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EXPEDITE  
 No Hearing Set  
 Hearing is Set:  
Date: December 18, 2015  
Time: 9:00 a.m.  
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,

Plaintiffs,

vs.

WASHINGTON STATE DEPARTMENT OF  
ECOLOGY,

Defendant.

NO. 14-2-02466-2

PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT ON LEGAL ISSUES

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**I. INTRODUCTION<sup>1</sup>**

Plaintiffs Magdalena T. Bassett, Denman J. Bassett, Judy Stirton, and Olympic Resource Protection Council (jointly “ORPC”) brought this petition for declaratory judgment under the Administrative Procedure Act, Chapter 34.05 RCW, to determine the validity of Chapter 173-518 WAC, the Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area 18 (the “Dungeness Rule”).

Washington State has a set of interrelated statutes involved in the allocation of water for instream flow protection, domestic water supply and other uses. The Legislature has directed through these statutes how water allocations are to be made by Ecology and thereafter protected and regulated. These statutes have a common overlapping purpose and have been described by the Supreme Court as a “statutory scheme” which the Court interprets together to determine the plain meaning of the statutes and the Legislature’s intent. As argued below, defendant Washington State Department of Ecology’s (Ecology) authority to create minimum instream flows (MIFs) by rule is limited by legislative mandates in these statutes. The limitations on Ecology’s authority is further informed by recent Supreme Court precedent. An instream flow rule that ignores these mandates and case law exceeds Ecology’s authority and is invalid.

The issue presented in this motion is a case of first impression. When adopting a rule that creates minimum instream flows that will have the status of water rights with priority dates, is Ecology required to make findings consistent with the granting of a water right under RCW 90.03.290(3)? It is undisputed that Ecology failed to make the four-part test findings under RCW 90.03.290(3) for the creation of MIF water rights in the Dungeness Rule. Ecology concedes that

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<sup>1</sup> This motion originally contained three legal issues and was filed on August 17, 2015. The motion was subject to a prehearing order requiring review by the Court for compliance with Local Rule 56(i) prior to requiring a response from the defendant. Judge Gary R. Tabor subsequently determined that only Issue No. 1 would be heard and considered by the Court on summary judgment. Subsequent to that ruling, the Supreme Court of Washington issued a new decision (*Sara Foster v. Dept. of Ecology*, Case No. 90386-7, dated October 8, 2015), that is relevant to the issue in this motion. This motion is being refiled to eliminate issues 2 and 3 and to incorporate discussion and arguments based on the *Foster* decision.

1 this issue is a legal question that does not require reference to the administrative record. The  
2 question can be resolved by statutory interpretation alone because it concerns the limits and  
3 conditions of Ecology's rule-making authority and the meaning of different statutory terms.

4 Two years ago, after Ecology had already adopted the Dungeness Rule, the Washington  
5 Supreme Court interpreted the same statutory terms and its interpretation is controlling law in  
6 this case. In *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 311 P.2d. 6  
7 (2013), the Supreme Court invalidated Ecology's amended Skagit River Basin instream flow rule  
8 (chapter 173-503 WAC) as exceeding Ecology's statutory authority. The Supreme Court made  
9 two rulings in *Swinomish* that require invalidation of the Dungeness Rule, one of which involves  
10 the four-part test issue. The Supreme Court held that because reservations, like MIFs, are given  
11 the status of water right appropriations with priority dates under RCW 90.03.345, Ecology must  
12 make findings under the four-part test of RCW 90.03.290 before adopting them, just like any  
13 other water right. Quite simply, because Ecology did not make findings under the four-part test  
14 for either the MIFs or the reservations in the Dungeness Rule, the *Swinomish* decision requires  
15 the rule's invalidation, as a matter of law.

