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85 South Washington Street
Suite 301
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206-829-8299

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16 *An Introduction to Washington Water Law*, Office of the Attorney General,

17 January 2000 20, 21

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I. INTRODUCTION

Intervener Center for Environmental Law & Policy offers this Response to Plaintiffs’ Opening Brief. Plaintiffs challenge Ecology’s adoption of the Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area (the Dungeness Rule, or “Rule”) under the Administrative Procedure Act, RCW 34.05. Plaintiffs have the burden to demonstrate that the Rule is invalid because it exceeded Ecology’s statutory authority, was adopted without compliance with statutory rulemaking procedures, or because it is arbitrary and capricious. They have not met this burden.

The Rule was developed after a decades-long process involving state and local governments, Tribes, environmental groups, and other stakeholders. It strikes an accommodation between protecting instream flows and values and providing water for development in the watershed, by allowing mitigated uses of groundwater for new domestic users. Because the new uses are mitigated, impacts on streamflows and instream values will be avoided. Mitigation may be provided through a water banking system (currently, the Dungeness Water Exchange) that ensures mitigation water is present in adequate quantity and provides a “one-stop” method for a landowner to obtain mitigation.

Plaintiffs’ arguments are based on significant misapprehensions, or even misrepresentations, regarding the Rule’s effect. Much of their Opening Brief asserts that the Rule operates to bar use of permit-exempt wells for domestic development and invokes the specter of development moratoria and wholesale devaluation of property. They then attempt to construct an argument that a rule that restricts rural development must somehow be invalid. However, both the premise and the logic of these arguments are flawed. First, the Rule does not bar rural use of permit-exempt wells; it in fact provides additional certainty to landowners regarding water use. There is nothing to

1 show that development has not continued apace in the Dungeness Basin. Second, even
2 if the Rule did bar or restrict use of these wells, plaintiffs have not shown that it would
3 be invalid for that reason.

4 This challenge is in reality an attack on the instream flow system in
5 Washington, which plaintiffs seek to eviscerate. Plaintiffs once again raise the issue of
6 whether the four-part test of RCW 90.03.290(3) is required before an instream flow can
7 be set. This theory would essentially prevent any further protection of instream flows in
8 Washington by requiring that streamflows could only be set at extremely low levels.
9 This argument was incorrect when it was raised on summary judgment, and it is
10 incorrect now.

11 The Rule was adopted after a long and careful process and provides a pathway
12 to meaningfully protect streamflows while accommodating reasonable development.
13 For the reasons explained in this Response, CELP respectfully requests that this court
14 affirm the Department of Ecology and dismiss this action.

15 **II. STATEMENT OF FACTS**

16 **A. The Dungeness River and its Watershed are Heavily Impacted by 17 Irrigation Diversions.**

18 The Dungeness River drains a watershed extending from high in the Olympic
19 Mountains to the north shore of the Olympic Peninsula, making up the eastern half of
20 Water Resource Inventory Area 18 (the Elwha-Dungeness watershed). The Dungeness
21 River Basin is located in the rain shadow of the Olympics, and is much drier than other
22 areas of Western Washington. Measured average annual flow streamflow is 384 cfs, but
23 this is highly variable; there are two flow peaks, in winter and in late spring/early
24 summer, and flow is lowest in late summer. ECY070224; ECY 065845-6. The mean
25 flow, measured above the major agricultural diversions, is 230 cfs in August and 161
26 cfs in late September. ECY070224.

1 Because of the relatively low rainfall in the basin, agriculture is dependent on
2 irrigation, mainly through diversions from the River, which is the most heavily
3 developed for irrigation of all rivers in Western Washington. ECY071754. Historically,
4 as much as 80% of the river's flow was diverted for irrigation. ECY007890. A 1924
5 adjudication identified 579 cfs of water rights. ECY 069967. A 2000 review by
6 Ecology identified certificates and permits for diversion of 207.7 cfs from the
7 Dungeness.¹ ECY 069966. The actual flow of the river during the last part (September)
8 of the summer irrigation season is frequently lower than either of these figures - the
9 50% and 90% exceedance flows for August/September are 207 and 142 cfs,
10 respectively.² ECY070224.

11 **B. Fish Populations in the Dungeness Basin Depend on Water in
12 Streams, And Low Flows Due to Diversion of Water Threaten Their
13 Populations.**

14 The River is used by salmonids including pink, chinook, coho, and chum
15 salmon, steelhead, and bull trout. Populations of these fish have decreased dramatically
16 since European settlement. ECY 71782. The Dungeness spring chinook and summer
17 chum salmon, as well as bull trout, are listed as Threatened under the Endangered
18 Species Act. ECY 070553. Additionally, fall coho, upper Dungeness pink, and summer
19 and winter steelhead are state-listed as "depressed," and spring/summer chinook, lower
20 Dungeness pink, and summer chum are state-listed as "critical." *Id.* Dungeness River
21 natural (non-hatchery) spring chinook spawning escapement has been fewer than 100

22 ¹ A 1998 agreement between the Water Users Association and the Department of Ecology limits total
23 irrigation diversion by Water Users' Association members to no more than half of the river flow.
24 ECY003450.

25 ² River flows are often described in terms of "exceedance flows," which represent the flow that is
26 exceeded on a given date in a certain percentage of years. For example, the 50% exceedance flow is the
flow that is greater than the actual flow in 50% of years and less than the actual flow in 50% of years
(essentially a median flow). Actual flow is greater than the 90% exceedance flow in 90% of years; that
is, a 90% exceedance flow represents the flow in the lowest 10% of years.

1 fish in some recent years. ECY 071783. Returns of fall chum salmon to the Dungeness
2 and other streams in the watershed are also greatly reduced relative to historic levels,
3 with “only ‘a handful’ of fish returning on an annual basis.” ECY071785. Wild coho
4 and pink salmon stocks are similarly reduced. ECY 071786; ECY 071789.

5 Numerous small creeks in the basin also suffer from low streamflows. The 90%
6 exceedance flows in August and September are essentially zero for Bagley, Bear, Bell,
7 Cassalery, Gierin, Matriotti, and Siebert creeks. ECY 069880; ECY070210. Of these,
8 Bagley, Bear, and Siebert Creeks have been reported to host chum salmon, and Bagley,
9 Bear, Cassalery, Gierin, Matriotti, and Siebert to host coho. ECY071784-9. Pink salmon
also spawn in Matriotti Creek. ECY071789.

10 Late summer and early fall (when irrigation demand is near its highest) has been
11 identified as a critical period in terms of water levels and fish habitat. ECY071768. As
12 early as 1930, it was recognized that irrigation ditches depleted the river of water during
13 the spawning season. ECY071836. Low flows in late summer impede migration of adult
14 salmon as well as reducing habitat available for juveniles, and were identified as the
15 primary fish access concern. *Id.*; ECY070554. Reduced streamflows due to diversion
of water has been identified as a primary cause of the loss of fish populations.

16 ECY071736. The Dungeness River Management Team identified water withdrawals as
the primary reason preventing upstream migration of pink and chinook salmon.

17 ECY010382. The National Marine Fisheries Service, in a letter commenting on the
18 proposed Rule, also expressed concern (“NMFS believes there is abundant evidence
19 that most years, withdrawals from the Dungeness River are a substantial limiting factor
20 for productivity of chinook salmon by adversely affecting streamflows . . .”)

21 ECY072186.

22 Flow during spawning has been generally correlated to salmon production in
23 numerous studies. A study of coho run size and streamflow found that June through

1 September flows were correlated with the numbers of returning adults. ECY009981.
2 The previous year’s spawning flow was also highly correlated with the population of
3 smolts in the following spring (“water equals fish”). ECY009825. For a discussion of
4 these and other studies, see ECY001830 at 001899-1903. As well as average flows
5 (those present in most years), occasional high flows or floods are important in
6 supporting a healthy stream environment; among other functions, they affect the
7 channel shape, clean out debris, and create habitat for some species. ECY012658;
8 ECY015377, ECY071768; ECY065844.

9
10 **C. Groundwater Withdrawals Affect Streamflows.**

11 Surface streams in East WRIA 18, including the Dungeness River itself, are in
12 “hydraulic continuity” with groundwater. See ECY069200-268; ECY069889. This
13 means that streams may gain or lose water to groundwater, depending on the level of
14 the groundwater table. *Id.* In much of the lower river (from River Mile 11.8, above
15 Sequim, to River Mile 3.6), the Dungeness River generally loses water to groundwater.
16 ECY069208; ECY069234. Significant declines in groundwater levels have been
17 documented in association with the City of Sequim’s well field. ECY069882-3.
18 Additional groundwater withdrawals would be expected to reduce streamflow in the
19 River and/or to smaller streams in this WRIA.

20 **D. The Dungeness Rule is The Product of a Long Collaborative Process**
21 **Involving Governments, Tribes, Agencies and Other Stakeholders.**

22 There has been a long history of scientific study and collaborative planning for
23 management of the Dungeness watershed, including recommended instream flows to
24 preserve instream values.³ An Instream Flow Incremental Methodology (IFIM) study

25 ³ See Chapter 1 of the Watershed Plan for a full history and description of the various working groups and
26 the reports that have been produced. ECY069824-836.

1 was performed in 1991 by the US Fish & Wildlife Service. ECY010567-698.⁴ In 1993,
2 based on the IFIM study, the Dungeness Instream Flow Group (“DIFG”; made up of
3 representatives of NMFS, Ecology, the then-existing Washington Departments of
4 Fisheries and of Wildlife, the U.S. Fish and Wildlife Service, and the Jamestown
5 S’Klallam Tribe) developed recommendations for instream flow. The recommendations
6 are for flows of 575 cfs from November through March, 475 cfs from April-July, and
7 180 cfs from August to October. ECY070274.

8 The Dungeness-Quilcene Management Plan (“DQ Plan”) was produced in 1994,
9 by a working group that included representatives from agriculture business, fisheries,
10 environmental, recreation caucuses, as well as tribal, state, and local governments.
11 ECY068233-844. One recommendation of the DQ Plan was that the instream flow
12 levels developed by IFIM should be adopted through rulemaking. ECY068508;
13 ECY068534.

14 In 1998, the Legislature passed the Watershed Management Act (RCW 90.82),
15 which provides a framework for local governments and stakeholders to develop a plan
16 for watershed resource management. Planning for WRIA 18 began in 1998. The
17 Watershed Planning Unit for WRIA 18 included Clallam County, the City of Port
18 Angeles, the Agnew Irrigation District, Jamestown S’Klallam Tribe, and the Elwha
19 Klallam Tribe as Initiating Governments (IG), with Clallam County as the Lead
20 Agency. ECY069773. Watershed planning for WRIA 18 was split into East (Dungeness
21 watershed) and West (Elwha watershed) regions.

22 The planning team for East WRIA 18 (Dungeness River Management Team;
23 “DRMT”) included representatives from governments (Clallam County, City of
24 Sequim, Washington Departments of Ecology and Fish & Wildlife), property owners

25 ⁴ IFIM examines habitat conditions in a river as a function of streamflow. By using known habitat
26 preferences for fish, the relationship between streamflow and usable habitat is determined. This allows
decision makers to establish instream flows to protect the greatest amount of fish habitat when setting
instream flows.

1 (Riverside Property Owners, River Mile 0-3.25 and River Mile 3.25-4.25), water users
2 (Dungeness River Agricultural Water Users Association), and environmental groups
3 (Protect the Peninsula's Future, North Olympic Land Trust). ECY069774. The DRMT
4 recommended that the Watershed Plan include the 1993 Dungeness River instream flow
5 recommendations made by the Dungeness Instream Flow Group.⁵ ECY070558. The
6 Watershed Plan (ECY069771-070954) ultimately did include these instream flow
7 recommendations, and was approved by all members of the WRIA 18 Planning Unit in
8 2004. ECY070477-8; ECY069775-6.

9 Where a Watershed Planning Group has agreed on instream flows, Ecology is
10 obligated to undertake rulemaking to adopt those flows into rule. RCW
11 90.82.080(1)(b). To adopt the flows determined by the East WRIA 18 Watershed
12 Planning process, Ecology conducted rulemaking pursuant to the process set forth in
13 RCW 34.05.310 - .395:

- 14 • A Preproposal Statement of Inquiry, as required by RCW 34.05.310, was drafted
15 and made available. ECY070955.
- 16 • A Notice of Proposed Rule per RCW 34.05.320 was drafted and made available.
17 ECY071266-7.
- 18 • Opportunities for public participation were provided as required by RCW
19 34.05.325:
 - 20 ○ An oral hearing was held June 28, 2012, in Sequim, Clallam County, and
21 comments were recorded per RCW 34.05.325(2). ECY000977-001722.
 - 22 ○ Written comments were solicited and included in the official record, per
23 RCW 34.05.325(3). ECY001843-2354.

24 ⁵ A narrative description of the studies leading to these flow recommendations is contained in the
25 Concise Explanatory Statement. ECY001830 at 001856-9.

- 1 • A Concise Explanatory Statement was prepared according to RCW
2 34.050.325(6)(a), including all comments received and Ecology’s responses.
3 ECY001830-2354.
- 4 • Ecology analyzed the costs and benefits of the proposed Rule, and determined
5 that it was the least burdensome alternative that would serve the goals and
6 objectives of the rulemaking, as described in RCW 34.05.328(1). ECY002380-
7 002402.
- 8 • Ecology prepared a Small Business Economic Impact Statement as required by
9 RCW 19.85.030. ECY072295-072303.
- 10 • Ecology maintained a rulemaking file as required by RCW 34.05.370.
11 ECY000001-072336.

12 **E. The Dungeness Rule Provides for Mitigated Use of Permit-Exempt
13 Wells, as Administered by The Dungeness Water Exchange.**

14 In order to protect streamflows while still allowing development, the Rule
15 contemplates new permit-exempt domestic wells under RCW 90.44.050, provided that
16 the water use is mitigated or it can be shown that it will not impact surface water. WAC
17 173-518-070(3). Water use may be mitigated through credits purchased from the
18 Dungeness water exchange or through an individual, Ecology-approved mitigation plan.
19 WAC 173-518-70(3)(a). While the Rule sets out reservations of water for domestic use,
20 the provisions for mitigated permit-exempt water use do not reference the reservations.
21 WAC 173-518-080. Mitigation through the exchange or through an individual plan
22 must meet certain requirements designed to ensure that mitigation is effective and is
23 guaranteed for the life of the water use. WAC 173-518-075(1). The Rule does not
24 specify what entity is to run the water exchange, or precisely how it is to provide
25 mitigation credits.

26 Initially, the Washington Water Trust (“WWT”) was chosen to operate the
exchange. WWT submitted a Mitigation Plan to Ecology in December 2012 that

1 outlined mechanisms for providing mitigation water. ECY071280-91. This plan
2 describes several such mechanisms, including purchasing or leasing water rights, either
3 year-around or for partial-season, aquifer recharge through use of irrigation water,
4 reclaimed water, or Dungeness River water during times of high flow. ECY071282. The
5 Plan contemplates that Shallow Aquifer Recharge (SAR) will be “the primary strategy
6 for generating mitigation.” ECY071281. Ecology approved this Plan on December 19,
7 2012, before the effective date of the Rule. ECY071278.

8 Under the Mitigation Plan, the Water exchange will issue mitigation certificates
9 in exchange for a one-time payment. Mitigation certificates are intended to provide
10 mitigation for basic indoor domestic use, with the option to purchase mitigation for
11 basic or extended outdoor water use. ECY071287. These mitigation packages are priced
12 at \$1000-\$3000. ECY071291. Mitigation certificates are recorded with the County
13 Auditor’s Office, and remain attached to the land (they are appurtenant to the title).
14 ECY024061; Washington Water Trust, “Dungeness Water Exchange Mitigation
15 Guidance Document” (2013) at 13 (Appendix A) (“Mitigation Doc.”).⁶ The Water
16 Exchange also issues Mitigation Certificate Options (MCOs), which allow a landowner
17 who is not currently ready to build on his or her property to ‘lock-in’ mitigation for a
18 period of up to five years. Mitigation Doc. at 15.

