certified Water Rights Examiner (CWRE) unless exempted at the discretion of regional management [RCW 90.03.665(9)]. Through a field inspection, the CWRE must determine the extent of actual development in terms of use(s), place of use, quantities, diversion locations, storage facilities, acreage irrigated (if any), etc. (WAC 173-165), and submit that information in a proof of examination report. Once a CWRE proof exam report is submitted [RCW 90.03.665(6)], the typical procedure is as follows:

- A. Review the proof exam
  - a. Compare the CWRE proof exam report to the permit file for completeness and compliance with the permit conditions.
  - b. Review and comment on any inadequacies in the CWRE report and return it to the CWRE and applicant within 30 days.
  - c. If after reviewing the CWRE report there are no inadequacies or corrections, issue a decision, by way of an Order, within 60 days of receipt of the report.
  - d. Upon receipt of an amended proof exam report, issue a decision, by way of an Order, within 30 days.
- B. Request fees

Notify the permittee when requesting fees if the certificate is to be issued for reduced quantities from those authorized by the permit.

## CHAPTER FIVE: CERTIFICATES AND SUPERSEDING DOCUMENTS

Issuance of a water right certificate or superseding document is the final decision point in the permitting process.

### I. CERTIFICATES

A water right certificate will not be issued until the permittee "perfects" the water right, and any appeals have been resolved. To perfect the right, the permittee must show that they have applied the authorized quantity of water (or some lesser quantity) to beneficial use under the terms of the permit.

Verification of water use is typically done by the permittee hiring a Certified Water Right Examiner to conduct a proof examination. In these cases, Ecology issues the certification decision in an order, which includes a 30-day appeal period.

In some cases, the permittee has submitted adequate information with their Proof of Appropriation to satisfy Ecology on the quantity and use of water under the permit. Ecology may then choose to issue the certificate without requiring an additional proof examination by a Certified Water Right Examiner.

A certificate is issued after statutory state and county filing fees have been received by Ecology's Cashiering Section and a receipt is received by the regional office. The certificate is forwarded to the county auditor(s), together with the appropriate recording fee, for entry into the county's permanent records. The auditor then forwards the recorded document to the certificate holder.

### II. CORRECTIONS TO PERMITS OR CERTIFICATES

Ecology may amend a permit or certificate to make any necessary correction(s) to the original. Corrected errors in an amended permit or certificate should be administrative and/or clerical in nature and not alter the conditions of the original certificate. The permit writer will prepare a memorandum to describe the reason for the amendment, which is made a permanent part of the file.

If the department identifies the need to make a correction to a permit or certificate that alters the conditions/attributes of a permit or certificate, it shall do so via a superseding permit or certificate with the same number, referencing the date of issuance of the original. Such a correction must be checked for consistency with public notice and re-advertised if not consistent.

If the permittee or water right holder corrects or alters information that is different from the public notice or the place of use under which the permit or certificate issued, he/she must submit an application for change and will result in a superseding document, if approved.

### III. SUPERSEDING DOCUMENTS

The water right change process results in different documents, depending on the original document type. Table 1 presents the types of superseding documents which result from changes of different types of water right documents.

**Table 1.** Superseding documents resulting from changes to different types of water rights.

Document to be Changed	Resulting Document
Water Right Certificate	Superseding Certificate
Water Right Permit	Superseding Permit
Vested Claim or Certificate of Change	Certificate of Change

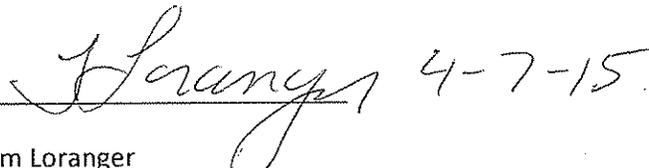
Actions that result in superseding documents include the following<sup>5</sup>:

- A. Corrections which alter conditions of a permit or certificate.
- B. Corrections in information from the applicant as described above.
- C. Partial relinquishment.
- D. Rescission.
- E. Corrections of clerical errors which alter the conditions/attributes of the permit or certificate.
- F. Approved change authorizations.
- G. Partial assignments affecting permits only.

In contrast, a permit or certificate can undergo a number of actions which do not result in superseding documents. These may include the following:

- A. Clerical errors which *do not* alter the conditions or attributes of the permit or certificate.
- B. Claim amendments.
- C. Showing of Compliance (POL 1260).

A superseding certificate is filed with the state then forwarded to the county auditor(s), together with the appropriate recording fee, for entry into the county's permanent record. The auditor then forwards the recorded document to the right holder.

 4-7-15  
 \_\_\_\_\_  
 Tom Loranger

Program Manager, Water Resources Program

**Special Note:** These policies and procedures are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rulemaking process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.

<sup>5</sup> Superseding documents will have the same number and reference the date of issuance of the original. For partial assignments, the letters A through Z are used to indicate a split record.