16 More recently, on October 8, 2015, the Supreme Court again reversed Ecology and  
17 invalidated a water right permit issued to the City of Yelm in *Sara Foster v. Dep't of Ecology*,  
18 Case No. 90386-7.<sup>2</sup> That decision underscored several of the extreme consequences of adopting  
19 MIFs as water rights with priority dates. Among them is that Ecology can no longer approve  
20 groundwater applications in the same basin for other purposes without "legally impairing" the  
21 minimum flow water rights. In *Foster*, Ecology's adoption of MIFs for the Deschutes and  
22 Nisqually watersheds resulted in senior instream flow water rights that could not be impaired in  
23 any respect, even by a de minimus effect of a remote groundwater withdrawal. *Foster*, Slip  
24 Opinion at 12. Because water for water mitigation was not available to cover all potential

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25  
26 <sup>2</sup> A copy of the slip opinion in *Foster v. Ecology* is provided in Appendix 1.  
27

1 impacts to the existing MIFs from the City of Yelm’s proposed water right, Ecology used the  
2 “overriding considerations of public interest” (OCPI) exception at RCW 90.54.020(3)(a) to  
3 approve Yelm’s mitigation plan and water right application. Ecology’s use of OCPI to approve a  
4 water right that would otherwise impair an existing MIF water right caused the Supreme Court to  
5 reverse Yelm’s water right, notwithstanding what Ecology officials called a “gold-plated regional  
6 mitigation plan” that was shared with the cities of Lacey and Olympia.<sup>3</sup> The unfortunate result  
7 for the City of Yelm can and will be repeated in every other watershed, including the Dungeness  
8 Basin, where Ecology has adopted MIFs, because under state law MIFs have the status of senior  
9 water rights and cannot be impaired by any subsequent appropriation. The *Foster* decision closed  
10 the door on the use of out-of-kind mitigation and the OCPI exception to get around this dilemma.  
11 This harsh consequence, with no ability to approve new water rights or water right changes or to  
12 allocate water for domestic or other uses, is the reason the issue raised in this motion is so critical  
13 to the citizens of the State of Washington. It begs the question whether Ecology appropriately  
14 created MIF water rights in the first place, i.e., whether the Department exceeded its statutory  
15 authority when adopting the Dungeness Rule without the four-part test findings.

## 16 II. ISSUE RAISED

17 When adopting a rule that creates minimum instream flows that will have the status of water  
18 rights with priority dates, is Ecology required to make findings consistent with the granting of  
19 a water right under RCW 90.03.290(3), including (1) that water is available for the minimum  
20 instream flow, and (2) that it will not be detrimental to the public welfare?

## 21 III. ARGUMENT AND AUTHORITY

### 22 A. Summary Judgment is Appropriate to Resolve the Purely Legal Issues 23 Addressed in this Motion

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26 <sup>3</sup> Only by the circumstance that nobody appealed the Lacey and Olympia permits, which were based on the same  
27 mitigation plan and identical OCPI findings, were those cities able to augment their water supplies with new water  
right permits to accommodate future growth.

1 The purpose of summary judgment is to avoid a useless trial and to test, in advance of  
2 trial, whether evidence to sustain the allegations actually exists. *Almay v. Khamme*, 63 Wn.2d  
3 326, 329, 387 P.2d 372 (1963). Summary Judgment is proper when the pleadings, authorities and  
4 affidavits show no genuine issue of material fact exists, and that the moving party is entitled to  
5 judgment as a matter of law. CR 56(e); *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 690, 974 P.2d  
6 836 (1999). A material fact is one upon which the outcome of litigation depends. *Harris v. Ski*  
7 *Park Farms*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993).

8 Summary judgment is uniquely appropriate for interpreting and deciding questions of  
9 statutory construction, the legal duties and obligations of administrative agencies, and other  
10 questions of interpretation and application of law when the facts are not disputed, and has been  
11 approved by the Supreme Court in similar water rights cases and instream flow rule challenges.  
12 See, e.g., *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 76, 11 P.3d 726 (2000); *Public*  
13 *Util. Dist. No. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002); and *Surface Waters of*  
14 *the Yakima River Drainage Basin v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 850  
15 P.2d 1306 (1993). Plaintiffs incorporate their previously-filed briefing for their Motion for  
16 Special Setting as to the proper interpretation and application of CR 56 and LR 56(i).

17  
18 **1. Resort to the Administrative Record is Unnecessary**

19 By letters to Judge Gary Tabor dated August 19, 2015 and August 24, 2015, respectively,  
20 defendant Ecology and intervenor CELP conceded that the issue raised in this motion is purely  
21 legal.

22 **2. There are no Disputed Material Facts because it is Undisputed that**  
23 **Ecology Adopted Instream Flows as Appropriations with Priority Dates but**  
24 **did not Complete the Four-Part Test in the Dungeness Basin Rule**

1 The Court can and should take judicial notice of the Dungeness Rule, Chapter 173-518  
2 WAC.<sup>4</sup> WAC 173-518-040(3) provides:

3 Instream flows established in this rule are water rights and will be protected from  
4 impairment by any new water rights commenced after the effective date of this  
chapter and by future water right changes and transfers.