19 Mitigation for indoor use is available throughout the area covered by the
20 Dungeness Rule. ECY004463; ECY064954. As of March 2016 (three years after Rule
21 adoption), 120 mitigation certificates had been issued for new homes in the Dungeness
22 Basin. Declaration of Dan J. Von Seggern at Ex. 1⁷. This is similar to the level of

21 ⁶ This document, while outside Ecology’s record, is admissible under RCW 34.05.562(1)’s standard.
22 Plaintiffs have questioned the lawfulness of Ecology’s actions in adopting the Rule, based partly on their
23 view that the Rule will foreclose permit-exempt well use due to inadequate mitigation. Factual
24 information relating to availability of mitigation is precisely the evidence needed to resolve this question.
RCW 34.05.562(1)(b). CELP therefore asks that this court accept this document as evidence of the
operation of the mitigation envisioned in the Rule.

⁷ The message from Ms. Cronin is relevant and admissible under RCW 34.05.562(1)(b) for the same
reasons as the Mitigation Guidance Document.

1 construction pre-Rule: a September 14, 2012 email from Tom Loranger at Ecology
2 notes that over “the last three years, the average [number of building permits using
3 permit-exempt wells” has been in the 50 to 60 range.” ECY065512.

4 Responsibility for regulating development with respect to water availability
5 under the Dungeness Rule is set out under a Memorandum of Understanding between
6 Ecology and Clallam County. ECY071273-7. Ecology is to track water use and make
7 the reserves provided in the Rule available to the public, as well as providing assistance
8 in interpreting the Rule where necessary. *Id.* The County is to issue development
9 permits consistent with State law, and to confirm that the mitigation obligations
applicable to a given development have been met. *Id.*

10 III. STANDARD OF REVIEW

11 Administrative rules are reviewed under the Administrative Procedure Act, Chapter
12 34.05 RCW. The party challenging a rule has the burden to demonstrate its invalidity.
13 RCW 34.05.570(1)(a). A court will find a rule invalid only if it finds that the rule
14 violates constitutional provisions, exceeds the statutory authority of the agency, was
15 adopted without compliance with statutory rule-making procedures, or is arbitrary and
16 capricious. RCW 34.05.570(2)(c). Agency action is arbitrary and capricious if it is
17 “willful and unreasoning, and taken without regard to the attending facts or
18 circumstances.” *Hillis v. Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Where
19 there is room for two opinions, an action taken after due consideration is not arbitrary
20 and capricious. *Id.* This is so even if the reviewing court believes the action was in
21 error. *Id.* In reviewing an agency regulation, the court must “scrutinize the record to
22 determine if the result was reached through a process of reason, not whether the result
23 was itself reasonable in the judgment of the court.” *Aviation West Corp. v. Dep’t of*
Labor & Industries, 138 Wn.2d 413, 432, 980 P.2d 701(1999).

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IV. ARGUMENT

A. The Dungeness Rule Neither Precludes Development or Leaves Landowners “High and Dry.”

Many of Plaintiffs’ arguments are variations of the theme that the Rule is invalid almost *per se*, because it will allegedly create hardship by allocating water for “fish but not people.”⁸ This is based on their assertion that the Rule will deny most or all water for domestic use, and the unsupported concept that a rule which denies water for domestic use must somehow be invalid. See, for example, the claim that the Rule was not “adequately coordinate[d]” with local regulations allowing permit exempt wells (Opening Br. at 9-10), the argument regarding maximum net benefits (*id.* at 24-7), the misplaced discussion of the water availability and public welfare prongs of RCW 90.03.290(3) (*id.* at 31-33)⁹, and the argument that Ecology lacks authority to close basins to permit-exempt well use (*id.* at 40-43). Plaintiffs are both legally and factually incorrect on this issue.

i. The Rule Does Not Bar Development Using Permit-Exempt Wells; New Permit-Exempt Withdrawals are Specifically Provided For.

The very first paragraph of the Opening Brief contains the claim that the Rule uses a “blitzkrieg” approach, and “appropriates all the available water in the basin as instream flows without allocating water for human domestic needs.” Opening Br. at 1.

⁸ The “Statement of Facts” in Plaintiffs’ Opening Brief consists largely of argument aimed at showing that the consequences of the Dungeness Rule (Rule) are so dire that it must be invalidated, including numerous conclusory statements to the effect that the Rule will foreclose development in the Dungeness Basin, speculation about what might happen (but has not happened) as a result of the *Foster v. Ecology* decision, and improper analogies to a different Rule (the Skagit River Instream Flow Rule, WAC 173-503). These arguments are not only misplaced, but are largely unsupported by citation to authority. As such they should be disregarded.

⁹ Consistent with this court’s ruling of January 22, 2016, CELP expressly does not concede that the four-part test of RCW 90.03.290(3) is in any way applicable to establishment of instream flows to protect instream resources.

1 Plaintiffs next complain of “closure of ground water in the basin for new uses in the
2 rural area . . . using permit-exempt wells – the only reliable water supply available.” *Id.*
3 at 1. The statement that the Rule “appropriated all the water in the basin for fish and left
4 the people and private property in the basin high and dry” is even more hyperbolic (as
5 well as incorrect). *Id.* at 2. Plaintiffs go on to state that “Clallam County was issuing
6 building permits based on exempt wells up until the adoption of the rule,” but omit the
7 fact that the County *continues* to issue permits based on (mitigated) use of permit-
8 exempt wells. *Id.* at 22; *see* Section II(E), *supra*. And finally, they claim that the result
9 of Ecology adopting an instream flow without a formal “maximum net benefits”
10 analysis is “a building permit moratorium such as has occurred in the Skagit basin . . .”
11 *Id.* at 34.

12 A reader who is unfamiliar with the actual Rule and with the record could easily
13 be left with the (incorrect) impression that it is now impossible for anyone to obtain
14 water in the rural areas of WRIA 18, or to develop rural property there. But the claim
15 that there can be no new permit-exempt groundwater uses under the Rule is simply and
16 demonstrably false. While it is correct that the Rule generally closes the Dungeness
17 Basin to new appropriations of groundwater, it also true that it specifically contemplates
18 use of new permit-exempt wells in conjunction with mitigation of the new water use.
19 WAC 173-518-070. The Rule also establishes small reservations or “maximum
20 depletion amounts” of water that are to be used as “shock absorbers” (i.e. water from
21 the reservations may be used but the reservations must be replenished with mitigation
22 water). ECY065294; ECY072195. This allows landowners to obtain water even while
23 the details of mitigation in all areas are being worked out. In other words, there was no
24 “loss of ability” to use a permit-exempt well.

25 It is not surprising that plaintiffs have pointed to nothing in the record that
26 supports the straw man argument that landowners will be unable to build homes on their
properties, because they cannot. In fact, the actual evidence shows precisely the
opposite: in the 3 years since the Rule went into effect, development in the rural areas

1 of WRIA 18 has hardly ground to a halt. Landowners are purchasing mitigation rights
2 and developing new homes within the process provided by the Rule. *See* Section II(E),
3 *supra*. Clearly, landowners are far from being “left high and dry.” Neither do plaintiffs
4 present any evidence whatsoever to show a decline in property values in the Dungeness
5 Basin. This Court should disregard the arguments regarding loss of the ability to obtain
6 water for domestic use, and any lost property value that could hypothetically result, in
7 their entirety.

8 **ii. Even if The Rule Did Hinder Future Development, That
9 Alone Would Not Invalidate it.**

10 More fundamentally, even if the Rule were to result in a building moratorium, it
11 would not necessarily be invalid. There are ultimately limits to the available water
12 supply in any basin, and nothing in statute or caselaw guarantees that there must be
13 water for unlimited development. Plaintiffs have provided no authority that would
14 require this, citing only to RCW 90.54.020(5)’s provision that “[a]dequate and safe
15 supplies of water shall be preserved and protected in potable condition to satisfy human
16 domestic needs” and to the Washington Supreme Court’s opinion in *Ecology v.*
17 *Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002). While RCW 90.54.020 clearly
18 requires *protection and preservation* of potable water, it does not require that water be
19 provided wherever and whenever a landowner desires to use it, or that water for
20 unlimited development be provided in any given watershed.

21 In a case directly on point here , the Washington Court of Appeals recently
22 rejected the contention that RCW 90.54.020(5)’s requirement that water supplies be
23 “preserved and protected” allowed use of a permit-exempt well that would impair the
24 instream flow. *Fox v. Skagit County*, 193 Wn. App. 254, 372 P.3d 784, 2016 Wash.
25 App. Lexis 711 at *9 (2016). The citation to *Campbell & Gwinn* is also unavailing; the
26 Court’s opinion in that case actually notes that “the Legislature did not intend unlimited
use of the exemption for domestic uses, and did not intend that water appropriation for

1 such uses be wholly unregulated.” *Campbell & Gwinn*, 146 Wn.2d at 16. The *Campbell*
2 & *Gwinn* opinion also notes that permit-exempt wells are subject to prior
3 appropriations, and that Ecology may limit withdrawals by appropriators in order to
4 protect groundwater bodies. *Id.* at 17 n. 8. In short, nothing in RCW 90.44.050, the
5 *Campbell and Gwinn* opinion, or any other statute or opinion “guarantees” use of
6 permit-exempt groundwater in order to make use of any given piece of rural land.¹⁰

7 **B. The Details of How the Dungeness Water Bank is to Operate Are**
8 **Not Part of the Rule, And Are Not Before the Court in This Case.**

9 Whatever effect the recent Washington Supreme Court decision in *Foster v.*
10 *Ecology*, 184 Wn.2d 265, 362 P.3d 959 (2015), has on the Dungeness Water Bank’s
11 mitigation practices, it does not speak to validity of the Dungeness Rule. To date,
12 mitigation certificates sold by the water exchange have been supported by leases of
13 agricultural water for part of the irrigation season. Plaintiffs argue that this mitigation is
14 barred by *Foster* because water is not provided year-around and there are times when
15 impacts on the instream flow may not be fully mitigated. Because the Water Bank’s
16 mitigation is inadequate, the argument goes, the Water Bank cannot provide for
17 homeowners to obtain a non-interruptible water supply. In turn, they claim that this
18 “may result in building permit moratoriums¹¹ [sic] unless the Dungeness Rule is
19 invalidated.” Opening Br. at 23.

20 But *Foster* has no bearing on the Dungeness Rule itself. The issue of whether
21 mitigation *as practiced by the Water Bank* is permissible is irrelevant to the validity of
22 the Rule, and is not before the court in this lawsuit. The Rule provides that permit-
23 exempt groundwater use may be mitigated through “purchase of credits available

24 _____
¹⁰ The problem with this argument can readily be appreciated by substituting “irrigation water” for
25 “domestic use.” No reasonable person would argue that a party who buys land that could potentially be
26 farmed is necessarily entitled to water to irrigate it.

¹¹ As discussed above, even if the Rule did result in a building moratorium, that would not necessarily
invalidate it.

1 through the Dungeness water exchange,” or by an alternative mitigation plan submitted
2 by the proponent. WAC 173-518-070(3). The Rule requires that the proposed
3 withdrawal, with mitigation in place, will not “impair existing rights,” be detrimental to
4 the public interest, or “result in a loss of water from a closed source greater than the
5 applicable maximum depletion amount.” WAC 173-518-075(2). It does not, however,
6 specify the details of how a mitigation plan is to operate.

7 Nor does the Rule specify exactly how the Dungeness water exchange is to be
8 operated. “Dungeness water exchange” is defined in the Rule as “a water bank pursuant
9 to the Water Resources Management Act, chapter 90.42 RCW.” WAC 173-518-030.
10 The Rule does not set forth how mitigation credits will be generated by the Water
11 Bank.¹² And the Rule does not require that the Water Bank use partial-season, full-
12 season, or any other particular type of water right as mitigation.

13 Even assuming, *arguendo*, that plaintiffs are correct and mitigation through the
14 Water Bank’s current practices¹³ was not legally sufficient under *Foster*, this would
15 amount to a violation of WAC 173-518-075(2)’s requirement that water uses be
16 mitigated, but would not invalidate the Rule itself (validity of which is the *only* question
17 before this court). This court need not decide this issue, and indeed should decline to
18 address it until it is properly raised (for example, if a party were to bring a challenge to
19 a use of permit-exempt groundwater authorized on the strength of mitigation purchased
20 through the water bank).

21 ¹² WAC 173-518-070(3)(a)(i) provides that the 2008 Dungeness Ground Water Flow Model “will be the
22 basis for determining credits for offsetting consumptive use associated with the new water use,” but does
23 not specify what the source of mitigation water for those credits must be.

24 ¹³ It bears noting that the Water Bank’s Mitigation Plan envisions the primary source of mitigation as
ultimately being aquifer recharge, not agricultural water leased for part or all of the season. ECY071281.
In that event, any argument based on *Foster* would become moot.

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C. The Instream Resources Protection Program for WRIs 3 And 4 (Chapter 173-503 WAC) is Not Analogous to the Dungeness Rule, and This Court Should Disregard Any Argument That the Rule is Arbitrary and Capricious or Otherwise Invalid Based on the Arguments Regarding the Skagit Basin.

In another attempt to suggest that the Rule imposes impermissible hardship on landowners, plaintiffs point to the situation in the Skagit River basin (WRIA 3), where there are very real difficulties in obtaining water for domestic use.¹⁴ This line of argument is offered to suggest the Dungeness Rule fails to take into account the attending facts or circumstances, and is therefore arbitrary and capricious.

The situation in the Skagit basin is simply not analogous to the Dungeness. Water use in the Skagit basin is governed by a different rule (Chapter 173-503 WAC), which closes the basin to further withdrawals and (unlike the Dungeness Rule) contains no provision for mitigated use of groundwater. (for comparison of the Rules, see ECY012850). Plaintiffs' citation to a Skagit County assessor's document that purportedly shows devaluation of property due to lack of water availability is particularly inappropriate. Opening Br. at 3. Unlike the Skagit parcels affected by the lack of water availability, water *is* available for development throughout the Dungeness basin (*see* Section II(E), *supra*). It is telling that plaintiffs can produce no evidence that property values in the *Dungeness* basin have decreased since the Rule was adopted.

¹⁴ Plaintiffs' submission of several documents (outside of the record) relating to the Skagit River Rule and the current issues with water availability and development there is improper. On judicial review of an agency action, a court may "receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding: . . . (b) Unlawfulness of procedure or of decision-making process; or . . . (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record." RCW 34.05.562. As explained below, any documentation relating to operation of the Skagit River Rule is irrelevant to the validity of Ecology's actions in adopting the Dungeness Rule, and there is nothing to show that it is "needed" to resolve (or even that it would be helpful in resolving) any disputed issue regarding procedure in rulemaking or disputed facts. This court should decline to accept the Skagit documents.

1 Because of the large differences between the rules, the situation in the Skagit
2 basin does not predict future events in the Dungeness basin, and is not part of the
3 “attending facts or circumstances” to be considered in adopting the Dungeness Rule. In
4 *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 87, 11 P.3d 726 (2000),
5 the Washington Supreme Court declined to “search for a uniform meaning in rules that
6 simply are not the same.” Just as in *Postema*, plaintiffs here have “selectively chosen
7 rules which most closely support their . . . position.” *Id.* at 84. And just as in *Postema*,
8 this court should recognize that different rules contain different provisions and have
9 different effects. All argument relating to the effects of the Skagit Rule or to the current
10 difficulties in obtaining water for development in the Skagit Valley should be
11 disregarded by this court. For the same reasons, this court should also disregard the
12 argument regarding the complexity of determining whether property may be developed
13 in the Skagit basin. Opening Br. at 15, *citing to* ECY062228-30. Whatever the situation
14 regarding water use determinations in the Skagit basin may be, the Dungeness Rule is
15 clear as to what a property owner must do to establish the right to use a permit-exempt
16 well. WAC 173-518-070. The Dungeness Rule is not (and could not be) rendered
17 “arbitrary and capricious” just because Ecology did not consider these irrelevant “facts
18 or circumstances” in its adoption.

