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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,

and

CENTER FOR ENVIRONMENTAL LAW &  
POLICY,

Intervener

NO. 14-2-02466-2

PLAINTIFFS' REPLY TO ECOLOGY  
AND CELPS'S RESPONSES TO MOTION  
FOR SUMMARY JUDGMENT

**I. INTRODUCTION**

Plaintiffs submit this consolidated reply to the response briefing of Defendants Department of Ecology (Ecology) and Center for Environmental Law & Policy (CELP).

The responses do not take issue with the Supreme Court's ruling in *Swinomish* that the 4-part test of RCW 90.03.290 is required before a reservation can be established by rule. That alone

PLAINTIFFS' REPLY TO ECOLOGY AND  
CELPS'S RESPONSES TO MOTION FOR  
SUMMARY JUDGMENT

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1 is enough to grant summary judgment to Plaintiffs on the issue presented, because there is no  
2 legal distinction in RCW 90.03.345 between the establishment of reservations or instream flows  
3 as water rights with priority dates. Both are established by rule. No Legislative intent to exempt  
4 instream flows can be found in the related statutes.

5 The responses instead attempt to paint a picture that instream flow appropriations are so  
6 different from reservations and other appropriations that a different set of rules should apply.  
7 These arguments do not hold water. In fact, they are attempting through omission and  
8 misdirection to argue both ways about the nature of instream flow water rights – that they are not  
9 like other water rights with priority dates so they do not require the 4-part test, but that they are  
10 just like other waters rights with priority dates and must be protected from impairment by any  
11 new application for water rights or exempt water uses in the same basin, even if that means no  
12 new water rights can ever be granted due to these instream flows and their status as  
13 appropriations with priority dates. They can't have it both ways.

14 Boiled down to the essentials, Ecology and CELP are arguing that instream flow water  
15 rights can have the full effect of appropriations that could foreclose any new water right in the  
16 basin, but without meeting the statutory standards for establishment of water rights under the  
17 prior appropriation system. This argument is inconsistent with the prior appropriation doctrine.  
18 This is a critical issue for the Dungeness Basin and for the state, because Ecology and CELP are  
19 seeking to avoid the public interest evaluation and availability tests for establishing instream  
20 flows as water rights. Multiple recent precedents have shown that the impact of this can foreclose  
21 all other water rights and exempt water uses in the same basin.

## 22 II. REPLY ARGUMENTS

### 23 A. Rules of Statutory Construction

24 Ecology argues that their interpretation of the statutes is entitled to deference, citing  
25 *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015). *Cornelius* did not involve  
26

1 one of the exceptions to agency defense described in Plaintiff's Motion for Summary Judgment  
2 at p. 7. An agency's interpretation is not entitled to deference if the statute does not require the  
3 agency's expertise (*Willowbrook Farms v. Ecology*, 116 Wn. App. 392, 66 P.3d 64 (2003)), is  
4 not ambiguous (*Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998)),  
5 or if the agency's interpretation conflicts with the statute. *Swinomish Indian Tribal Cmty. v.*  
6 *Dep't of Ecology*, 178 Wn.2d 571, 581 (2013). Ecology's briefing fails to assert that the  
7 applicable statutes are ambiguous or require their unique expertise to decipher. In fact, the  
8 Supreme Court has so recently and so completely interpreted the applicable statutes that any  
9 interpretation contrary to the Supreme Court's would obviously fail to satisfy the test for agency  
10 deference. Ecology's interpretation of the 4-part test as it applies to appropriations established by  
11 rule is inconsistent with the Supreme Court's interpretation of those statutes, and therefore is not  
12 entitled to deference. Only the Legislature can change the law, not an agency interpretation.