5 The Dungeness Rule thus establishes instream flows as water rights but does not include findings  
6 that these instream flows pass the four- part test for establishing water rights.

7 **B. Legal Standards Applicable to this Motion**

8 **1. Standards for APA Rule Challenges**

9 The Administrative Procedure Act, at RCW 34.05.570(2), provides for judicial review of  
10 administrative rules through the filing of a petition for declaratory judgment. A court shall  
11 declare the rule invalid only if it finds that: the rule violates constitutional provisions; the rule  
12 exceeds the statutory authority of the agency; the rule was adopted without compliance with  
13 statutory rule-making procedures; or the rule is arbitrary and capricious. RCW 34.05.570(2)(c).  
14 An administrative rule cannot amend or change a legislative enactment, and a rule that is  
15 inconsistent with the statutes it implements is invalid. *Swinomish Indian Tribal Cmty. v. Dep't of*  
16 *Ecology*, 178 Wn.2d 571, 581 (Wash. 2013); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146  
17 Wn.2d 1, 19, 43 P.3d 4 (2002); *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d  
18 1241 (1998)). Administrative “[r]ules must be written within the framework and policy of the  
19 applicable statutes.” *Swinomish* at 580 (emphasis added); *quoting Dep't of Labor & Indus. v.*  
20 *Gongyin*, 154 Wn.2d 38, 50, 109 P.3d 816 (2005). A court must declare an administrative rule  
21 invalid if it finds that “the rule exceeds the statutory authority of the agency.” *Id.*; *Foster v.*  
22 *Ecology*, slip opinion at 4; RCW 34.05.570(2)(c). Rules that are not consistent with the statutes  
23 that they implement are invalid. *Swinomish* at 581; *Bostain v. Food Express, Inc.*, 159 Wn.2d  
24

25  
26 <sup>4</sup> A copy of the Dungeness Rule is attached as Appendix 2.

1 700, 715, 153 P.3d 846 (2007). An agency exceeds its rule-making authority to the extent it  
2 modifies or amends precise requirements of statute. *Baker v. Morris*, 84 Wn.2d 804, 809-10, 529  
3 P.2d 1091 (1974).

4 In *Swinomish* and very recently in *Wash. State Hosp. Ass'n v. Dep't of Health*, 183 Wn.2d  
5 590, 353 P.3d 1285 (2015), the Supreme Court carefully interpreted the meaning of statutory  
6 terms used by administrative agencies in the promulgation of rules, and invalidated the rules  
7 because the agency gave the terms a broader meaning than intended in the authorizing statutes. In  
8 *Swinomish*, the Supreme Court rejected Ecology's interpretation of "overriding considerations of  
9 public interest" because it gave Ecology too much discretion and authority to issue reservations  
10 of water and was inconsistent with the interrelated statutory scheme of water rights, water  
11 allocation, and instream flow protection. In *Wash. State Hosp. Ass'n*, the Supreme Court rejected  
12 the Department of Health's interpretation of "sale, purchase, or lease" and invalidated its rule  
13 requiring a certificate of need process for any change in the board of directors of a hospital. 183  
14 Wn.2d at 596-97.

## 15 2. General Rules for Statutory Construction

16 When construing a statute, the court's goal is to determine and effectuate legislative  
17 intent. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010);  
18 *Campbell & Gwinn*, 146 Wn.2d at 9-10. Where possible, courts must give effect to the plain  
19 meaning of the language used as the embodiment of legislative intent. *TracFone*, 170 Wn.2d at  
20 281; *Campbell & Gwinn*, 146 Wn.2d at 9-10. "We determine plain meaning 'from all that the  
21 Legislature has said in the statute and related statutes which disclose legislative intent about the  
22 provision in question.'" *TracFone*, 170 Wn.2d at 281 (quoting *Campbell & Gwinn*, 146 Wn.2d at  
23 11). In general, words are given their ordinary meaning, but when technical terms and terms of  
24 art are used, courts give these terms their technical meaning. *Swinomish* at 581; *Tingey v. Haisch*,  
25

1 159 Wn.2d 652, 658, 152 P.3d 1020 (2007); *City of Spokane ex rel. Wastewater Mgmt. Dep't v.*  
2 *Dep't of Revenue*, 145 Wn.2d 445, 452, 454, 38 P.3d 1010 (2002).