17 **D. Instream Flows in the Rule Were Set According to the Results of the**
18 **Watershed Planning Process, in Accordance With RCW 90.82, and**
19 **are Supported by Scientific Studies.**

19 Adoption of the Dungeness Rule was the culmination of a decades-long process
20 of scientific study as well as work by groups representing diverse interests including
21 Ecology, local governments, property owners, environmentalists, and Indian Tribes. *See*
22 Section II(D), *supra*. After passage of the Watershed Act, a group of Initiating
23 Governments began the process of planning under the Act. ECY069803. Under the Act,
24 setting instream flows as part of a Watershed Plan requires that:

1 “all government members and tribes that have been invited and accepted
2 on the planning unit present for a recorded vote unanimously vote to
3 support the proposed minimum instream flows, and all nongovernmental
4 members of the planning unit present for the recorded vote, by a
5 majority, vote to support the proposed minimum instream flows.”

6 RCW 90.82.080(1)(a)(ii).

7 One part of the Dungeness Watershed Plan was a recommendation that instream
8 flows be set for the Dungeness River. ECY070558. All Initiating Governments
9 endorsed the Watershed Plan, including the instream flow recommendations.
10 ECY069772-069789. The Watershed Plan’s recommended instream flows stem from
11 scientific studies including the 1991 IFIM study and the 1993 flow recommendations.¹⁵
12 ECY010567-698; ECY070558. The Washington Department of Fish and Wildlife
13 reviewed, and concurred with, the instream flow recommendations. ECY001890
14 (comment No. 49 to Concise Explanatory Statement).¹⁶ Ecology’s participation in this
15 very thorough process is evidence of the “process of reason” that *Aviation West*
16 demands of an agency. *Aviation West*, 138 Wn.2d at 432.

17 ¹⁵ Plaintiffs cite to only one actual analysis of the instream flow levels, by Kris Kaufman (the “Kaufman
18 comment”) to support their argument that the instream flow level is too high. Opening Br. at 12. Mr.
19 Kaufman, however, merely points out that the instream flows set in the Dungeness Rule are higher
20 relative to average river flows than are the instream flows in the Okanogan, Deschutes, and Newaukam
21 river systems. This line of argument is equally consistent with the proposition that the instream flows set
22 in these watersheds are *lower* than they should be to preserve instream resources as with the flow in the
23 Dungeness being set too high. Nothing in this comment addresses the fact that the Dungeness instream
24 flows were determined by the Watershed Planning process, and nothing suggests that the flows as set by
25 Ecology will not be protective of instream resources on the Dungeness. Because Ecology was adopting
26 instream flows based on the consensus of the Watershed Planning Group, it did not have the authority to
set flows at the much lower level that Mr. Kaufman suggests. RCW 90.82.080(1)(b).

¹⁶ Much of plaintiffs’ argument revolves around the fact that the instream flows effectively resulted in
closure of the basin to new water withdrawals. However, because the amount of water rights that had
already been issued to agricultural users exceeded the ordinary summer flow of the River, the basin was
effectively closed to new non-interruptible withdrawals even before the Rule was adopted.

1 Once instream flows have been recommended by the Watershed Planning
2 Group, Ecology “shall undertake rulemaking to adopt flows under (a) [of RCW
3 90.82.080(1)].” ECY001893. Ecology then undertook rulemaking under the APA to
4 adopt these flows. RCW 90.82.080(1)(b).

5 **E. The Cost-Benefit Analysis’ Consideration of Costs to Landowners**
6 **Was Appropriate, Because There is no “Right” to Use a Permit-**
7 **Exempt Well Simply Based on Land Ownership.**

8 CELP addresses plaintiffs’ argument regarding the cost-benefit analysis only as
9 it relates to the purported loss of a “right” to use water. Plaintiffs argue that the costs of
10 the Rule, for purposes of the Cost-Benefit Analysis (CBA) under RCW 34.05.328(1)(d),
11 should account for loss of a “right” to use groundwater under the permit-exempt well
12 statute.¹⁷ The contentions that the CBA failed to account for costs to landowners, and
13 that Ecology’s actions in adopting the Rule were therefore arbitrary and capricious, rest
14 largely on the incorrect assumption that rural landowners will incur large costs,
15 including reduced property values, through widespread loss of such a “right.” See
16 Opening Br. at 21 (alleging that Rule will “eliminate exempt wells as a source of
17 ‘adequate water supply’”); *id.* at 44 (arguing that Ecology created instream flow rights
18 that foreclose future appropriations without mitigation). This contention is incorrect,
19 both because the Rule does not prevent use of permit-exempt wells and because there is
20 no right to future use of a permit-exempt well under Washington law.

21 **i. The Rule Does Not Foreclose Use of Permit-Exempt Wells.**

22 As a threshold issue, the Rule does not prevent use of permit-exempt wells, and
23 in fact provides additional certainty that landowners will be able to do so in future. *See*

24 _____
25 ¹⁷ Ecology’s Cost-Benefit Analysis recognized that there would be relatively small additional costs
26 associated with mitigation, and estimated that on average, 0.3 – 4.4 homes annually would not be
constructed due to the effects of the Rule. ECY002390.

1 Section II(D), *supra*. Whether there is a general right to a permit-exempt well or not,
2 they are usable for development under the Rule. For this reason alone, there is no reason
3 to include any costs associated with loss of such a right in the CBA.

4 The actual cost to landowners that should be considered is the additional cost of
5 mitigation imposed by the Rule, which has proven to be \$1000-\$3000 for a mitigation
6 certificate purchased from the water exchange. Mitigation Guide at 15 (Appendix A). In
7 fact, in performing the CBA, Ecology likely *over-accounted* for the cost to landowners,
8 by estimating the cost of mitigation at \$1000-\$4620, which is somewhat higher than the
9 actual cost. ECY002384.

10 **ii. There is no vested “right” to future use of a permit-exempt well.**

11 **a. Permit-Exempt Wells are Governed by the Prior**
12 **Appropriations System and Do Not Enjoy a “Super-Priority.”**

13 Under Washington law, there is no right to use water until it has been put to
14 beneficial use. RCW 90.03.010. The appropriate baseline for evaluating costs and
15 benefits of the Rule, and the one that Ecology correctly used, is an *expectation* of water
16 use, not a *vested right* to water use.¹⁸ Permit-exempt wells, like other water uses, are
17 subject to the prior appropriations system’s “first in time, first in right” principle. RCW
18 90.44.030; *Campbell & Gwynn*, 146 Wn.2d at 9; *Fox*, 2016 Wash. App. Lexis 711 at
19 *5. Use of water from a permit-exempt well is therefore subject to senior rights, and it is
20 entirely possible that a person who holds property and intends to use such a well in the
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22 ¹⁸ “Therefore, prior to the completed appropriation, the priority date is merely an expectation until such
23 time that the water right was fully created as evidenced by a completed appropriation though the
24 application of water to beneficial use. Only then did the right relate back to the earlier priority date.” *An*
Introduction to Washington Water Law, Office of the Attorney General, January 2000 at III:28.

1 future could find that senior water rights that preclude his use of water are issued before
2 he establishes beneficial use from the permit-exempt well.¹⁹

3 Plaintiffs appear to contend, on the other hand, that there is a “right” to use a
4 permit-exempt well simply by virtue of owning property. Opening Br. at 21-2. This
5 would effectively create a “super-priority” class of water user, because it would remove
6 the requirement of beneficial use to establish a water right,²⁰ a fundamental tenet of
7 Washington water law, as well as the requirement that a permit-exempt well not
8 interfere with existing uses (including instream flows). RCW 90.03.010; RCW
9 90.03.290(3). This notion is at odds with the prior appropriations system and with
10 controlling caselaw.²¹ *Swinomish Indian Tribal Cmty v. Dept. of Ecology*, 178 Wn.2d
11 571, 598, 311 P.3d 6 (2013) (statutes do not allow “jump to the head of the line” for
12 permit-exempt wells); *Postema*, 142 Wn.2d at 81 (instream flows may not be impaired
13 by subsequent groundwater withdrawals); *Fox*, 2016 Wash. App. Lexis 711 at *5.

13 **b. The Argument Regarding “Relation Back” is Inconsistent**
14 **With the Groundwater Code and With Decisional Law.**

15 Plaintiffs argue that because a landowner must show a legal source of water
16 before obtaining a building permit, certainty can only be provided by relating back the
17 priority date for a permit-exempt well to “when the project was initiated,” perhaps as

18 ¹⁹ Rights to divert water for agriculture already exceed the ordinary flow of the river in summer, so that
19 there is no water available for new uses, including permit-exempt wells, even without the Rule in place.
20 ECY069966. The fact that Ecology has so far not acted to regulate permit-exempt wells is not an
21 indication that there is actually water available.

22 ²⁰ The right to use of water “shall be hereafter acquired only by appropriation for a beneficial use and in
23 the manner provided and not otherwise.” RCW 90.03.010.

24 ²¹ If permit-exempt well use was already privileged over other uses (and effectively outside the prior
25 appropriations system), then the provisions of some other rules (such as the Water Resources Program for
26 the Little Spokane river), which do assign permit-exempt uses a higher priority than certain others, would
be superfluous. *See* WAC 173-555-040; -050.

1 early as when the land was subdivided.²² Opening Br. at 20. The implication of this
2 would be that the Rule (including the general closure to groundwater withdrawals and
3 the provisions for mitigated well use) would not apply to anyone who owned land zoned
4 for residential development at or before the time that the Rule became effective. This
5 assertion is supported only by plaintiffs’ conclusory statements (“[t]he analogous point
6 in time would be the notice of intent filed by a well driller, or date of application for
7 subdivision . . .”), based on an analogy to “common-law relation-back doctrine.”
Opening Br. at 19.

8 But both statute and caselaw argue against such relation back to the time of
9 subdivision. The Groundwater Code sets the priority date of a permit-exempt
10 withdrawal at the time the water was put to beneficial use. RCW 90.44.090 provides
11 that a certificate showing a vested right to groundwater may be issued, and that the right
12 shall have “a priority as of the date of the earliest beneficial use of the water.” RCW
13 90.44.050, the permit-exempt well statute, says that persons making withdrawals of less
14 than 5000 gallons per day (i.e., permit-exempt wells) may file a declaration under RCW
15 90.44.090 and obtain a certificate “in the same manner and under the same requirements
16 as . . . in the case of withdrawals in excess of five thousand gallons a day.” RCW
17 90.44.090’s priority provision therefore applies to use of a permit-exempt well and fixes
the priority date as of the date the water was first used.

18 The Washington Court of Appeals recently considered this question in *Fox v.*
19 *Skagit County*, in the context of an instream flow’s priority over a later permit-exempt
20 well, and held that subdivision of property was “not sufficient to prove an appropriative
21 water right.” *Fox*, 2016 Wash. App. Lexis 711 at *9. The instream flow scheme
22 Ecology has enacted in the Dungeness River Rule is consistent with *Fox*: permit-
exempt wells where use was not established prior to the Dungeness Rule’s adoption

23 ²² The hypothetical landowner who applied for a permit, built a house, and drilled a well but did not turn
24 it on until after the effective date of the Rule (Opening Br. at 18-9) is a red herring, as there is no
evidence before the court of any homeowners falling into this category.

1 may not interfere with the Rule’s Dungeness River instream flow, and permit-exempt
2 water use must be mitigated. WAC 173-518-040; -070.

3 **iii. Rather Than Preventing the Use of Exempt Wells as Uninterruptible**
4 **Sources of Water for Home Construction, The Dungeness Rule**
5 **Provides Certainty for Mitigated Permit-Exempt Well Users.**

6 Not only is there is no loss of a “right” to water use under the Rule (a “right”
7 that does not yet exist cannot be lost), the Rule specifically provides a mechanism for
8 future use of permit-exempt wells and *preserves* a landowner’s expectancy of such
9 future use. In any basin where a large fraction of the water has already been
10 appropriated, new permit-exempt wells are at some risk of being regulated in favor of
11 senior users.²³ In this case, the Dungeness River’s flow is already greatly over-allocated
12 (*see* Section II(A), *supra*). There is currently an agreement in place by which senior
13 irrigators voluntarily reduce their diversions, but there is no guarantee that they will do
14 so indefinitely. ECY003450. Prior to adoption of the Dungeness Rule and its mitigation
15 scheme, therefore, any new permit-exempt well was therefore effectively withdrawing
16 water that had already been lawfully allocated to senior users (who were voluntarily
17 curtailing its use, but retained the right to the water). The pre-Rule situation subjected
18 permit-exempt well users to at least a theoretical risk of curtailment, and under
19 plaintiffs’ reasoning their wells could not serve as uninterrupted water sources for
20 domestic use. RCW 90.44.030. This was true whether or not Clallam County chose to
21 issue building permits on the strength of those wells.

22 Post-Rule, on the other hand, a permit-exempt well user who mitigates his use
23 either through the water bank or through a mitigation plan he develops is by definition
24 impairing neither the instream flow nor other water right holders. Once mitigation water
25 is purchased, it remains with the title to the land, providing assurances of future water

23 It appears that Ecology has, to date, refrained from curtailing water use from permit-exempt wells.
This does not, however, change the relative priorities of users. As water becomes scarcer, it will become
more and more likely that permit-exempt users will be regulated according to their priority dates.

1 availability. ECY024056 at 024061; Mitigation Doc. at 13 (Appendix A). Contrary to
2 plaintiffs’ analysis, then, the effect of the Rule is to provide more, not less, certainty for
3 a property owner who builds on his property using a permit-exempt well. Further
4 certainty is provided through the availability of Mitigation Certificate Options from the
5 Dungeness Water Bank, which allow a landowner to “lock-in” the availability of
6 mitigation water for a five-year period (which may be renewed) by paying a portion of
7 the mitigation fee. Mitigation Doc. at 13.

8 **F. The Reservations of Water as Set Forth in WAC 173-518-080 are**
9 **Lawful Under RCW 90.54.210 and RCW 90.54.020(3)(A).**

10 **i. The Reservations of Water Associated With the Dungeness Rule**
11 **are Part of a Scheme Designed to Prevent Impairment of the**
12 **Instream Flow.**

13 The Dungeness Rule makes small reservations of water for domestic use, with
14 the proviso that the use of water from the reservations must be mitigated. WAC 173-
15 518-080. The Rule also provides that new permit-exempt groundwater withdrawals
16 must be mitigated. WAC 173-518-070(3)(a). “Maximum depletion amounts” are set out
17 for the same quantities of water as in the reservations, and are specifically defined as
18 “not additional to the reservations.” WAC 173-518-085. In this scheme, the reservations
19 are not designed to allow water to be reallocated from instream flows to out-of-stream
20 use (as *Swinomish* forbids), but are analogous to “overdraft protection” for a checking
21 account – the water used from the reservations is intended to be replaced through
22 additional mitigation. ECY072195.
23
24

1 **ii. The Legislature Has Specifically Explained That the Dungeness**
2 **Reservations are Within its Legislative Intent and Therefore**
3 **Within Ecology’s Statutory Authority.**

4 In response to questions regarding the Dungeness Rule’s use of the OCPI
5 exception, the 2016 Legislature enacted ESSB 6513, which added the following section
6 to Chapter 90.54 RCW:

7 (1) The department shall act on all water rights applications that rely on
8 the reservations of water established in WAC 173-518-080 or 173-
9 545-090, as those provisions existed on March 31, 2016. *The*
10 *legislature declares that the reservations of water established in*
11 *WAC 173-518-080 and 173-545-090, as those provisions existed on*
12 *March 31, 2016, are consistent with legislative intent and are*
13 *specifically authorized to be maintained and implemented by the*
14 *department.*

15 (2) This section does not affect the department's authority to lawfully
16 adopt, amend, or repeal any rule, including WAC 173-518-080 or
17 173-545-090.

18 (3) This section may not be construed to prejudice any reservation of
19 water not referenced in this section.

20 RCW 90.54.210 (emphasis added).

21 Despite plaintiffs’ argument to the contrary, ESSB 6513 presents no separation-
22 of-powers issue. The issue here is whether the reservations of water in the Dungeness
23 Rule are permissible under the OCPI exception in RCW 90.54.020(3)(a). While it is the
24 province of the court to determine legislative intent, it discerns a statute’s meaning from
25 “all that the Legislature has said *in the statute and related statutes which disclose*
26 *legislative intent* about the provision in question.” *Ecology v. Campbell & Gwinn*, 146
 Wn.2d 1, 11-12, 43 P.3d 4 (2002) (emphasis added).