13 CELP argues for a rule of statutory construction that the more recently enacted and  
14 specific statute will control over an older, more general law. CELP Response at p. 17. Plaintiffs  
15 agree, but point out that this rule of statutory construction cuts against CELP and Ecology, not  
16 for them. The 4-part test was adopted in 1917 along with the codification of prior appropriation  
17 as the only means for establishing new water rights in the State. Laws of 1917, Ch. 117. The  
18 statutes authorizing protection of instream flows were adopted in 1969 (RCW 90.22.010) and  
19 1971 (RCW 90.54.040). It is true that these statutes do not mention the 4-part test, but neither do  
20 they mention that instream flows are appropriations with priority dates. That feature of the law  
21 was not added until later, in 1979, when the Legislature created RCW 90.03.345. Laws of 1979,  
22 ex. sess. Ch. 216, §7. This statute is the most recent and specific statute relating to the present  
23 issue, not the 1969 and 1971 acts, and it has already been interpreted by the Supreme Court to  
24 require the 4-part test for appropriations established by rule.

25 Another rule of statutory construction is that the Legislature is presumed to be aware of  
26 and understand existing law when it adopts a new and related provision. See *Swinomish*, 178  
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1 Wn.2d at 587. The Legislature directed that reservations and instream flows be established by  
2 rule rather than by application for a permit, and then the Legislature, in 1979, created RCW  
3 90.03.345 giving reservations and instream flows the status of appropriations with priority dates.  
4 If the Legislature intended that these two new types of appropriations should be exempt from the  
5 requirements of every other appropriation under the Water Code, including the 4-part test, it  
6 could have specified that in 90.03.345 or 90.03.290. It did not. Therefore, these appropriations by  
7 rule are not exempt from the 4-part test, as the Supreme Court clearly recognized in *Swinomish*.

8 **B. Instream Flows and Reservations Are Established by the Same Mechanism**

9 Respondents' primary argument to distinguish *Swinomish* and the requirement for the 4-  
10 part test is that instream flows and reservations are established differently. This is false and  
11 misleading. Both instream flows and reservations are established by rule. Instream flows are  
12 required to be established by rule pursuant to RCW 90.22.020 and RCW 90.54.040. Reservations  
13 are required to be established by rule pursuant to RCW 90.54.050. Thus, instream flows are  
14 exactly like reservations in how they are established, by rulemaking pursuant to the  
15 Administrative Procedure Act, chapter 34.05 RCW. It is not important that other types of  
16 appropriations are established by application for permits, because that is not how reservations or  
17 instream flows are established and the Supreme Court has already determined that the  
18 establishment of reservations requires the 4-part test. Neither Ecology nor CELP contends that  
19 the Supreme Court was wrong about that determination in *Swinomish*. They are simply trying to  
20 mislead this court into thinking that instream flows are different. As to their establishment, they  
21 are not different, and that is the critical point for purposes of the 4-part test.

22 **90.03.345 Establishment of reservations of water for certain purposes and**  
23 **minimum flows or levels as constituting appropriations with priority dates.**  
24 The establishment of reservations of water for agriculture, hydroelectric energy,  
25 municipal, industrial, and other beneficial uses under RCW 90.54.050(1) or  
26 minimum flows or levels under RCW 90.22.010 or 90.54.040 shall constitute  
27 appropriations within the meaning of this chapter with priority dates as of the  
effective dates of their establishment. ... (Emphasis added).

1 The plain meaning of this statute is that the establishment of reservations or instream  
2 flows constitutes an appropriation within the meaning of the Water Code, Chapter 90.03 RCW,  
3 not how they are implemented. RCW 90.03.010, a pre-existing part of the Water Code, provides  
4 in pertinent part:

5 **90.03.010 Appropriation of water rights—Existing rights preserved. ...**  
6 Subject to existing rights all waters within the state belong to the public, and any  
7 right thereto, or to the use thereof, shall be hereafter acquired only by  
8 appropriation for a beneficial use and in the manner provided and not otherwise.  
9 ... (Emphasis added.)