3 The court considers the statutory context, related statutes, and the entire statutory scheme  
4 when ascertaining plain meaning. These considerations are especially important here, at the  
5 intersection of instream flow protection, water policy, water rights, and the legal availability of  
6 water from permit-exempt wells for building permits and subdivisions. “[R]esolving the meaning  
7 of a statutory provision concerning water rights almost always requires consideration of  
8 numerous related statutes in the water code. *Swinomish* at 582, citing *Campbell & Gwinn*, 146  
9 Wn.2d at 12-17, and *Postema*, 142 Wn.2d at 77-83.

10 **3. Deference to Agency Interpretations is not Warranted Here**

11 An agency’s interpretation of a law is not entitled to deference by a reviewing court if the  
12 interpretation does not require the agency’s expertise, *Willowbrook Farms v. Ecology*, 116 Wn.  
13 App. 392, 66 P.3d 64 (2003); if the statute is not ambiguous, *Theodoratus*, 135 Wn.2d at 589; or  
14 if the agency’s interpretation conflicts with the statute. *Swinomish*, at 588-591; *Pasco Police*  
15 *Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997); *Waste Mgmt. of*  
16 *Seattle, Inc. v. Utils & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). The  
17 court should not grant deference to Ecology’s interpretation of the statutes involved in this  
18 motion because, just as the Supreme Court held in *Swinomish*, it conflicts with the statutory  
19 scheme.

20 **C. Because Instream Flow Regulations Will Have the Status of Water Rights**  
21 **with Priority Dates, They Must Meet the Four-Part Test of RCW 90.03.290**

22 “Reservations of water under RCW 90.54.050 constitute appropriations of water.  
23 RCW 90.03.345 (a reservation of water is an appropriation having as its priority  
24 date the effective date of the reservation). Reservations of water must therefore  
25 meet the same requirements as any appropriation of water under the water code.  
26 “[B]efore a permit to appropriate may be issued, Ecology must affirmatively find  
27 (1) that water is available, (2) for a beneficial use, and that (3) an appropriation  
will not impair existing rights, or (4) be detrimental to the public welfare.”

1 *Swinomish*, at 588-89 (emphasis added); citing *Postema*, 142 Wn.2d at 79 and RCW  
2 90.03.290(3). The Court’s basis for this holding is RCW 90.03.345, which provides:

3           **90.03.345 Establishment of reservations of water for certain purposes and**  
4           **minimum flows or levels as constituting appropriations with priority dates.**  
5           The establishment of reservations of water for agriculture, hydroelectric energy,  
6           municipal, industrial, and other beneficial uses under RCW 90.54.050(1) or  
7           minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute  
8           appropriations within the meaning of this chapter with priority dates as of the  
9           effective dates of their establishment. ... (Emphasis added).

10           RCW 90.03.345 is the critical statute and the *Swinomish* decision includes the only  
11           statutory interpretation needed to decide this motion. RCW 90.03.345 treats MIFs and  
12           reservations identically. Both MIFs and reservations are given the identical status of  
13           appropriations with priority dates. The Water Code is based on the common law doctrine of prior  
14           appropriation. Under the Water Code, any later appropriation cannot impair a MIF water right or  
15           reservation with an earlier priority date. RCW 90.03.290(3). This effect of creating MIFs as  
16           water rights is recognized in the Dungeness Rule at WAC 173-518-040(3), which provides:

17           Instream flows established in this rule are water rights and will be protected from  
18           impairment by any new water rights commenced after the effective date of this  
19           chapter and by future water right changes and transfers.

20           Logically, if reservations must meet the four-part test because of RCW 90.03.345, as  
21           already interpreted by the Supreme Court, there is no reason why MIF water rights can escape the  
22           same statutory requirement to meet the four-part test. It is consistent with the statutory scheme  
23           interpreted by the Supreme Court in *Postema* and *Swinomish* that before Ecology adopts a rule  
24           including MIFs as water rights, thereby prohibiting later appropriations from impairing the MIFs,  
25           Ecology must make the same findings as required for any other water right. Specifically, Ecology  
26           must determine under RCW 90.03.290(3) that (1) water is available in the stream to satisfy the  
27           MIF, and (2) the MIF appropriation would not be detrimental to the public welfare.