1 RCW 90.54.210 is unquestionably “related” to RCW 90.54.020(3)(a), and the
2 two must be read together. When everything that the Legislature has said on the issue of
3 OCPI is considered, the statutory meaning is crystal clear: the reservations in WAC
4 173-518-080 are expressly within legislative intent. That alone should resolve this issue.
5 Where a statute is not ambiguous, there is no need for any further interpretation.
6 *Campbell & Gwinn*, 146 Wn.2d at 10 (“[I]f the statute's meaning is plain on its face,
7 then the court must give effect to that plain meaning as an expression of legislative
8 intent.” (citation omitted)).

9 Plaintiffs’ argument on this point is completely devoid of authority, and their
10 suggestion that this court must “narrowly apply” ESSB 6513 is unconvincing. Nothing
11 suggests that the Legislature is at odds with the Supreme Court’s *Swinomish*
12 interpretation of the OCPI exception. The *Swinomish* court was construing the statutes
13 in a very different context than that present here – “whether Ecology has correctly
14 interpreted and implemented the exception in RCW 90.54.020(3)(a)” as it related to
15 large reservations of water that would result in permanent re-allocation. *Swinomish*, 178
16 Wn.2d at 581. *Swinomish* also differs from this case in that no specific statutory
17 provision spoke to the Skagit Basin reservations at issue.

18 Here, on the other hand, the reservations at issue are quite different from those
19 in *Swinomish* (the small reservations in the Dungeness rule, along with the mitigation
20 requirement, are part of an overall scheme to ensure that instream flows are *not*
21 impaired). And most importantly, the Legislature has *specifically* said that the
22 Dungeness reservations are consistent with legislative intent. RCW 90.54.210.

23 As to whether the Rule is within Ecology’s statutory authority, that authority is
24 provided and defined by the Legislature. There can be no better indication of the bounds
25 of statutory authority provided by the Legislature than a *direct statement by the*
26 *Legislature* that the agency’s actions (here, establishing the reservations in the
Dungeness Rule) were consistent with legislative intent. There is no tension between
the Court holding that one type of reservation is outside the bounds of OCPI and the

1 Legislature (which of course enacted the OCPI exception) stating that a different type of
2 reservation *is* within its intent. Accordingly, there is no need to interpret the language of
3 ESSB 6513 narrowly.

4 **iii. Even if the Reservations of WAC 173-518-080 Were Found to be**
5 **Unlawful, the Provisions of the Rule Allowing New Groundwater**
6 **Uses Would Function.**

7 Even if the reservations were held to be an improper use of OCPI, invalidation
8 of the Rule and its scheme for new permit-exempt groundwater uses is not inevitable.
9 New permit-exempt wells are provided for in WAC 173-518-070(3), which requires
10 that any new water use is mitigated and makes no mention of the reservations. The
11 requirements for mitigation are detailed in WAC 173-518-075, which also makes no
12 mention of the reservations. This section instead contemplates that a new use would be
13 fully mitigated or would not have an impact greater than the applicable maximum
14 depletion amount. “Maximum depletion amount” is defined as “a limit on how much
15 impact to water resources resulting from groundwater withdrawals will be allowable
16 under this rule before ecology declares water is not available.” WAC 173-518-030. This
17 definition makes no reference to reservations. And “maximum depletion amount” is
18 discussed in WAC 173-518-085: “impacts from consumptive use of water from the
19 reserves *and* impacts from implementation of ecology approved mitigation plans shall
20 be debited against the maximum depletion amount for each affected subbasin.”
21 (emphasis added). Clearly, use of water from the reserves is different from the use of
22 water via an approved mitigation plan.²⁴ The scheme for mitigation of new permit-
23 exempt wells therefore can operate even without the reserves in place. If it finds that the
24 reserves are not authorized under RCW 90.54.020(3)(a), as Plaintiffs contend, then this

23 ²⁴ If water use from mitigated withdrawals implicated the reservations, then the mention of “impacts from
24 implementation of ecology approved mitigation plans” here would be superfluous.

1 Court can simply sever WAC 173-518-080 from the rest of the Dungeness Rule. In the
2 checking account analogy, the account does not become void or unusable simply
3 because overdraft protection is no longer available.

4
5 **G. Any Consideration of Maximum Net Benefits Must Consider the**
6 **Fact That the Majority Of Water Has Already Been Appropriated**
7 **for Out-Of-Stream Use.**

8 It is state water policy that public waters be used “in a fashion which provides
9 for obtaining maximum net benefits arising from both diversionary uses of the state’s
10 public waters *and retention of waters within streams and lakes in sufficient quantity to*
11 *protect instream and natural values and rights.”* RCW 90.03.005 (emphasis added).

12 Plaintiffs argue that Ecology impermissibly failed to make a formal Maximum Net
13 Benefits (MNB) analysis before adopting the Rule. Ecology’s position, expressed in
14 their Policy 2025, is that MNB analysis is not required for instream flow setting such as
15 in the Dungeness Rule. ECY013038. CELP takes no position on the validity of
16 Ecology’s policy, except to note that agency policies (unlike administrative rules) are
17 generally not subject to judicial review under the APA. *Sudar v. Department of Fish*
18 *and Wildlife Commission*, 187 Wn. App. 22, 29, 347 P.3d 1090 (2015). However, even
19 if an MNB analysis were required, it would not direct the outcome that plaintiffs desire,
20 because of the large fraction of the Dungeness that has previously been appropriated for
21 out-of-stream use.²⁵

22 ²⁵ Plaintiffs offer an unofficial 1986 memorandum (“[t]his memorandum . . . does not constitute a formal
23 opinion of this office”) from Charles Roe in the Washington Attorney General’s Office for the
24 proposition that instream flows should be set at some bare minimum level pending an MNB analysis.
Opening Br. at 10-11. It should go without saying that this unofficial memorandum is entitled to no more
weight than the opinions of the Assistant Attorneys General who currently represent Ecology. Even the
Roe memorandum, however, recognizes the importance of maintaining flows necessary to protect fish, as
evidenced by the emphasis Mr. Roe added to his quotations of statutes (“for the purposes of protecting
fish, game, birds . . .”; “to protect fish”; “to protect the resource or preserve the water quality”) and his
statement that the instream flow laws “announce a very strong policy in favor of retaining waters in
naturally flowing streams.” ECY06423-7 (emphasis in original). The Dungeness river is currently at a
much-diminished level, and its salmon stocks are accordingly threatened, so that Ecology’s actions in

1 While RCW 90.03.005 requires that benefits arising from two classes of uses
2 (“diversionary uses and retention of waters within streams and lakes”) are to be
3 considered, the language describing them is quite different. On the one hand, RCW
4 90.03.005 contemplates that waters will be retained in-stream “in sufficient quantity to
5 protect instream and natural values and rights.” Read together with RCW
6 90.54.020(3)’s command that rivers “*shall* be retained with base flows necessary to
7 provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental
8 values . . .” (emphasis added), it is clear that any calculation of the total net benefits
9 must include the benefits that result from leaving adequate water in stream. Nothing in
10 the instream flow statutes suggests that protection of instream and natural values and
11 rights is to be conditioned on any form of balancing against other uses. As the
12 Washington Supreme Court noted in *Swinomish v. Ecology*, RCW 90.03.005’s policy of
13 water use to yield maximum net benefits does not “conflict with the statutes authorizing
14 or mandating rules setting minimum flows.” *Swinomish*, 178 Wn.2d at 585.

15 On the other hand, there is no requirement in RCW 90.03.005 (or any other
16 statute) that water be diverted in sufficient quantity for any particular out-of-stream use
17 or uses (or that any diversions occur at all); the statute merely requires that the
18 combination of benefits from diversionary as well as in-stream uses be maximized. See
19 *Department of Ecology v. Bureau of Reclamation*, 118 Wn.2d 761, 773, 827 P.2d 275
20 (1992) (recognizing that “maximum net benefits” may be realized by leaving water in
21 stream). The Dungeness Rule meets the statute’s requirement, by setting instream flows
22 based on scientific studies of flows required to protect “instream and natural values and
23 rights.” Section II(D), *supra*. Total benefits may be maximized by including some out-
24 of-stream uses, but not at the expense of protecting the instream flow as required by
25 RCW 90.54.020. As the *Swinomish* Court noted, “even as to allocation of water not

26 closing the basin to further withdrawals is perfectly consistent with the statutory command to protect fish,
wildlife, and other instream resources.

1 already spoken for, best use of water does not necessarily mean economically beneficial
2 use.” *Swinomish* at 599.

3 Plaintiffs assert that Ecology should not “allocate all available water in a river or
4 stream to instream flows,” and contend that if Ecology does not perform a maximum
5 net benefits (MNB) balancing test when adopting instream flow rules, it will be “too
6 late.” Opening Br. at 27. This contention implicitly suggests that the only water that is
7 to be considered is that which has not been allocated at the time of rulemaking, and that
8 only the benefits from in- and out-of-stream uses begun from the time an instream flow
9 is set are to be considered.²⁶ But nothing in RCW 90.03.005 limits MNB analysis to
10 future allocations; rather, consideration of MNB implicates *all* benefits flowing from
11 both existing and contemplated uses of water (which would include the benefits from
12 any diversionary uses already established).

13 In this case, it is undisputed that the majority of the Dungeness River’s flow has
14 long been appropriated for out-of-stream (mainly agricultural) uses – in other words,
15 very large benefits from diversionary uses were being realized prior to adoption of the
16 Rule. See Section II(A), *supra*. Under the Memorandum of Understanding with major
17 irrigators, up to one-half of the river flow may currently be withdrawn for irrigation use
18 alone. ECY003450. Even if Ecology did perform an MNB analysis, the benefits that are
19 already flowing from diversion of most of the River for out-of-stream uses (including
20 agricultural and municipal uses that began in the past) would more than outweigh the
21 lost benefits of any new out-of-stream uses that were foregone due to the instream flow
22 rule.

23 ²⁶ Rather than the MNB analysis of RCW 90.03.005, this would be essentially the calculation made under
24 the cost-benefit analysis (CBA) of RCW 34.05.328(1)(d), which assesses the benefits of any water uses
begun post-Rule along with the costs imposed by the Rule. Because an instream flow rule is junior to any
water rights existing before the date of its enactment, the cost-benefit analysis of the rule does not
consider costs and benefits flowing from pre-existing water uses (rather, these form part of the baseline
for the analysis).

1 The real danger of being “too late” is that more and more water would be
2 allocated for out-of-stream uses before instream flows are adopted (as plaintiffs
3 correctly note, any instream flow established is unable to return water to the River once
4 it has been appropriated for out-of-stream use), so that meaningful instream flows and
5 the associated natural values could never be protected. This result would be squarely in
6 conflict with RCW 90.54.020(3)(a)’s command that rivers and streams “shall be
7 retained” with base flows necessary to provide for preservation of instream values and
8 with RCW 90.22.010’s grant of authority to protect those values.

9 **H. Plaintiffs Cannot Establish that the “Four-Part Test” Applies to**
10 **Adoption of In-Stream Flows, and the Arguments Regarding**
11 **Compliance with the Various Prongs of the “Four-Part Test” are**
12 **Therefore Irrelevant.**

13 **i. Plaintiffs’ Argument Regarding the Applicability of the Four-**
14 **Part Test to In-Stream Flow Regulations is Materially**
15 **Identical to Their Failing Argument Contained in Plaintiffs’**
16 **Motion for Summary Judgment.**

17 Plaintiffs contend that in-stream flow regulations are to be treated like any other
18 water appropriation and, therefore, Ecology should employ the same procedures,
19 including the “Four-Part Test” contained in RCW 90.03.290(3), when deciding whether
20 or not to implement such a rule. Plaintiffs previously raised this precise issue on
21 Summary Judgment. *See* Motion for Summary Judgment on Legal Issues, filed with this
22 court on November 17, 2015 (“MSJ”). In denying the motion, this Court determined
23 that it could not “establish that the law absolutely requires that four-part test to be
24 utilized.” *See* Transcript of Motion for Summary Judgment, Jan. 8, 2016, Pg. 31, Lines

1 20-22 (Appendix B). This court further stated that plaintiffs “did not meet their burden”
2 to show that the four-part test was always required. *Id.* at pg. 35, Lines 7-8.

3 Despite their failure to meet their burden of proof on this issue via their MSJ,
4 Plaintiffs now present the exact same argument to the Court in their Opening Brief.
5 Indeed, Section IV(D)(1) of Plaintiff’s Opening Brief is almost word-for-word identical
6 to the argument in their MSJ. With the exception of the opening paragraph, which
7 attempts to show that RCW 90.03.010 contains an implicit “foundation” for the
8 argument, Plaintiffs’ Opening Brief contains no new arguments or authority²⁷ to support
9 the contention that the Four-Part Test applies to the creation of in-stream flow
10 regulations. The Court has already found this argument unconvincing once; Plaintiffs
11 cannot hope to prevail on a second attempt by presenting the same authority in a
12 slightly reworded and reorganized version.

13
14 **ii. The Argument Regarding the Water Availability Prong of RCW**
15 **90.03.290(3) is Actually an Attack on The Instream Flow**
16 **Concept.**

17 Even if the four-part test of RCW 90.03.290(3) *were* required for establishing an
18 instream flow (it is not, and CELP expressly does not concede otherwise), the argument
19 regarding the water availability prong would be incorrect. We address this here because
20 it is important to understand the implications of what plaintiffs request by this argument
21 – they seek nothing less than abolition of meaningful instream flow protections.

22 First, there is no absolute requirement that water be available at all times before
23 a water right can be granted. Water rights are routinely issued in cases where water to

24 ²⁷ Plaintiffs’ MSJ presented a pure question of law: must Ecology apply the four-part test of RCW
25 90.03.290(3) when adopting an instream flow? Because there was no factual component to that question,
26 consideration of the record in this case should have no bearing on its answer and the result should be no
different now.

1 meet the full extent of the proposed use is not always available. See, for example,
2 Report of Examination, Water Right No. S1-28782²⁸ (Appendix C), which includes the
3 following condition:

4 USE OF WATER UNDER THIS WATER RIGHT IS NOT ALLOWED WHEN THE
5 ACTUAL FLOW OF THE NOOKSACK RIVER (AT FERNDALE) – USGS GAGE
6 12213100, IS LESS THAN THE MINIMUM INSTREAM FLOW FOR THAT
7 CONTROL STATION, AS SPECIFIED IN WASHINGTON ADMINISTRATIVE
8 CODE (WAC) 173-501-030(2) AND ATTACHMENT 2. **DUE TO THE
9 LIKELIHOOD OF INTERRUPTION, THIS WATER RIGHT SHOULD NOT BE
10 RELIED ON TO GROW PERENNIAL CROPS THAT REQUIRE IRRIGATION
11 TO SURVIVE.**

12 *Id.* at 1.

13 Such rights are simply made interruptible in favor of more senior rights, as is
14 made abundantly clear by the language cited above. And that is precisely the situation
15 with respect to instream flows: the full amount of the instream flow is only available
16 where that much water is left in the stream after more senior users are satisfied. In other
17 words, instream flows are interruptible by their nature. The Dungeness River provides a
18 ready example of this – there are numerous water diverters (primarily for agriculture)
19 that are senior to the Rule. When the River’s hydrograph is examined, it is clear that the
20 remaining water in the river meets the instream flow some of the time, but not all of the
21 time (that is, the instream flow is effectively “interrupted” in drier years). ECY065845-
22 6.

23 Protecting “potential habitat” by setting an instream flow is no different than
24 protecting “potential farm production” when an interruptible permit is issued to an
25 agricultural user. The habitat provided by the full amount of the instream flow will be
26 present only in some (wet) years, just as the farmer holding the interruptible water right

28 ²⁸ This document too is relevant to determining a factual question raised by plaintiffs regarding legality of
agency action (adopting an instream flow at levels not always present in the river) and therefore may be
received under RCW 34.05.562.

1 would be able to use it for irrigation only in wet years. This is the compromise among
2 water users that is the heart of the prior appropriations system.