10 The Supreme Court cited this provision in *Swinomish* and clearly interpreted it together  
11 with RCW 90.03.290 (the 4-part test), RCW 90.03.345 (reservations and instream flows are  
12 appropriations with priority dates) and RCW 90.54.050 (reservations are established by rule).  
13 There is no hint in the *Swinomish* decision that the Supreme Court was confused about the fact  
14 that reservations are not established by an application for a permit. In fact, after citing RCW  
15 90.03.010 the very next statement in *Swinomish* is “Reservations of water under RCW 90.54.050  
16 constitute appropriations of water.” *Swinomish*, at 588; citing RCW 90.03.345. The Court then  
17 stated, “Reservations of water must therefore meet the same requirements as any appropriation of  
18 water under the water code,” and recited the 4-part test of RCW 90.03.290. *Swinomish*, at 588-  
19 89. Clearly the Supreme Court was aware that reservations are established by rule and not by  
20 permit, but held nevertheless that because reservations are appropriations with priority dates, they  
21 must comply with the Water Code and meet the 4-part test. Nothing in Respondents’ arguments  
22 support a different interpretation of these statutes, and if they did, it would be contrary to the  
23 Supreme Court’s interpretation.

24 The only difference between the establishment of reservations by rule as appropriations  
25 with priority dates and the establishment of instream flows by rule as appropriations with priority  
26 dates is which rule authorizes them. For purposes of the Water Code, it doesn’t matter which rule  
27 authorizes their establishment, only that they meet the 4-part test before they are established.

1           **C. Arguing that Instream Flows Have a Unique Purpose is a Red Herring**

2           CELFP and Ecology also argue that instream flows and reservations are established for  
3 different purposes and operate differently once established. These arguments also miss the point.  
4 There is nothing in the establishment clause of RCW 90.03.345, or the Supreme Court’s opinion  
5 in *Swinomish* that pegs the 4-part test requirement to the unique purpose of reservations or how  
6 they operate after they are established. In fact, none of the distinguishing factors listed by  
7 Ecology and CELFP alter the fact that instream flows are appropriations with priority dates. Their  
8 attempts to divert the court’s attention from this simple fact and from the Supreme Court’s  
9 interpretation requiring the 4-part test are just smoke and mirrors.

10           **D. The 4-Part Test Ruling in *Swinomish* was not Dicta.**

11           Ecology argues that the Supreme Court’s 4-part test ruling in *Swinomish* was dicta and  
12 does not warrant a similar ruling for instream flow appropriations. Ecology is wrong and a  
13 careful reading of the *Swinomish* decision verifies that. In *Swinomish*, the Supreme Court was  
14 explaining the full set of reasons that Ecology had no authority to adopt the reservations that  
15 were challenged in that case. After examining and interpreting the common statutory scheme, the  
16 Court first ruled that Ecology’s test for identifying “overriding considerations of public interest”  
17 was insufficient and conflicted with the plain meaning of the statute, RCW 90.54.020(3)(a). 178  
18 Wn.2d at 586-88. The Court then discussed OCPI, instream flows and reservations in the context  
19 of the prior appropriation doctrine and rejected Ecology’s interpretation of OCPI as inconsistent  
20 with the entire statutory scheme. 178 Wn.2d at 588-591. The key language cited in Plaintiff’s  
21 motion about the 4-part test requirement comes from this section of the Court’s decision, which  
22 was not dicta at all. It was a key part of the Court’s analysis that OCPI was not a replacement for  
23 prior appropriation and the 4-part test.

24           The Court went on to find that use of the OCPI exception to establish reservations in the  
25 Skagit Rule would violate at least two prongs of the 4-part test – availability and impairment.  
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1 178 Wn.2d at 589. Thus, the Court’s interpretation of the entire statutory scheme, including  
2 RCW 90.03.345, the OCPI exception, and the prior appropriation system in the Water Code,  
3 concluded that the 4-part test was necessary before establishing a reservation by rule. How can  
4 this be regarded as dicta and dismissed by Ecology, which is responsible for implementing the  
5 decision of the Court? It is disingenuous in the extreme for Ecology to suggest that the Thurston  
6 County Superior Court ignore this precedent.