          Requiring the latter “public welfare” finding is also consistent with the Legislature’s  
directive to allocate water based on securing the “maximum net benefits” (MNB) for the people

1 of the state, which is a form of public interest evaluation. RCW 90.54.020(2). The MNB  
2 directive is also codified in the Water Code at RCW 90.03.005<sup>5</sup> and is consistent with Ecology's  
3 duty to protect the public welfare before approving any new appropriations of water. RCW  
4 90.03.290(3). The consistency of the public interest/public welfare requirement among RCW  
5 90.54.020(2), 90.03.005, 90.03.290(3) and 90.03.345 is compelling. These statutes must be  
6 interpreted together, as directed by the Supreme Court in *Swinomish* and *Foster*, as a common  
7 statutory scheme that requires Ecology to protect the public interest before adopting a MIF water  
8 right by rule. It must do so by making the four-part test findings, including the public welfare  
9 prong of that test, which is consistent with the maximum net benefits directive in the Water Code  
10 at RCW 90.03.005.

11 Ecology adopted the Dungeness Rule before the *Swinomish* decision, but that does not  
12 exempt the Dungeness Rule from the same statutory mandates and limitations that led the  
13 Supreme Court to invalidate the Skagit Basin MIF rule in *Swinomish*. The Supreme Court's  
14 interpretation in *Swinomish* applies to the Dungeness Rule because it establishes that MIFs and  
15 reservations are appropriations of water that, like all other appropriations of water, must meet the  
16 four-part test at RCW 90.03.290(3).

17 **D. The Directive to Protect Base Flows at RCW 90.54.020(3)(a) does not Allow**  
18 **Ecology to Ignore other Statutory Mandates Prior to Creating Instream Flow Water**  
19 **Rights**

20 Ecology and CELP are expected to argue that RCW 90.54.020(3)(a) exempts MIFs from  
21 the four-part test. That argument would be misleading and inconsistent with fundamentals of  
22 statutory interpretation. RCW 90.54.020 sets forth general fundamentals for allocating and  
23 managing waters of the state, including the maximum net benefits mandate at subsection (2), the  
24 OCPI exception at subsection (3)(a), a mandate to protect and preserve adequate and safe

25 \_\_\_\_\_  
26 <sup>5</sup> RCW 90.03.005 provides in part, "It is the policy of the state to promote the use of public waters in a fashion which  
27 provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and  
retention of waters within streams and lakes in sufficient quantity to protect instream and natural values and rights."

1 supplies of water to satisfy human domestic needs at subsection (5), and the mandate to protect  
2 “base flows” at subsection (3)(a). The latter mandate provides:

3 (3) The quality of the natural environment shall be protected and, where possible,  
4 enhanced as follows:

5 (a) Perennial rivers and streams of the state shall be retained with base flows  
6 necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other  
7 environmental values, and navigational values. Lakes and ponds shall be retained  
8 substantially in their natural condition. Withdrawals of water which would  
9 conflict therewith shall be authorized only in those situations where it is clear that  
10 overriding considerations of the public interest will be served. RCW 90.54.020.

11 To be consistent with the Supreme Court’s decision that water rights statutes be interpreted  
12 together as part of a statutory scheme, a court cannot interpret the “base flow” requirement as  
13 though it were separate from all other aspects of the Water Resources Act (chapter 90.54) and the  
14 Water Code (chapter 90.03). RCW 90.54.020 sets forth multiple directives that are potentially, if  
15 not necessarily, inconsistent with one another. For example, how can the State protect both base  
16 flows for various environmental purposes and adequate water for domestic use, which requires  
17 the diversion of water, without creating some conflicts? It makes no sense that the Legislature  
18 intended that only one of these objectives have priority and that other objectives take a secondary  
19 or conditional place in line, unless of course that is what the Legislature said in the statute. The  
20 statute is silent with respect to the relative priority of the various fundamentals established in  
21 RCW 90.54.020. The statute also fails to exempt the appropriation of water for MIFs from the  
22 four-part test of RCW 90.03.290, which predated chapter 90.54 RCW. The Legislature is  
23 presumed to be aware of existing law requiring the four-part test for new water rights. If it  
24 intended to exempt MIF water rights from that test, it could and should have stated that  
25 exemption expressly in the statutes, but did not.