3 Even an interruptible right may not be impaired by more *junior* water users,
4 however. In this case, future permit-exempt well users would either impair the instream
5 flow (which is impermissible) or be regulated themselves in many years. This is the
6 reason for the basin closure and mitigation system that the Rule puts in place – to
7 provide a way for these junior users to be accommodated while still protecting the
8 instream flow.

9 Plaintiffs’ argument that an instream flow right could be adopted only where
10 there was sufficient water in-stream to meet the instream flow at all times (and in all
11 years) has profound implications. Most importantly, it would effectively mean that no
12 instream flow could ever be adopted that protected more than the lowest flow seen in
13 dry or drought years.²⁹ Protecting only this level of flow would be in conflict with RCW
14 90.54.020’s mandate to protect instream values, as well as the non-degradation
15 provisions of WAC 173-201A-310, as drought-level flows are insufficient to protect
16 instream values such as fish and wildlife, recreation, aesthetics, and navigation.
17 Requiring all of the water to satisfy an instream flow to be present at all times before a
18 flow could be established would render instream flows a lesser class of water right (one
19 that could not be issued in an interruptible fashion), and effectively remove instream
20 flows from the prior appropriations scheme. This would surely be the proverbial
21 “absurd result,” as it is well-established that instream flows are water rights squarely
22 within the prior appropriations system. RCW 90.03.345; *Swinomish*, 178 Wn.2d at 585
23 (“minimum flow may not be impaired by subsequent withdrawals); *Postema*, 142
24 Wn.2d at 82 (instream flow rights are not limited but are subject to same protections as
25 other water rights).

23 ²⁹ The experience of 2015 shows that this would be hollow protection indeed for fish and other instream
24 values.

1 **iii. The Argument Regarding Permit-Exempt Wells and the Public**
2 **Interest is Also Incorrect.**

3 Again, assuming *arguendo* that the four-part test were required, plaintiffs’ claim
4 that the Legislature somehow made a determination that permit-exempt water use was
5 *per se* consistent with the public welfare (and therefore essentially untouchable by other
6 appropriations) is completely without support. See Opening Br. at 33. Neither caselaw,
7 statute, nor legislative history is provided to support the notion that RCW 90.44.050’s
8 exemption provision was intended to do anything more than reduce the regulatory
9 burden of establishing relatively small water uses. Finally, the statement that Ecology’s
10 OCPI determination somehow shows that Ecology believed that the instream flow
11 (which it itself was establishing) was contrary to the public welfare is frankly ludicrous.
12 Opening Br. at 33.

13 **I. The Rulemaking Process was Amply Coordinated With State &**
14 **Local Governments, and the Rule is Not in Conflict With Local**
15 **Regulations.**

16 Plaintiffs claim that Ecology “did not adequately coordinate the rule with state
17 and local regulations allowing permit-exempt wells for rural property development.”
18 But that is precisely what Ecology did, and the Rule and its requirements for protecting
19 water resources are consistent with state law. While plaintiffs object that the Rule places
20 limits on Clallam County’s ability to permit unrestricted development, any limitation
21 results from nothing more than application of state law regarding instream flow
22 protection and use of permit-exempt wells. It is black-letter law, with or without the
23 Dungeness Rule, that a county building code or permitting authority cannot trump state
24 law or regulations. *See Fox*, 2016 Wash. App. Lexis 711 at *6 (2016) (county building
25 permit process must be consistent with state law, including “hierarchy of water rights”
26 under prior appropriations). And Dungeness Rule or no, the *Kittitas County v. Eastern*
 Washington Growth Management Hearings Board, 172 Wn.2d, 179, 256 P.3d 1193

1 (2011) decision holds that a county is responsible for ensuring that water is legally
2 available before permitting development. A county’s desire to provide water for
3 development of all possible parcels of land does not excuse violation of state law, and
4 the fact that development may be regulated or limited does not demonstrate any “lack of
5 coordination” between levels of government.

6 Far from being imposed by Ecology on an unwilling local government, the Rule
7 developed out of a decades-long process including tribal, state, county and city
8 governments, as well as various stakeholder groups. See Section II(D), *supra*. Clallam
9 County was fully represented in the Watershed Planning process and ultimately joined
10 in the Planning Group’s unanimous agreement regarding the instream flow
11 recommendations. ECY069775.

12 The Rule permits development consistent with Clallam County building codes,
13 including permit-exempt well use consistent with the Groundwater Code and the prior
14 appropriations system, provided that state law regarding legal availability of water is
15 observed. RCW 19.27.087. The precise division of responsibilities between the County
16 and Ecology is spelled out in the 2012 Memorandum of Agreement: Ecology will
17 determine whether mitigation is needed and whether the requirement has been met
18 (most frequently, through purchasing mitigation certificate through the water
19 exchange), and the County will issue building permits based on that determination.
20 ECY071273-7. This is fully consistent with the County’s obligations under *Kittitas* to
21 ensure that water is legally available in approving development, with Ecology’s
22 responsibility to provide consultation, and with the partnership between Ecology and
23 local government that *Kittitas* anticipates. *Kittitas*, 172 Wn.2d at 179. There is no
24 conflict between the Rule and either state law regarding appropriation of water or local
25 building regulations.

1 **J. The “Less” Burdensome Alternatives Suggested by Plaintiffs are**
2 **Either Unworkable or not Alternatives at All.**

3 Plaintiffs contend that Ecology failed to determine that the Dungeness Rule was
4 the least burdensome method to achieve its goal (protecting the instream values in the
5 Dungeness watershed). They identify three “less burdensome” approaches, two of
6 which do not comport with the Water Code and one that is operationally identical to the
7 current situation.

8 First, plaintiffs cite the Washington Realtors’ suggestion to “analyze future
9 buildout” and only then see if there is an effect on streamflows, and mitigate the effects
10 if necessary. Opening Br. at 8. But if there were an effect on streamflows, the damage
11 would already have been done by the time it was detected. As plaintiffs correctly point
12 out, an instream flow rule cannot put water back in the stream, and this alternative
13 would not be able to accomplish the goal of protecting instream values. As such it
14 would violate RCW 90.54.020 and 90.22.010.

15 Second, plaintiffs suggest that Ecology “reserve enough water for future
16 domestic uses without requiring mitigation.” Opening Br. at 8. But this is precisely what
17 is forbidden by the *Swinomish* decision. *Swinomish*, 178 Wn.2d at 598-9 (Legislature
18 has not extended “broad authority” to reallocate water through reservations).

19 Finally, they suggest that Ecology should have “provided regional mitigation”
20 by “purchasing and relinquishing additional water rights” or adopted the Rule only after
21 the water bank was in operation. However, it is unclear how either of these would be
22 less burdensome than the present Rule (or even that they represent “alternatives”), as
23 the same Rule would ultimately have been adopted and mitigation would be provided
24 by the same water bank as is currently operating. Plaintiffs complain that “Ecology’s
25 failure to provide any certainty that mitigation required by its Rule would be available
26 before closing groundwater” was shortsighted and expensive. However, the facts of this
case (mitigation is available at a reasonable cost, and development has not been

1 hindered, see Section II(E), *supra*) demonstrate that this alternative is ultimately the
2 same means to the end that Ecology did adopt.

3
4 **V. CONCLUSION**

5
6 For the reasons set forth above, plaintiffs have failed to meet their burden to
7 show that the Rule exceeds Ecology's statutory authority, was adopted without
8 compliance with statutory rule-making procedures, or is arbitrary and capricious.
9 Because they have not met their burden, CELP respectfully requests that this court
10 dismiss plaintiffs' complaint and affirm Ecology's adoption of the Dungeness Rule.

11
12
13 Respectfully submitted this 9th day of September, 2016,

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25 Attorneys for Intervener

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the _9th day of September, 2016 I served one true and
3 correct copy of the foregoing Response in Intervention on the following individuals via
4 e-mail, per the parties' email service agreement:
5

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22
23
24
25 /s/ Dan J. Von Seggern
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APPENDIX A

The Dungeness Water Exchange Mitigation Guidance Document

April 2013



Prepared by
Washington Water Trust
1530 Westlake Avenue N, Suite 400
Seattle, WA 9810



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Dungeness Mitigation Guidance Document

This mitigation guide is intended to accompany the Dungeness Instream Flow Rule (WAC 173-518-930) and serve as a guide for implementing mitigation requirements via the Dungeness Water Exchange under the rule. The guide will be a resource for those entities working closely with the Dungeness Water Exchange as well as members of the public who have more detailed questions about its operations. The document is structured as a series of frequently asked questions so the user can efficiently find pertinent information. The guide may be revised over time if necessary.

Questions Pertaining to the 2012 Dungeness Water Management Rule and Mitigation

Note: For more detailed information on the rule please see the actual Rule text and Department of Ecology publications at: www.ecy.wa.gov/programs/wr/instream-flows/dungeness.html.

1. What is the Dungeness Water Resources Management Rule/ Instream Flow Rule?

The Dungeness Water Management Rule (the rule) was adopted by the Washington Department of Ecology (Ecology), which is the state agency that manages water resources. The rule is intended to guide water use planning and decision-making for new water users in the Dungeness Watershed, and set policies to help protect the availability of water supplies for current and future needs of people and the environment. Two of the biggest changes are the formal closing of surface water to new appropriations (except for some peak flows in the Dungeness River which could be granted for interruptible water rights) and the requirement that all new groundwater users mitigate their water use to offset the impact to streams within the watershed. All new water users, including permit-exempt well users, are covered by new requirements under the rule. Every new water user will need to offset the impact of their consumptive water use on surface water.

The rule sets instream flow levels for the mainstem Dungeness River and its tributary Matriotti Creek, and seven smaller streams: Bagley Creek, Siebert Creek, McDonald Creek, Meadowbrook Creek, Cassalery Creek, Gierin Creek and Bell Creek. In addition to the instream flow levels, small amounts of water are set aside in each subbasin listed above for in-house domestic use (see question No. 4).

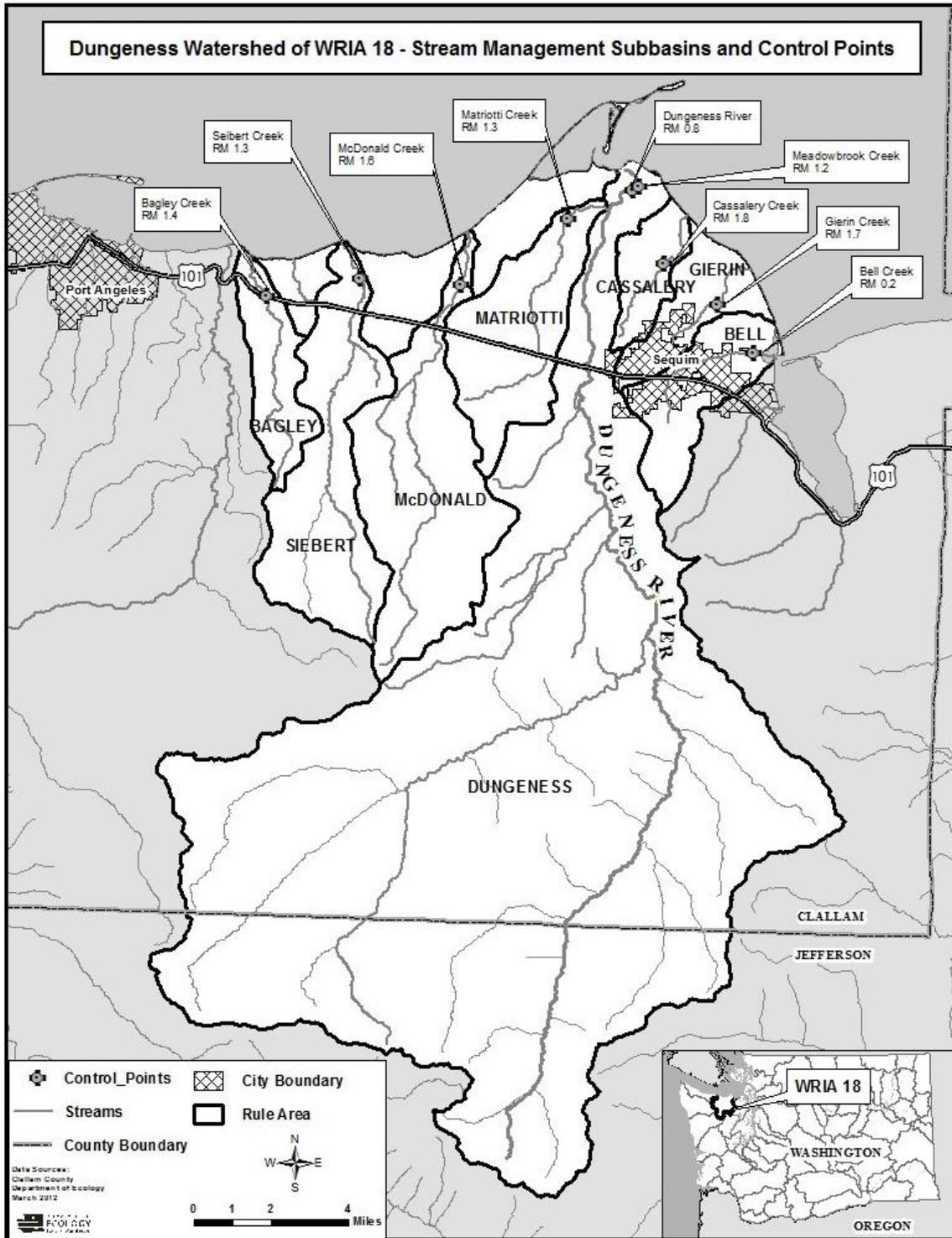
2. When is the rule effective?

The effective date of the rule is January 2, 2013.

3. Where does the Dungeness Water Management Rule apply?

The rule covers some of eastern Clallam County, from Bagley Creek to Bell Creek (see map below).

Figure 1. Dungeness Rule Area Map, courtesy of the Department of Ecology



4. What is a reserve of water?

Water reserves are finite amounts of water set aside for new uses, and usually have specific conditions of use to access them. Uses from reserves are legally allowed to continue even if stream flows fall below the instream flow levels set by rule. The reserves are not stored in a reservoir or other physical place, but they are a small quantity of water that currently exists in groundwater and streams throughout the Dungeness Basin. The reserves were established by Ecology to ensure that water is available for domestic (household) use. Under the rule, mitigation (the offsetting of new water uses) is required to replenish reserves.

5. How do the reserves in the rule work?

Each time a mitigation certificate is issued for a residential unit, the consumptive amounts of the groundwater withdrawal (150 gallons per day (gpd) for a home connected to a sewer and 15 gpd for a home served by a septic system, established in the rule as annual averages across the basin) will be multiplied by the predicted impact to each stream according to the groundwater model and the result will then be subtracted from the water reserve amounts (in Table IV in WAC 173-518-080). As mitigation projects are put in place, the amount of water benefitting each stream is added to the reserve for that stream. Reserves were not established for any purpose other than domestic (i.e., indoor) use.

6. How were the reserve amounts arrived at?

Using either stream gauging records or information on the lowest measured summer flows, state biologists looked at the late summer/fall flows for each creek. They calculated one percent of the lowest flows and agreed that these small quantities could be withdrawn. Given the impact on stream flow and habitat for species listed under the Endangered Species Act, and the small sizes of the reserves, they have been designated in the rule to be for in-house/domestic use only.

7. What is mitigation?

Mitigation is a water management tool to offset the impacts of new water uses on area streams. See additional explanation under question No. 20.

8. Why is mitigation needed for future water use?

- The Dungeness River is fully appropriated; this means existing senior water rights can legally divert so much water that in late summer, hypothetically, a new water right could be required to reduce or cease diversions. Although it's true the basin is seasonally wet and rainy, during the late summer and fall months precipitation is minimal, stream flow is typically at its lowest, and demand for water for commercial and residential irrigation is

at its peak. This leaves insufficient water in streams to support healthy aquatic systems and fish habitat.