7 Was the Supreme Court wrong in *Swinomish*? None of the parties to this case have  
8 suggested that. It would therefore be a mistake to ignore the Supreme Court’s holding requiring  
9 the 4-part test for appropriations established by rule. Changing that interpretation of the statutes  
10 is a matter that only the Legislature can accomplish by amending the statutes.

11 **E. The Directive to Protect Base Flows does not Alter the Requirements for**  
12 **Appropriations Established by Rule.**

13 As expected, Ecology argued that the “base flow” provision of the Water Resources Act  
14 somehow exempts instream flows from the four-part test, which is a red herring. Ecology  
15 specifically argues that if the Legislature intended Ecology to use the 4-part test to establish  
16 instream flows it would have said so. Conversely, the Legislature did not say the opposite either,  
17 that base flows were exempt from the 4-part test. In fact, the subject was not raised in statute  
18 until eight years later, when RCW 90.03.345 was adopted and codified in the Water Code. Prior  
19 to 1979, instream flows did not have the status of appropriations so it would have been  
20 superfluous to mention the 4-part test. Later and more specific statutory provisions control over  
21 earlier or more general statutes.

22 Because the Supreme Court directs that water rights statutes be interpreted together as  
23 part of a statutory scheme, the “base flow” requirement cannot be interpreted in isolation. If the  
24 Legislature intended that the obligation to protect “base flows” should trump the obligation to  
25 use the 4-part test for new appropriations by rule, it wouldn’t have used a different term,  
26 “minimum flows or levels under RCW 90.22.010 or 90.54.040” in RCW 90.03.345. Clearly, the  
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1 Legislature did not state that “base flows” are water rights with priority dates or that they are  
2 exempt from the 4-part test.

3 **F. Ecology’s Dismissal of Plaintiff’s Arguments as “Policy” is Inappropriate**  
4 **and Misreads their Relevance.**

5 Plaintiffs’ Motion for Summary Judgment raises four arguments (III.D - G) to illustrate  
6 the consistency of the 4-part test requirement for appropriations by rule with other related statutes  
7 and how Ecology’s errors are compounded when they fail to balance the public interest before  
8 the establishment of instream flow water rights. These arguments are relevant and cannot be  
9 dismissed as “policy” because they examine the complicated and interrelated statutory scheme  
10 for both instream protection and water allocation for other uses. The Supreme Court also made  
11 lengthy interpretations of the statutory scheme in *Postema*, *Swinomish*, and *Foster*, but Ecology  
12 does not contend that those interpretations were irrelevant.

13 This motion does not include the MNB issue, which was excluded by order of the court.  
14 However, the MNB directive in both RCW 90.54.020(2) and 90.03.005 is part of the relevant  
15 statutory scheme, and illustrates the enormous significance given by the Legislature to water  
16 allocation policy choices and and the public interest in regulatory decisions that it entrusted to  
17 Ecology. Critical among these directives is that Ecology must carefully weigh the costs and  
18 benefits of allocations of water to both instream and out-of-stream uses for the maximum net  
19 benefit of the people of the state. The public welfare prong of the 4-part test is similar to the  
20 MNB directive in its purpose. It requires a weighing of the public interest before establishing a  
21 new appropriation with a priority date, i.e., before that new appropriation could foreclose other  
22 appropriations important to the public by virtue of the first-in-time aspect of the prior  
23 appropriation system. These requirements reflect a common statutory purpose that Ecology not  
24 allocate or appropriate water without first considering the balance of public interests involved,  
25 because otherwise, just like in *Swinomish* and *Foster*, Ecology could foreclose opportunities to  
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1 appropriate water for other purposes by unwittingly creating a water right that has the effect of  
2 closing a basin.