26 RCW 90.54.020 does, however, set forth a method for resolving conflicts among the  
27 competing fundamental policies of that section, and for allocating water despite the apparent  
conflict of objectives. The Legislature directed Ecology in subsection (2) to allocate waters based

1 on securing the “maximum net benefits for the people of the state.” While this motion does not  
2 include Plaintiffs’ Issue 3 regarding the MNB directive, MNB is part of the statutory scheme for  
3 allocation of water that must, as directed by the Supreme Court, be read together with other  
4 statutes concerning the allocation or appropriation of water between instream and out-of-stream  
5 uses.<sup>6</sup> Reading the statutes together as a common scheme, the Legislature did not intend for base  
6 flows to be protected by MIF water rights that are exempt from the four-part test. It intended that  
7 any such permanent allocation of water pass a public interest evaluation, as represented by the  
8 MNB directives in RCW 90.54.020 and RCW 90.03.005 and the public welfare prong of the  
9 four-part test of RCW 90.03.290(3).

10 **E. Ecology can Protect “Base Flows” without Creating Minimum Flow Water**  
11 **Rights**

12 RCW 90.54.020 creates a mandate for Ecology to protect “base flows” among other  
13 mandates, but it does not require Ecology to protect base flows by creating minimum instream  
14 flow water rights to the exclusion of all other uses of water. Ecology can protect “base flows”  
15 without creating a water right for that purpose by denying or conditioning other water right  
16 applications as necessary to protect such “base flows.” A requested permit can be denied as  
17 detrimentally affecting the public welfare if base flows in a river are not protected. *Hubbard v.*  
18 *Ecology*, 86 Wn. App. 119, 936 P.2d 27 (1997). Ecology is authorized to refuse or condition a  
19 water permit if issuing the permit might result in lowering the flow of water in a stream below  
20 the flow necessary to adequately support food fish and game fish populations in the stream.  
21 *Richert v. Ecology*, PCHB No. 90-158 (1991). Ecology can impose base flow conditions in a

22 \_\_\_\_\_  
23 <sup>6</sup> “Utilization and management of the waters of the state shall be guided by the following general declaration of  
24 fundamentals: ... (2) Allocation of waters among potential uses and users shall be based generally on the securing of  
25 the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs  
26 including opportunities lost. ...” RCW 90.54.020(2) (emphasis added). The MNB directive was elaborated by a  
27 1979 statute that was codified in the Water Code at RCW 90.03.005, which states in part: “It is the policy of the state  
to promote the use of public waters in a fashion which provides for obtaining maximum net benefits arising from  
both diversionary uses of the state’s public waters and retention of waters within streams and lakes in sufficient  
quantity to protect instream and natural values and rights. ...” (Emphasis added).

1 Section 401 Certification of a hydropower project. *Dep't of Ecology v. Public Util. Dist. No. 1*,  
2 121 Wn.2d 179, 849 P.2d 646, (1993). Ecology can withdraw waters from further appropriation  
3 when sufficient information and data are lacking to allow for the making of sound decisions.  
4 RCW 90.54.050(2). Ecology can also protect base flows by enforcing against wasteful uses of  
5 water. RCW 90.03.005; 90.03.400; *Methow Valley Irrigation District v. Ecology*, PCHB No.  
6 02-071 (2003). None of these methods of protecting base flows would require creating a new  
7 MIF water right.

8 **F. MIF Water Rights are a Higher Level of Protection that Forecloses Other**  
9 **Uses of Water -- Which is an Appropriation that Requires the Four-Part Test**

10 By creating a MIF water right with a particular numerical flow level and a priority date,  
11 Ecology is forever appropriating the waters of a river up to that level for instream flow purposes.  
12 That appropriation of water is permanent, and forever excludes other future uses of the same  
13 water by establishing a senior water right that must be protected from impairment, even from de  
14 minimus effects (as decided in *Foster*). Because it is a permanent appropriation for instream flow  
15 purposes, and creates a water right with a priority date, the four-part test of RCW 90.03.290 is  
16 necessary to comply with the full range of public policy directives in RCW 90.54.020, RCW  
17 90.03.005 and RCW 90.03.290.