- Hydrogeologic studies and a groundwater model specific to the Dungeness watershed show that aquifers are hydraulically connected to surface waters. The hydraulic connection between ground and surface waters means that using ground water for consumptive purposes has an impact on flows.
- Summer and fall water diversions have decreased the habitat available to fish in the Dungeness River and its tributaries. Diversions and groundwater use reduce the flow in the small independent streams that flow directly into the Strait of Juan de Fuca. Low stream flows are considered a critically limiting factor for four species of salmon listed as threatened under the federal endangered species list. These include Chinook, steelhead, eastern Strait of Juan de Fuca summer chum and bull trout. Ecology has a legal obligation to protect both reliable supplies of drinking water and fish, wildlife and other “instream resources” that depend on sufficient stream flow.
- Once a right to use water has been established, if use is continuous and beneficial (not wasteful), the water right remains in good standing. Water rights are generally permanent allocations of water, with priority dates and conditions of use. Without management of future withdrawals, the prospective demand for water in the Dungeness watershed could lead to substantially more impairment of late summer and fall flows.
- Since low summer and fall stream flows have been identified as limiting to fish populations and recovery, work has been underway to address this issue. Restoring flows is one approach that has been used. Without management and mitigation of new water uses, opportunities to restore and protect flows would be lost. Mitigation will offset expected impacts to surface water; restoration will focus on increasing flows at the most important times and places.
- Providing mitigation for water use and saving water is not free. A new user of water choosing to purchase “mitigation credits” from the Exchange will help pay for projects that offset the impacts of new uses.

9. Who needs to mitigate for their water use?

All new groundwater uses (meaning those uses that are not authorized by an permit, an existing water certificate, water right claim, or permit-exempt use with use beginning prior to January 2, 2013) need to be mitigated, including:

- Any new groundwater permit under RCW 90.44.050.
- Any new permit-exempt use of groundwater under RCW 90.44.050.
- Some Group A water users (generally 15 or more connections) who cannot be served by a nearby Group A water system, even though they are located within the service area.

- Some Group B water users (14 or fewer connections). A new user connecting to a Group B system more than five years after water use started in the subdivision would need to mitigate for their use and install a meter. However, if a new water user is connecting to a Group B water system within five years of when a residence in the subdivision first began using water, and the first use started before January 2, 2013, the new user would not be required to supply mitigation or install a meter.

10. How does a new water user obtain mitigation?

New water users have two options for obtaining mitigation:

- Water users may purchase a mitigation certificate from the Dungeness Water Exchange to offset their new uses to show proof to Ecology that their proposed use is mitigated. Clallam County will require a copy of the mitigation certificate as part of the building permit process.
- Alternatively, water users may choose to develop their own mitigation plan to offset the impact of their proposed new water use. Typically, a water user would acquire senior water right(s), and transfer it to the state Trust Water Rights Program¹ to serve as mitigation. The mitigation plan must be approved by Ecology and implemented, before the new water use is begun. More information on individual mitigation plans can be found in the rule (WAC 173-518-075).

11. How much water can a new water user relying on a permit-exempt groundwater well use?

In Washington, new uses of groundwater must acquire a permit or water right certificate, with the exception of a permit exempt well which can be used for small-scale water uses. Permit-exempt wells may use up to 5,000 gallons *per day* (gpd) and irrigate up to one-half acre of lawn or garden per well. The rule does not change these limits. However, the rule does require new permit-exempt wells to mitigate for the impact to the Dungeness River and small streams due to their new consumptive use; that is the amount of water consumed by indoor water uses and taken up by lawn and garden plants, and not returned to groundwater. Nearly all permit-exempt wells use less than the full 5,000 gpd. In fact the annual average in-house use for households in the Sequim-Dungeness area is estimated at about 150 gpd. While any new groundwater user could technically use up to the full exemption, they must mitigate for their use, and mitigating for a larger amount of water costs proportionately more. For this reason, the Exchange offers mitigation packages for a range of water quantities (see No. 24), with prices that vary accordingly. The cost savings generated by not choosing the highest volume mitigation package should save homeowners money and encourage water conservation.

¹ A trust water right is a right secured through transfer of an existing right. It retains the same priority as the original right and it is held by the state for instream flows and other purposes, such as mitigation.

12. What are the metering requirements for new water users?

- Ecology will require new water users to install a meter to record their water use. Specifications for meters can be found in Ecology Publication #12-11-053.
- The average cost of a meter is \$350. Meter installation can be completed by homeowner, the contractor, or the plumbing contractor for the home builder. Inspection may be required to ensure proper installation and functioning. Ecology will handle meter inspections on a case-by-case basis.
- It is the well owner's responsibility to maintain the meter and meter box in good working order. If installation does not meet specifications or there are abnormal readings, the home builder or well owner must assure that equipment is reinstalled, repaired or replaced as necessary.
- Meters are required to be equipped with a totalizer and telemetry that keeps track of the total amount of water used for a year. Ecology or its designee may record meter readings, but it is not the well owner's responsibility to report their water use to Ecology, unless directed to do so by Ecology.

13. How will the mitigation requirement be enforced?

Ecology has regulatory authority and responsibility over water rights and water use including the following:

- Enforcing the requirement to mitigate prior to beginning a new use of water.
- Ensuring meters are properly installed and functioning.
- Assuring compliance with other limitations for new permit exempt wells, such as irrigation restrictions and gallons per day limitations consistent with the mitigation provided.

Ecology has discretion on how and when to take enforcement actions regarding potential deficiencies in mitigation. If water use in the Dungeness watershed consistently exceeds the amount of water available for mitigation, Ecology will work with the Dungeness Water Exchange to ensure the shortage of mitigation water is resolved.

If an individual's water use consistently exceeds the amount of outdoor irrigation identified in the water user's mitigation certificate or significantly exceeds the typical average indoor water use quantity, the water user will likely be contacted first by the Dungeness Water Exchange to find out if a pipe is broken, or the mitigation needs of the user have changed. In extreme situations, Ecology may choose to take enforcement action. In all but the most egregious cases, Ecology is required to provide technical assistance to resolve water users' compliance problems before responding with formal notices, orders or penalties.

14. What is a mitigation obligation?

A mitigation obligation is the impact of the amount of water a new applicant plans to use and therefore is required to mitigate for. Ecology uses the following procedures and assumptions in determining groundwater mitigation obligations:

- Mitigation obligations are based on the expected full use of water under the new water right or permit exempt well use.
- Mitigation obligations are based on expected use not on actual reported use. This means that rather than using water, then reporting the amount used and paying to mitigate for this amount, new users are given the option of choosing among three levels of water use (packages listed in Table 1, question no 23 below). Each of the three mitigation packages is based on an average amount of gallons per day.
- Mitigation obligations reflect mitigation for the expected use of water in perpetuity, (unless a temporary use is applied for) and as the rule states, the use must cease if the mitigation plan is not working. It is in everyone's best interest to ensure a functioning mitigation program.

15. How is the groundwater mitigation obligation determined for a new water right or permit exempt well?

Mitigation obligations are based on the following:

- The expected amount of withdrawal stated by the prospective user.
- An accounting of the consumptive portion of the new water use. Consumptive water is water that is consumed by irrigation, domestic use or evaporation and does not return to the aquifer, as in the case of recharge through a septic system, with the following general approaches applying:
 - For residential indoor use, consumptive use is assumed to be 10 percent
 - For outdoor use, the consumptive use of irrigation water is assumed to be 90 percent, based on crop irrigation requirements in the Washington Irrigation Guide. For example, the crop irrigation requirement for pasture and turf grass in the Sequim area is 19.38 inches. The irrigation season runs from April 15th to September 15th.
- The impact of the groundwater extracted on stream flows in the Dungeness River and eight other small streams (Bagley, Bell, Casselary, Gierin, McDonald, Meadowbrook, Matriotti and Siebert). Stream flow impacts are calculated based on results of the Ecology's 2008 Dungeness groundwater model. Two important factors in this calculation of water use impacts are:
 - Geographic location (at the parcel level)

- Depth of the well and the aquifer from which water is pumped (based on well log data and the Groundwater model)

Questions pertaining to the Dungeness Water Exchange

16. What is the Dungeness Water Exchange?

The Exchange is the organizational structure that provides a means of obtaining mitigation credits to offset a new user's estimated water consumption and its effects on streams. To assist new water users with obtaining required water mitigation after the effective date of the rule, Ecology and Clallam County have contracted with Washington Water Trust to establish a Water Exchange. The Dungeness Water Exchange will be administered by Washington Water Trust. The Exchange has two primary programs: a stream flow restoration program and groundwater mitigation program. This document focuses on the details of the groundwater mitigation program. The stream flow restoration program is funded through grants and other funding sources, not mitigation fees.

17. Who oversees the Exchange?

The Exchange is managed by Washington Water Trust, a nonprofit that specializes in water rights issues, stream flow restoration and water right mitigation. The Exchange is guided by an Advisory Council with members representing the following entities: Clallam County, Department of Ecology, the Dungeness Water Users Association, the Jamestown S'Klallam Tribe, City of Sequim, Clallam PUD No.1, Clallam Conservation District and Washington Department of Fish and Wildlife.

18. Do I have to use the Exchange to obtain mitigation?

No. New water users seeking mitigation may use the Exchange or they may choose to develop their own mitigation plan and submit it to the Department of Ecology for approval. See WAC 173-518-075 and contact Ecology's Southwest Regional Office for more information.

19. How will the Exchange obtain water for mitigation?

The Dungeness Water Exchange will provide mitigation by implementing a variety of project types which are listed below. More detail about the mitigation can be found in the Exchange's Mitigation Plan which was approved by Department of Ecology prior to the effective date of the rule. The Exchange in cooperation with Ecology will also serve as the mechanism for creating, marketing and tracking "credits" (water purchased/acquired through water right transfers or projects, for example) and "debits" (water that will be used to mitigate for new uses) for the purpose of mitigating water use for new uses in the Dungeness Basin.

It is important to emphasize that the Exchange will operate a credit system, in which the Exchange will have generated mitigation credits in advance of an applicant needing to buy the credits to satisfy a mitigation obligation. A mitigation obligation is the amount of water required to mitigate impacts and is based on the amount an applicant chooses to use. Mitigation credits will be available for purchase to meet mitigation obligations under the rule.²

Transactions and projects that may be used by the Exchange to generate mitigation credits may include:

- Permanent purchase or lease of surface water rights and groundwater rights to the state Trust Water Rights Program for instream benefit.
- Shallow aquifer recharge projects, using high spring flows from the Dungeness River when available or reclaimed water from a sewage treatment plant to infiltrate to the aquifer for example.
- Deepening existing wells, substituting use of a well in place of continuing an existing surface water diversion, or small storage projects.
- Out-of-kind mitigation or habitat improvements, meaning not ‘water to offset water’ mitigation as approved in the Exchange’s mitigation plan.

20. What activities or projects create mitigation credits?

The Dungeness Rule defines “Mitigation” as follows:

The avoidance of impairment to senior water rights, including the levels of flow adopted in this rule for the Dungeness mainstem, its tributaries, and smaller streams from future groundwater appropriations as provided in WAC 175-518-070. Mitigation may be water for water or by other means approved by Ecology. Mitigation may be in-place, occurring where the withdrawal occurs, or out-of-place, occurring at another location, or at a different time, as approved by Ecology.

Mitigation credits represent mitigation water that the Exchange has created either through a water rights transaction using the state’s Trust Water Rights Program or a water resource management action that enhances stream flows or groundwater levels. While the rule definition above makes it clear there are different types of projects that may create mitigation credits, Ecology will determine what qualifies for mitigation on a project-by-project basis. The Exchange received approval of their mitigation plan prior to the effective date of the rule from Ecology. It is expected that the Dungeness Water Exchange mitigation plan will be periodically updated.

² Under the credit system, the priority date of a new mitigated water use is established when the water is put to beneficial use. This ‘credit’ water is in not tied to any historic water rights that were retired to serve as mitigation.

21. When in the building permit approval process must mitigation be in place?

A mitigation certificate must be recorded with the Clallam County Auditor's office before a building permit is issued.

22. What is the step-by-step process for a building permit applicant to obtain mitigation using the Exchange?

The applicant will follow a series of steps as determined by Ecology and the County as outlined below. The Exchange does not guarantee that mitigation will be available for all new proposed uses. Building permits that do not involve plumbing or water use not be subject to the water rule, and do not follow these steps.

1. **Initiate the permit process at the County.** County staff will assess whether applicants in the water rule area must attempt to get a water system connection, obtain mitigation, or that the proposed water use qualifies under an existing use. For more complex situations, the Exchange and/or Ecology will be consulted. The County will work with the applicant to fill out a Mitigation Certificate Application which will be submitted to the Exchange. Note: Applicants who are not yet ready to apply for building permits can contact the Exchange directly about purchasing mitigation in advance; availability will depend on the supply of mitigation credits at the Exchange. See question No. 23.
2. **Choose a mitigation package.** Mitigation packages are described in question No. 24 below. If outdoor mitigation is available for the applicant's site, the applicant will be given the option to add an outdoor package to the mitigation application at the time of initial application. If the applicant chooses to obtain only the basic indoor only mitigation certificate, they can always come back later (directly to the Exchange) to buy an outdoor package, but an additional recording fee will apply at the County.
3. **Make payment to the Exchange** based on the price of the selected mitigation package. Note: If you are among the first applicants in 2013 you may be eligible to have the cost of your indoor mitigation package covered in full by Ecology grant funds to Clallam County. County staff will work with the applicant to determine eligibility for this program. The County will electronically forward the application to the Exchange, along with any other relevant information. If an outdoor package is applied for, the additional payment will be mailed to the Exchange.
4. **Exchange will Issue Mitigation Certificate** and send a copy to the County and the applicant.
5. **Contact a well driller and drill well (if one is not already drilled).** The well may be drilled at any time. Drilling the well and submitting the necessary documentation, and a water sample, are necessary to demonstrate adequate water is physically available. This "Proof of Potable Water" is an existing requirement to issue the building permit.

6. **Complete the building permit process:** The final steps in the process can all take place in a few minutes at the Clallam County Courthouse or be done remotely.
 - a. **Pay all county permit fees.** Once all permit review is complete, and the permit is ready to issue, the applicant must pay all necessary County fees.
 - b. **Sign and notarize the Certificate.** Once fees are paid, the certificate must be signed and notarized. (If signed at the courthouse, the county will attempt to provide a notary.)
 - c. **Record Certificate with the County Auditor.** The Mitigation Certificate will be appurtenant to the buyer's property and title and will remain attached to the land. The Certificate cannot be transferred to another place of use or point of withdrawal without the Exchange's prior written consent.
 - d. **Show proof of recording, and pick up the issued Building Permit.** The applicant will return to the Permit Center with the recording receipt, and pick up the issued building permit.
7. **Deliver a copy of the notarized Certificate to Clallam County Department of Community Development** demonstrating that adequate water is legally available and recorded on the parcel. (The County Environmental Health section will also need the applicant to provide proof of potable water to satisfy health requirements for water availability.)
8. **Install a meter** (as required by Ecology) as part of the plumbing system. See question No. 12 above for more information.

23. Can a landowner in the rule area purchase a mitigation package if they do not have a pending building permit?

Any landowner with a property interest in one or more lots within the WRIA 18 rule area may purchase a Mitigation Certificate Option (MCO). The MCO requires an upfront payment of 25 percent of the cost of a mitigation certificate (.25 x \$1,000 = \$250) and 5 percent per year. The MCO cannot be exercised for two years but must be exercised within five years or renewed. If the option is exercised the payments are credited towards the certificate. The option can be renewed; the price for the mitigation certificate is based on market conditions at the time of renewal. Please contact the exchange to obtain a Mitigation Certificate Option Application.

24. What levels of mitigation are offered by the Exchange?

At this point in time, the Exchange is offering a choice of three mitigation packages as described in the table below, depending on the location of the property. The indoor-only mitigation

package is for “domestic” purposes only, as defined in the Rule³ . An outdoor mitigation package reflects the maximum amount of water that you agree to use on your property from your permit-exempt well (available only in areas where mitigation is available).