3 In the *Swinomish* case, Ecology adopted the Skagit River instream flows and stream  
4 closures by rule in 2000 without a 4-part test or MNB finding. These water rights were protected  
5 from impairment by subsequent appropriations. This later prevented Ecology from establishing  
6 reservations for other out of stream uses that it forgot to authorize before establishing instream  
7 flow appropriations by rule. In the *Foster* case, Ecology established instream flows by rule in the  
8 Deschutes and Nisqually basins in 1980 and 1982, without 4-part tests or MNB findings. Those  
9 instream flow water rights later prevented Ecology from granting a water right permit to the City  
10 of Yelm because, even with a “gold-plated mitigation plan” and 12-factor OCPI finding, Ecology  
11 had no authority to allow any impairment to the existing instream flow water rights, even a de  
12 minimum impairment, and even with an OCPI finding. These harsh results happened because  
13 under the prior appropriation system the water right that is first-in-time is first-in-right, and  
14 cannot be impaired by any subsequent appropriation. *Swinomish*, 178 Wn.2d at 591; *Foster*, slip  
15 opinion at 5. This is the relevance of Plaintiffs’ remaining arguments that Ecology wants the  
16 court to ignore as “policy” and CELP wants the court to strike from the Plaintiffs’ motion.

17 To summarize Plaintiffs’ remaining arguments, the balancing of public interests in water  
18 allocation that is required by the Legislature has to take place in the proper sequence, before an  
19 instream flow water right is created, in order to have any effect, because once such a right has  
20 been established, there is no statute that requires any further weighing of interests or economic  
21 considerations. *Swinomish*, 178 Wn.2d at 585 (citing *Postema*, 142 Wn.2d at 82-83). After  
22 *Foster*, it also clear that Ecology cannot replace a public interest finding before adopting  
23 instream flow water rights with an OCPI type of public interest finding after-the-fact.

24 The Legislature could not have intended that Ecology could avoid public interest  
25 evaluations altogether by establishing instream flow water rights without either a MNB finding  
26 or the four-part test findings of RCW 90.03.290. Why would the Legislature create a requirement  
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1 for a public interest evaluation and then allow it to be made after it is too late to have any  
2 consequence? Ecology and CELP want the court to ignore this question. They are defending an  
3 absurd result at the cost of water availability for domestic and agricultural uses and municipal  
4 growth in the Dungeness Basin, which will forever be foreclosed without the public interest ever  
5 having been determined if the Dungeness Rule is not invalidated.

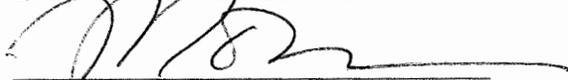
6 Finally, CELP makes a feeble comparison of the public notice features of the APA  
7 rulemaking requirements to the requirement that the public interest be determined before  
8 allocating water for competing uses. Public notice and public interest determinations are not the  
9 same thing. Essentially, Ecology and CELP argue that it is okay to ignore the public interest in  
10 water allocation so long as the public is notified of a process. When the public interest is ignored,  
11 the public is left to bear the cost of Ecology's philosophy to protect instream flows first and  
12 worry about the consequences later.

### 13 III. CONCLUSION

14 This should be an easy decision for the Court, because it applies recent black letter law  
15 from the Supreme Court. That precedent is supported by interpretation of the entire statutory  
16 scheme. Ecology and CELP do not disagree with that precedent, and their arguments that  
17 instream flow water rights deserve a different set of rules fail for the reasons discussed above.  
18 Because Ecology failed to comply with a statutory requirement it exceeded its statutory authority  
19 as a matter of law. The Dungeness Rule should be declared invalid. Ecology can reopen the  
20 rulemaking process to protect instream flows so long as it complies with all applicable statutory  
21 mandates, including the 4-part test.

22 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of January, 2016.

23  
24 LAW OFFICE OF THOMAS M. PORS



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