18 Requiring the four-part test does not prevent Ecology from adopting MIF water rights at  
19 specific levels of flow and permanently protecting those levels from impairment, but Ecology  
20 must make the four-part test findings in order to do so. The four-part test is a procedural  
21 requirement to evaluate the availability of water and the public interest before adopting a MIF  
22 water right, like any other water right application

23 **G. The Severe Consequences of Creating Instream Flow Water Rights Requires**  
24 **Full Compliance with the Statutory Scheme for Appropriating Water**

25 At the risk of repetition, the section of the argument summarizes the severe consequences  
26 of creating MIF water rights, in order to underscore the need for a timely four-part test analysis at  
27

1 the front end, before such MIF rights permanently foreclose other uses (even minute quantities)  
2 of the same water.

3 Under the state water code, minimum flows and levels established by administrative  
4 rules, including the Dungeness Rule, are appropriations of water.

5 “The statutes plainly provide that minimum flows, once established by rule, are  
6 appropriations which cannot be impaired by subsequent withdrawals of  
7 groundwater in hydraulic continuity with the surface waters subject to the  
8 minimum flows. RCW 90.03.345; RCW 90.44.030. A minimum flow is an  
9 appropriation subject to the same protection from subsequent appropriators as  
10 other water rights, and RCW 90.03.290 mandates denial of an application where  
11 existing rights would be impaired.” *Postema v. Pollution Control Hearings Bd.*,  
12 142 Wn.2d 68, 81, 11 P.3d 726 (2000) (emphasis added).

13 Water necessary to meet a MIF water right is permanently unavailable for appropriation  
14 to other uses. *Swinomish* at 578; RCW 90.03.345. Applications for water permits relating to  
15 streams with MIFs must be conditioned to protect the MIFs. RCW 90.03.247. In other words,  
16 they are interruptible when the established flow level is not available, making them unusable for  
17 domestic, municipal and other uses that require a continuous source of water.

18 “[Minimum] flows are not a limited water right; they function in most respects as  
19 any other water appropriation. As such, they are generally subject to our State's  
20 long-established "prior appropriation" and "first in time, first in right" approach to  
21 water law, which does not permit any impairment, even a de minimus impairment,  
22 of a senior water right.” *Foster*, slip opinion at 5.

23 “Our cases have consistently recognized that the prior appropriation doctrine does  
24 not permit even de minimus impairments of senior water rights.” *Foster*, slip  
25 opinion at 12.

26 "A minimum flow is an appropriation subject to the same protection from  
27 subsequent appropriators as other water rights, and RCW 90.03.290 mandates  
denial of an application where existing rights would be impaired." *Foster*, slip  
opinion at 6, citing *Postema*, 142 Wn.2d at 82.

The ultimate result of these significant consequences is a building permit moratorium  
such as has occurred in the Skagit basin following the Supreme Court’s rejection of Ecology’s

1 reservations of water for future uses in the *Swinomish* case. With no legal source of water supply,  
2 properties in the Dungeness basin could also be permanently stranded, unbuildable, and  
3 unusable. After the *Foster* decision, reliance on mitigation plans to make water available for new  
4 uses is unpredictable because it must prevent “legal impairment” of MIF water rights, meaning  
5 100% flow replacement in-kind, in-time, and in-place – a feat that may be impossible to achieve  
6 in most areas of basins with MIF water rights.

7         The MNB directive is illustrative of the enormous significance given by the Legislature to  
8 water allocation policy choices and regulatory decisions that it entrusted to the Department of  
9 Ecology. Critical among these directives is that Ecology must carefully weigh the costs and  
10 benefits of allocations of water to both instream and out-of-stream uses. Similarly, the four-part  
11 test requires a weighing of the public interest before creating a new appropriation with a priority  
12 date, i.e., that the appropriation as proposed “not be detrimental to the public welfare.” These  
13 requirements reflect a common statutory purpose that Ecology not allocate or appropriate water  
14 without first considering the balance of public interests involved.

15         That balancing of public interests has to take place in the proper sequence, before a MIF  
16 water right is created, in order to have any effect, because once a MIF has been established, there  
17 is no statute that requires any further weighing of interests or economic considerations.  
18 *Swinomish*, 178 Wn.2d at 585 (citing *Postema*, 142 Wn.2d at 82-83). In other words, **if Ecology**  
19 **does not make the four-part test findings when creating a MIF water right, it will be too**  
20 **late to reconsider the public interests involved in that allocation of water.** After *Foster*, it  
21 also clear that Ecology cannot replace a public interest finding before adopting MIF water rights  
22 with a public interest finding after-the-fact.