Table 1. Mitigation Package Descriptions (availability depends on location)

Package Description	Average Amount of Indoor Use (Gallons/Day)	Average Amount of Outdoor Use (Gallons/Day)	Amount of Irrigated Lawn Area (Square Feet)	Amount of Irrigated Lawn Area (Acres); pumped volume
Indoor Only Package (with minimal incidental outdoor use only)	150*	0	0	0
Indoor with Basic Outdoor Package	150*	89	2,500 sq. ft. (approx. 50x50 ft)	.06 acres; 0.099 acre-feet/year
Indoor with Extended Outdoor Package	150*	200	5,625 sq. ft. (approx. 75x75 ft)	.13 acres; 0.224 acre-feet/year

**150 gpd is the annual average used by households across the Dungeness watershed as determined by Ecology. The household water use for domestic purposes normally varies based on the number of people in the household. This is not an absolute limit on domestic use. Annual average domestic water use in the Sequim area is 150 gpd serving a household of about 2 persons.*

The amount of outdoor use is based on the amount of irrigation required for turf grass according to the Washington Irrigation Guide (20.80 inches/year), a larger amount of landscaping or garden area may be possible with the same number of gallons per day listed in Table 1.

Purchasing mitigation in amounts offered by the Exchange will provide less water than the full exemption allows under state law (5,000 gpd). This means the Exchange’s mitigation buyers have voluntarily agreed to limit their water use to the amount purchased (a note to the property title will reflect this), to take advantage of lower mitigation costs.

Applicants for exempt wells that wish to pursue the full amount (5,000 gpd with up to ½ acre irrigated area) allowed under the permit exemption (RCW 90.42) may pursue their own mitigation plan and work directly with Ecology as indicated under the rule.

³ WAC 173-518-030 “Domestic use” means use of water associated with human health and welfare needs, including water used for drinking, bathing, sanitary purposes, cooking, laundering, and other incidental household uses. The incidental uses must minimize the consumptive use of water. Examples of incidental household uses include, but are not limited to: washing windows, car washing, cleaning exterior structures, care of household pet, and watering potted plants. Domestic use does not include other uses allowed under the groundwater permit exemption: Outdoor irrigation of up to one-half acre of noncommercial lawn or garden, stockwatering, and industrial use.

The Exchange may also work with applicants on a case by case basis to provide mitigation in other quantities or for other uses than those listed in the table above.

25. How much will mitigation packages cost from the Exchange?

Table 2. 2013 Dungeness Water Exchange Mitigation Package Pricing

Mitigation Package:	Cost per well:
Indoor Only	\$1,000
Basic Outdoor Package	\$2,000
Extended Outdoor Package	\$3,000

Mitigation package costs reflect the costs associated with purchasing water rights and conducting other water management actions that provide mitigation credits. These costs include transactions costs including the labor needed to implement particular projects and the capital costs of purchasing mitigation water, as well as overhead costs of operating the Exchange.

Transaction costs associated with water transaction projects are significant. They encompass all of the steps associated with buying a water right and transferring it to the state Trust Water Program which include: identifying valid and transferable water rights, contacting and negotiating with willing water right sellers, legal assistance with contracting, preparing change applications, guiding the change application through the Ecology process, closing and escrow costs and long term monitoring. Transaction costs for implementing recharge projects include those listed above for water right purchase, as well as: recharge site identification, communication with landowners, legal assistance with easements and cooperation agreements, site preparation and earth moving, installation of infiltration pipes and measuring devices, continued site maintenance and monitoring.

26. How will the Exchange insure that new water users are using only as much water as they paid to mitigate for?

The Exchange will need to monitor compliance with the chosen mitigation package. This means that the Exchange may conduct the following activities before issuing mitigation certificates:

- Review parcel map, aerial photos and, as necessary, conduct a site visit to record any existing outdoor uses on the site and establish a baseline of any area irrigated from other water sources. (The potential for people to have expanded their irrigated area by using very efficient irrigation will be taken into account).

Once a new mitigated groundwater use has begun, the Exchange may also:

- Conduct annual monitoring via site visit with the landowner’s permission, review aerial photography, meter readings or other appropriate methods in order to verify that the

acreage irrigated under the permit exempt well is equal to or less than that specified in Mitigation Certificate.

- If an individual's water use consistently exceeds the amount of outdoor irrigation identified in the water user's mitigation certificate or significantly exceeds the typical average indoor water use quantity, the water user will likely be contacted first by the Dungeness Water Exchange to find out if a pipe is broken, or the mitigation needs of the user have changed.
- The Exchange will report any failures to comply to Ecology for further action. Ecology may issue notices, orders, or penalties deemed necessary to gain compliance by the water user. In all but the most egregious cases, Ecology is required to provide technical assistance to resolve water users' compliance problems before responding with formal notices, orders, or penalties.

We hope this Mitigation Guide has helped you gain a better understanding of the Dungeness Water Rule and the Dungeness Water Exchange. Please contact the Exchange with additional questions.

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APPENDIX B

1 make, sometimes not, but in any event, that's not my
2 role to try to guess what the Supreme Court may do.
3 My role is to rule as I see fit.

4 Now, having said all that, one of my pet peeves
5 when I was in your position was a judge that went on
6 and on and on and didn't get to the point as quickly
7 as I would like, and I understand you may be feeling
8 that as well. It is my practice to try to get right
9 to the point and rule. The issue about doing that is
10 sometimes when I rule people don't hear another word
11 that I say, but, of course, that's why we have a
12 court reporter, because anything that I do say will
13 be taken down and I will try to spend some time going
14 back and giving you some of the bases for my ruling
15 in this particular case.

16 The issue before me is a limited issue. The
17 limited issue is must the four-part test be utilized
18 in this case as a matter of law, and I say in this
19 case I'm talking about in determining minimum
20 instream flows. My ruling is that I do not believe
21 that I can establish that the law absolutely requires
22 that four-part test to be utilized, and so I am
23 denying the petitioner's motion for summary judgment
24 here today.

25 In telling you that, you may interpret this as

1 that I'm waffling or punting on certain issues, but I
2 want to be up front with you. This was a summary
3 judgment motion. Summary judgment entails situations
4 in which it's a strictly legal issue, that is, that
5 there are no material issues of fact that need to be
6 determined.

7 I've been told that there's a 70,000 page record
8 in this administrative matter. I don't like making
9 work for myself, and I will tell you I've never had a
10 70,000 page record before. I did one several weeks
11 ago that was 27,000 pages and I thought that that was
12 very onerous to try to understand everything in that
13 issue and to rule in an appropriate way, but that's
14 my job.

15 Let me say that in ruling that I do not find that
16 there is an absolute legal requirement that there be
17 the four-part test, that does not necessarily imply
18 that a four-part test might not be appropriate in
19 this case. When we're talking summary judgment and
20 legal issues, we're often talking about things in a
21 general way rather than specific, yet when I talk
22 about "in this case" we get considerably more
23 specific because there may be considerations that are
24 raised by the record and arguments therein, and this
25 is probably an appropriate time for me to discuss why

1 I did not grant the motion of the State, or actually
2 it's the intervenor, to strike portions of the
3 arguments by petitioner in this particular case and
4 that was in regard to maximum net benefits, and I
5 understand that I didn't agree to hear that on
6 summary judgment.

7 I understand that the petitioner suggested in a
8 number of areas in their briefing that while they
9 understood that this was not an issue before me, they
10 wanted to talk about that issue from the standpoint
11 of the big picture. But the big picture is an
12 individual situation, as far as I'm concerned, that
13 gets back to the record, and so by agreeing or --
14 that's not the term I wanted to use. By telling you
15 that I was not going to strike that material, I told
16 you that I might have more to say about how I
17 evaluated that material, and the bottom line is
18 evaluating that tells me that there are issues that
19 are still out there but I want to consider those
20 issues in the context of the administrative record.
21 I'm not making any ruling as the State and the
22 intervenor both argued, certainly the intervenor did,
23 that it would be premature for me to make any
24 decisions about issues that were not before me today.
25 That's correct, and I'm not making any decisions, but

1 I am telling you that all of that material certainly
2 needs to be addressed in the context of this
3 administrative law review at some point in time
4 unless the parties change their positions, obviously.

5 So I'm not trying to tell anybody how this Court
6 may or may not consider a particular argument or what
7 I may ultimately rule as to particular arguments, but
8 it is clear to me that there is an administrative law
9 review matter regarding what I would characterize as
10 the Dungeness Rule.

11 There's a motion by the petitioner for declaratory
12 judgment. There was rulemaking involved here. The
13 argument originally was that rulemaking ultimately
14 ended up in water rights and, therefore, the
15 four-part test should be applied. My basis for not
16 agreeing with that is that the legislature did not
17 clearly address the four-part test, and when I read
18 the two Washington Supreme Court cases, and this
19 jurisdiction is pretty familiar with both of those
20 cases, by the way, having seen them before. In any
21 event, I think that there may be all kinds of issues
22 that I'll have to get into, but this was not a
23 clearly established legal principle that a four-part
24 test is required in every situation where instream
25 flows are being established. The arguments that the

1 four-part test might be an issue in regard to other
2 considerations is out there and so I won't go any
3 further in that regard.

4 But as a matter of law, let me indicate that I
5 believe the petitioner did have the burden in this
6 case of proving to me that their motion for summary
7 judgment is absolutely established, they did not meet
8 their burden, the legislature did not specifically
9 address this, nor do I find that the Supreme Court
10 specifically addressed these types of situations.
11 There can be arguments about whether or not there are
12 appropriate analogies that would compare and
13 contrast, agree with or disagree with their rulings
14 in other cases, but I find that the context is indeed
15 the record in this particular case, and so this court
16 or the appropriate court -- and I think it's assigned
17 to me -- and so although I am retiring in a year, I
18 hopefully am going to be around to hear this matter
19 at some point prior to that retirement, and so I will
20 expect that we'll be going forward.

21 I've been provided that record, I believe, in an
22 electronic format, although I don't think I have it
23 in my chambers, I think it's floating around
24 somewhere, but I believe that we allow voluminous
25 records to be electronically provided to us as

1 leave that to you to brief in the way that you think
2 appropriate according to your party's position.

3 I guess I had a question. Since we have an
4 intervenor in this particular case and that happened
5 fairly late in the process, was that only as to the
6 summary judgment motion or is that to all motions?

7 MR. VON SEGGERN: That's to the entire case,
8 Your Honor.

9 THE COURT: Okay. I assumed that because I
10 think you came into the case and wrote me letters
11 about what I should consider on summary judgment or
12 not.

13 MR. VON SEGGERN: That's correct, Your Honor.
14 That happened fairly shortly after we were granted
15 intervenor status.

16 THE COURT: All right. Well, I've announced
17 my decision. I need the prevailing party in this
18 case, the Department of Ecology, to draft an order.
19 It doesn't have to be in detail, I don't have to do
20 findings and conclusions, although a summary judgment
21 motion does require that you list all the documents
22 that I considered. Luckily, you don't have to list
23 all the documents in the record.

24 MR. NORTH: We'll prepare an order, Your
25 Honor.

APPENDIX C



STATE OF WASHINGTON
DRAFT PROTESTED
REPORT OF EXAMINATION
FOR
INTERRUPTIBLE WATER RIGHT

WR File NR S1-28782
WR Doc ID 6263724

PRIORITY DATE	WATER RIGHT NUMBER
June 10, 2014	S1-28782

MAILING ADDRESS	SITE ADDRESS (IF DIFFERENT)
Courtney Polinder 1093 Polinder Road Lynden, WA 98264	

Total Quantity Authorized for Diversion

DIVERSION RATE	UNITS	ANNUAL QUANTITY (AF/YR)
0.67	CFS	173

Purpose

PURPOSE	DIVERSION RATE			ANNUAL QUANTITY (AF/YR)		PERIOD OF USE (mm/dd)
	ADDITIVE	NON-ADDITIVE	UNITS	ADDITIVE	NON-ADDITIVE	
Irrigation	0.67		CFS	173		05/01-09/30

REMARKS

USE OF WATER UNDER THIS WATER RIGHT IS NOT ALLOWED WHEN THE ACTUAL FLOW OF THE NOOKSACK RIVER (AT FERNDALE) – USGS GAGE 12213100, IS LESS THAN THE MINIMUM INSTREAM FLOW FOR THAT CONTROL STATION, AS SPECIFIED IN WASHINGTON ADMINISTRATIVE CODE (WAC) 173-501-030(2) AND ATTACHMENT 2. **DUE TO THE LIKELIHOOD OF INTERRUPTION, THIS WATER RIGHT SHOULD NOT BE RELIED ON TO GROW PERENNIAL CROPS THAT REQUIRE IRRIGATION TO SURVIVE.**

IRRIGATED ACRES		PUBLIC WATER SYSTEM INFORMATION	
ADDITIVE	NON-ADDITIVE	WATER SYSTEM ID	CONNECTIONS
100		NA	NA

Source Location			
COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
Whatcom	Nooksack River	Bellingham Bay	1 - Nooksack

SOURCE FACILITY/DEVICE	PARCEL	WELL TAG	TWN	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
POD #1	400321151108	NA	40N	03E	21	NE SW	48.940334	-122.432289
POD #2	400321151108	NA	40N	03E	21	NE SW	48.938872	-122.431756
POD #3	400321151108	NA	40N	03E	21	NW SW	48.939395	-122.438479

Datum: NAD83/WGS84

Place of Use (See Attached Map)
PARCELS (NOT LISTED FOR SERVICE AREAS)
400321151108, 400321237095, 400328186457, and 400328242458

LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE
<p>NE ¼ SW ¼, Section 21 lying south of the Nooksack River. NW ¼ SW ¼, Section 21 lying south of the Nooksack River. SE ¼ SW ¼, Section 21 lying south of the Nooksack River. Eastern 450 feet SW ¼ SW ¼, Section 21.</p> <p>Eastern 1,165 feet NE ¼ NW ¼, Section 28.</p> <p>All in Township 40 North, Range 3 East W.M., in Whatcom County, Washington.</p>

Proposed Works
<p>Irrigation water directly pumped from the Nooksack River with a diesel powered pump on a movable trailer. Water pumped into an existing below grade 6-inch mainline with risers. Water applied via a traveling big gun sprinkler.</p>

Development Schedule		
BEGIN PROJECT	COMPLETE PROJECT	PUT WATER TO FULL USE
April 1, 2016	April 1, 2020	January 1, 2035

Measurement of Water Use

How often must water use be measured?	See footnote
How often must water use data be reported to Ecology?	See footnote
What rate should be reported?	See footnote
What volume should be reported?	See footnote

Footnote: Ecology issued a companion administrative order with this authorization that specifies what the water right holders will need to do to comply with the minimum instream flow rule, what data will need to be measured and recorded throughout the irrigation season, and what data will need to be reported to Ecology.

Provisions

Minimum Instream Flow

This authorization is subject to the following minimum flow provision as specified in WAC 173-501-030(1) through (3). It is subject to regulation by the Department of Ecology for protection of instream resources when gaged flows are less than the following minimum flow provisions at:

Control Station: Nooksack River (at Ferndale) – USGS 12213100
River Mile: 5.8
Minimum Instantaneous Discharge

Date*	Discharge (cfs)
January 1 through May 1	2,900
May 15 through July 1	3,500
July 15	3,000
August 1	2,400
August 15	1,900
September 1	1,800
September 15 through October 1	1,700
October 15	2,050
November 1	2,300
November 15	2,500
December 1	2,900

***Note: Attachment 2** shall be used for identification of minimum instream flows on those days not specifically identified in the table above.

Real-time discharge data for USGS station 12213100 can be obtained from the following web site: http://waterdata.usgs.gov/wa/nwis/uv/?site_no=12213100. Provisional data will be relied upon for regulation and any later revisions made to the data by the USGS will not be used as evidence of non-permitted water use by the water right holder.

Compliance

If you are irrigating without a legal water right, in excess of an existing right, or outside of the terms of your water right, you are violating Revised Code of Washington (RCW) 90.03.400 and will be notified to

immediately curtail your diversion of water. According to provisions of RCW 90.03.600, failure to comply with Washington's water code may result in the issuance of an Administrative Order and/or Notice of Penalty, with possible fines of up to \$5,000 per day of illegal water use.