23         Ever since the *Postema* decision, Ecology has attempted to allocate water for other  
24 purposes such as domestic or municipal by making OCPI findings that allowed the new  
25 appropriations or reservations to impair existing MIF water rights. Theoretically, the  
26 consequences of establishing MIF water rights without a public interest or MNB finding could be  
27

1 ameliorated if Ecology could make a public interest finding later, in the form of an OCPI finding,  
2 so that new water appropriations could be made after adopting a MIF. That presumption by  
3 Ecology, which was in reality a safety valve used to correct Ecology's erroneously adopted MIFs,  
4 is no longer available as a result of the *Swinomish* and *Foster* decisions. If Ecology does not  
5 make a public interest finding or MNB finding before adopting a MIF it will be too late to make  
6 such findings in the future, and all other appropriations that could impair the new MIF water  
7 right would be prohibited.

8         What is the use of a public interest evaluation if it is too late to have any consequence?  
9 The Legislature cannot be presumed to have intended that Ecology could avoid public interest  
10 evaluations altogether by adopting MIFs first, without the four-part test findings of RCW  
11 90.03.290, then leaving the public interest evaluation for later when it is too late to have any  
12 consequence. Yet that is the absurd result that Ecology and the Intervenor, CELP, are defending  
13 in this case. The potential cost of Ecology and CELP defending that position is that future  
14 appropriations for other purposes, including water for domestic uses and municipal growth, will  
15 be forever foreclosed without the public interest ever having been evaluated.

16         Ecology has unnecessarily painted itself into a corner with the Dungeness Rule by  
17 adopting MIFs first and avoiding the public interest evaluation for that appropriation of water.  
18 Now, after the *Swinomish* and *Foster* decisions, Ecology finds itself in the position of being  
19 unable to appropriate water for any other purpose because it would impair those senior MIF  
20 water rights. This colossal error in judgment, which violated statutory mandates for the  
21 appropriation of water, has come home to roost because Ecology's safety valves (OCPI,  
22 reservations, and out-of-kind mitigation) are no longer available. The problem cannot be fixed  
23 without invalidating the illegally adopted MIFs in the Dungeness Rule. Ecology can adopt a new  
24 set of MIFs for the Dungeness basin after complying with the four-part test, but only if the  
25 current MIFs are invalidated. If they are not, it will be too late to consider the availability of  
26 water and the public interests involved.

1 **IV. CONCLUSION**

2 Supreme Court precedent determined after the effective date of the Dungeness Rule  
3 demonstrates that Ecology ignored critical statutory mandates before creating new MIF water  
4 rights. It failed to comply with four-part test in the Water Code for new MIF appropriations. In  
5 doing so, Ecology exceeded its statutory authority as a matter of law. The Court should therefore  
6 declare that the Dungeness Rule is invalid.

7 **V. RELIEF REQUESTED**

8  
9 Plaintiffs, by and through their counsel, Thomas M. Pors, move the Court for summary  
10 judgment and request a declaration of law as follows:

- 11 1. Minimum instream flows are appropriations of water that must meet the same  
12 requirements as any other appropriation of water under the Water Code. Before  
13 adopting minimum flows as water rights, Ecology must affirmatively find (1) that  
14 water is available, (2) for a beneficial use, and that (3) an appropriation will not  
15 impair existing rights, or (4) be detrimental to the public welfare. *Swinomish*, 178  
16 Wn.2d at 588-89; RCW 90.03.290(3).<sup>7</sup>

17 DATED this 17<sup>th</sup> day of November, 2015.

18 LAW OFFICE OF THOMAS M. PORS

19 

20 Thomas M. Pors, WSBA No. 17748  
21 Attorney for Plaintiffs

22  
23  
24  
25 <sup>7</sup> Because the Court determined that Plaintiffs' MNB issue is not appropriate for summary judgment, Plaintiffs  
26 reserve the right to request additional relief that would require a MNB analysis before adopting MIFs as water rights,  
27 although this would appear to be implicit as part of the public welfare prong of the four-part test.

APPENDICES

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1. Slip Opinion, *Sara Foster v. Department of Ecology and City of Yelm*, Supreme Court Case No. 90386-7 (October 8, 2015).
2. Chapter 173-518 WAC