Family Farm Irrigation

This authorization to use public waters of the state is classified as a Family Farm Permit in accordance with Chapter 90.66 RCW. This means the land being irrigated under this authorization shall comply with the following definition: Family Farm - a geographic area including not more than 6,000 acres of irrigated agricultural lands, whether contiguous or noncontiguous, the controlling interest in which is held by a person having a controlling interest in no more than 6,000 acres of irrigated agricultural lands in the state of Washington which are irrigated under water rights acquired after December 8, 1977. Furthermore, the land being irrigated under this authorization must continue to conform to the definition of a family farm.

Metering and Reporting

An approved measuring device must be installed and maintained for each of the sources identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use," Chapter 173-173 WAC.

Chapter 173-173 WAC describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition the Department of Ecology for modifications to some of the requirements.

Recorded water use data shall be submitted to Ecology via the Internet. To set up an Internet reporting account, contact the Bellingham Field Office or go to <https://fortress.wa.gov/ecy/meteringx/Login.aspx>. If you do not have Internet access, you can submit paper copies of your water use data by contacting the Bellingham Field Office for forms to use to submit your water use data.

Department of Fish and Wildlife Requirement(s)

Pursuant to Chapter 77.55 RCW, a Hydraulic Project Approval permit must be obtained from the Washington State Department of Fish and Wildlife prior to beginning construction of the diversion.

The intake(s) must be screened in accordance with Department of Fish and Wildlife screening criteria (pursuant to RCW 77.57). Contact the Department of Fish and Wildlife, 600 Capitol Way N, Olympia, WA 98501-1091. Attention: Habitat Program, Phone: (360) 902-2534 if you have questions about screening criteria. <http://wdfw.wa.gov/licensing/hpa/>

No dam or weir may be constructed in connection with this diversion.

Easement and Right-of-Way

If the water source and/or water transmission facilities are not wholly located upon land owned by the water right holder, they are advised that issuance of a water right by this department does not convey a right of access to, or other right to use, land which the water right holder does not legally possess. Obtaining such a right is a private matter between applicant and owner of that land.

Proof of Appropriation

The water right holder must file the notice of Proof of Appropriation of water (under which the certificate of water right is issued) when the permanent distribution system has been constructed and the quantity of water required by the project has been put to beneficial use. Once Ecology has accepted the Proof of Appropriation form, the applicant shall retain the services of a Certified Water Rights Examiner (CWRE) to verify the extent of the perfected right and prepare the necessary documentation to allow Ecology to issue a water right certificate for this project. The certificate will reflect the extent of the project perfected within the limitations of this authorization. Elements of a proof inspection may include, as appropriate, the source(s), system instantaneous capacity, beneficial use(s), annual quantity, place of use, and satisfaction of provisions. Information on hiring a CWRE is available on Ecology's website at: <http://www.ecy.wa.gov/programs/wr/rights/cwrep.html> or by calling the appropriate Ecology regional office.

Inspections

Department of Ecology personnel, with proper credentials, will have access to the project location to inspect records of water use, diversions, measuring devices, and associated distribution systems for compliance with water law at all times.

Senior Water Rights

This authorization to make use of public waters of the state is subject to existing rights, including any tribal water rights held by the United States for the benefit of tribes, to the extent they may exist.

Findings of Facts

Upon reviewing the investigator's report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the investigator that water is available from the source in question under certain conditions; that there will be no impairment of existing rights if water is only diverted when instream flows are being met as per WAC 173-501; that the purpose of use will be beneficial; and that there will be no detriment to the public interest.

Therefore, I ORDER approval of Application No. S1-28782, subject to existing rights and the provisions specified above.

Your Right To Appeal

You have a right to appeal this Order to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of the Order:

- File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	Department of Ecology Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
Pollution Control Hearings Board 1111 Israel RD SW, Suite 301 Tumwater, WA 98501	Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903

Signed at Bellevue, Washington, this _____ day of _____, 2015.

Thomas Buroker, Section Manager

For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>. To find laws and agency rules visit the Washington State Legislature Website: <http://www1.leg.wa.gov/CodeReviser>.

INVESTIGATOR'S REPORT

Application for Water Right: Courtney Polinder

Water Right Control Number: S1-28782

Investigators: Andy Dunn, Jim Bucknell, Adam Neff (RH2 Engineering, Inc.)

BACKGROUND

This report serves as the written findings of fact concerning Water Right Application Number S1-28782.

On June 10, 2014, Courtney Polinder filed a water right application with the State of Washington Department of Ecology. Application S1-28782 requested 0.668 CFS for irrigation of 80 to 85 acres from a surface water diversion from the Nooksack River.

Coordinated Cost Reimbursement

This application is one of nine applications being processed under a coordinated cost reimbursement process initiated under RCW 90.03.265(3). The water source included in this coordinated process is the stream management reach defined in WAC 173-501-030(1) as the Nooksack River, "from influence of mean annual high tide at low instream flow levels to the confluence with, and including, Smith Creek." This stream management reach contains one control station identified as Nooksack River (at Ferndale), which is USGS gage number 12213100. The Nooksack River includes minimum instream flows in WAC 173-501-030(2) and all applicants have been informed that any permits issued will be interruptible based on these flows. Only surface water applications were included for processing. Each individual applicant has entered into a cost reimbursement contract with the Department of Ecology. This report has been prepared by RH2 Engineering, Inc. (RH2) on behalf of the Department of Ecology.

Table 1 Summary of Requested Water Right

Applicant Name	Courtney Polinder
Date of Application	June 10, 2014
Place of Use	See Page 2 and Attachment 1

County	Waterbody	Tributary To	WRIA
Whatcom	Nooksack River	Bellingham Bay	01 - Nooksack

Purpose	Rate	Unit	Af/yr	Begin Season	End Season
Irrigation of 100 acres	0.67	CFS	150	Seasonal	

Source Name	Parcel	Well Tag	Twp	Rng	Sec	QQ Q	Latitude	Longitude
POD #1	400321151108	NA	40N	03E	21	NE SW	48.940334	-122.432289
POD #2	400321151108	NA	40N	03E	21	NE SW	48.938872	-122.431756
POD #3	400321151108	NA	40N	03E	21	NW SW	48.939395	-122.438479

POD = Point of Diversion; cfs = cubic feet per second; af/yr = acre-feet per year; Sec. = Section; QQ Q = Quarter-quarter of a section; WRIA = Water Resource Inventory Area; E.W.M. = East of the Willamette Meridian; Datum: NAD83/WGS84.

Legal Requirements for Approval of Appropriation of Water

Chapter 90.03 RCW authorizes the appropriation of public water for beneficial use and describes the process for obtaining water rights. Laws governing the surface water right permitting process are contained in RCW 90.03.250 through 90.03.340. In accordance with RCW 90.03.290, determinations must be made on the following four criteria in order for an application for water rights to be approved:

1. Water must be available
2. There must be no impairment of existing rights
3. The water use must be beneficial
4. The water use must not be detrimental to the public interest

Each of these four tests is addressed in the **INVESTIGATION** section.

Public Notices

RCW 90.03.265(3) requires that the Department of Ecology provide notice, both on its web site and in a newspaper of general circulation in the area where affected properties are located, if it elects to initiate a coordinated cost reimbursement process. Notice was provided on a Department of Ecology web site (<http://www.ecy.wa.gov/programs/wr/rights/epwra.html>) from April 9, 2014, through June 8, 2014. Notice of the coordinated cost reimbursement process was published by the Department of Ecology in the *Lynden Tribune* on June 4 and 11, 2014.

RCW 90.03.280 requires that notice of a water right application be published once a week, for two consecutive weeks, in a newspaper of general circulation in the county or counties where the water is to be stored, diverted and used. Notice of this application was published in the *Lynden Tribune* on October 8 and 15, 2014.

Consultation with the Department of Fish and Wildlife

The Department of Ecology must give notice to the Washington Department of Fish and Wildlife (WDFW) of applications to divert water. On December 2, 2014, Mr. Andy Dunn of RH2 Engineering notified Mr. Steven Boessow (Water Rights Biologist) of WDFW of the 9 pending surface water right applications related to the coordinated cost reimbursement process. Mr. Boessow was provided with a summary of the applications and proposed decisions. On April 20, 2015 Mr. Boessow provided a letter stating that, "based on impacts to fish and/or wildlife and the habitat they rely on, and pursuant to Chapter 77.57.020 RCW, WDFW does not oppose the issuance of these applications as described in this ROE."

WDFW added that "pursuant to Chapter 77.55 RCW, A Hydraulic Project Approval permit must be obtained from the Washington State Department of Fish and Wildlife prior to beginning construction of the diversion. The intake(s) must be screened in accordance with the Department of Fish and Wildlife screening criteria (pursuant to RCW 77.27). Contact the Department of Fish and Wildlife, 600 Capitol Way N, Olympia, WA 98501-1091. Attention: Habitat Program, Phone: (360) 902-2534 if you have questions about screening criteria." <http://wdfw.wa.gov/licensing/hpa/>

Consultation with the Lummi Nation and Nooksack Tribe

The Lummi Nation and Nooksack Tribe were notified by the Department of Ecology prior to initiation of the coordinated cost reimbursement process. The Lummi Indian Business Council (LIBC) sent a protest

letter dated June 30, 2014. In that letter the LIBC identified that it was protesting this application based on concerns over current and future potential impacts on instream flows. It also indicated that all withdrawals within WRIA 1 have the capacity to adversely impact the rights of the Lummi Nation. The Nooksack Tribe did not protest the application.

State Environmental Policy Act (SEPA)

A water right application is subject to a SEPA threshold determination (i.e., an evaluation whether there are likely to be significant adverse environmental impacts) if any one of the following conditions are met.

- (a) It is a surface water right application for more than 1 cubic feet per second, unless that project is for agricultural irrigation, in which case the threshold is increased to 50 cubic feet per second, so long as that irrigation project will not receive public subsidies;
- (b) It is a groundwater right application for more than 2,250 gallons per minute;
- (c) It is an application that, in combination with other water right applications for the same project, collectively exceed the amounts above;
- (d) It is a part of a larger proposal that is subject to SEPA for other reasons (e.g., the need to obtain other permits that are not exempt from SEPA);
- (e) It is part of a series of exempt actions that, together, trigger the need to do a threshold determination, as defined under WAC 197-11-305.

Because the application does not meet any of these conditions, it is categorically exempt from SEPA and a threshold determination is not required.

INVESTIGATION

Site Visit

On January 7, 2015, Mr. Jim Bucknell, Mr. Andrew Dunn, and Mr. Adam Neff from RH2 Engineering, Inc., and Ms. Kasey Cykler from the Department of Ecology met with Mr. Courtney Polinder at the site of the proposed project. Before travelling to the proposed points of diversion, the proposed farm operations and the proposed water right were discussed with Mr. Polinder.

Mr. Polinder grows grass and corn, which is primarily sold to area dairies for feed. This water right application requests water for seasonal irrigation.

Mr. Polinder indicated that he plans to irrigate the areas planted in grass and those areas that are planted in corn where there are sandy soils, closer to the river. Currently, Mr. Polinder has an even split in acreage between corn and grass.

Mr. Polinder has a 6-inch diameter buried mainline across the proposed place of use, which is currently used for nutrient application, but will also be used to convey the irrigation water. Irrigation will be accomplished using one traveling big gun sprinkler system.

In touring around the property, Mr. Polinder pointed out three potential points of diversion. The exact locations of the point(s) of diversion are not yet known. Uncertainty in location is related to the vertical

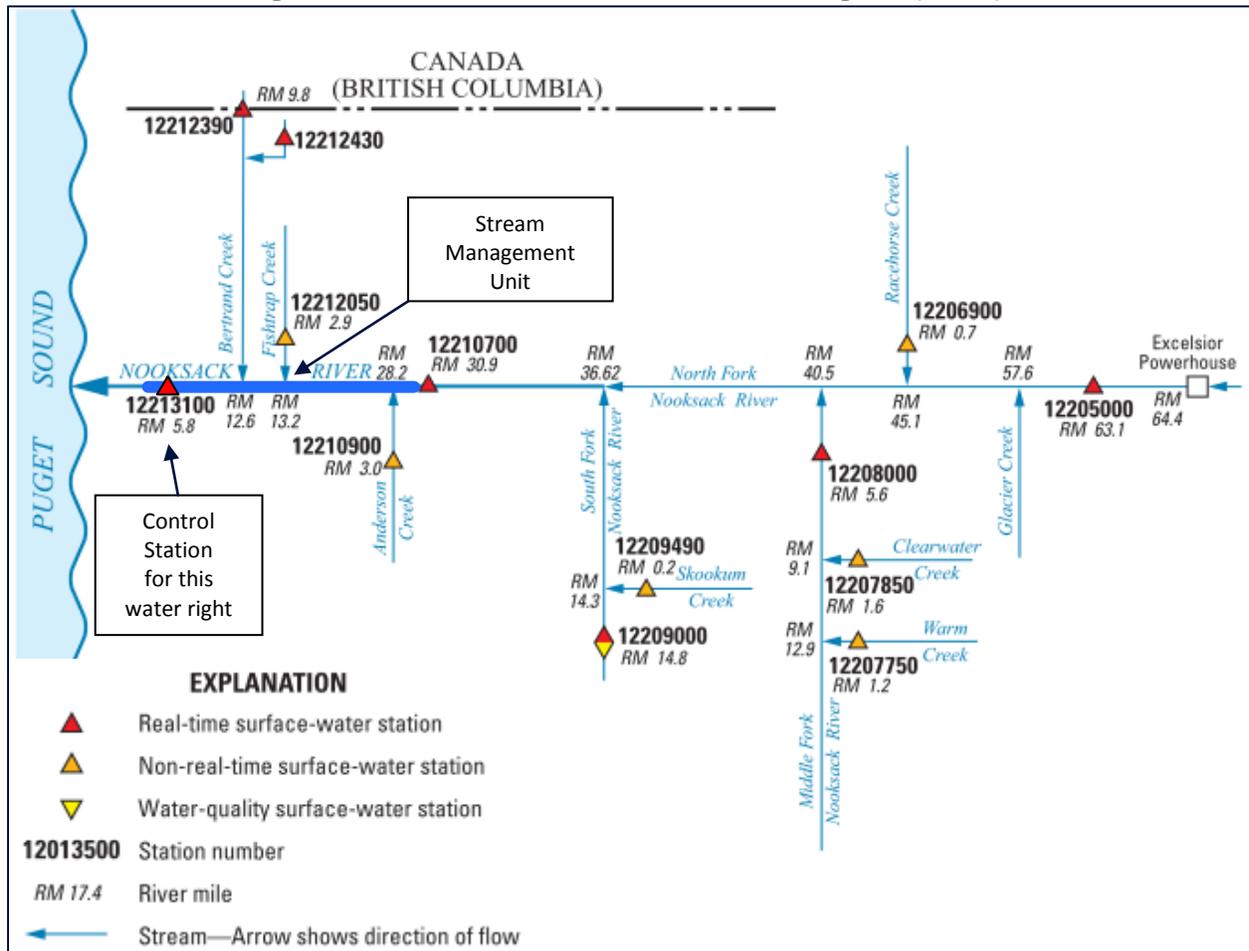
distance between the river and the top of the dike and uncertainty about the intake submergence needed and available at any particular point. The diversion(s) will likely utilize a diesel motor and centrifugal pump on a trailer. Power is currently not available near the river at the proposed diversion locations.

After the site visit, Mr. Polinder obtained permission from the neighbor to the east (Parcel No. 400321237095) to irrigate a portion of their property under this water right application. That increase in acreage enlarged the acres to be irrigated up to 100 acres from the originally requested 80 to 85 acres.

Nooksack River Hydrology

The Nooksack River is located in northwestern Washington State in Water Resource Inventory Area (WRIA) 1. The river's watershed spans from the northwest side of Mount Baker and the northern side of Mount Shuksan in the east to approximately the Canadian Border in the north with discharge occurring into Bellingham Bay. In the Cascade Mountains, small streams and creeks flow into one of three forks of the Nooksack River (North Fork, Middle Fork, and South Fork). These forks come together just upstream from the City of Deming to form the mainstem Nooksack River. After exiting the foothills, the river flows across a relatively flat area referred to as the Nooksack Lowland before discharging into the marine water of Bellingham Bay. Average precipitation across the watershed ranges from approximately 112 inches at the Mt. Baker Lodge in the Cascade Mountains to approximately 30 inches at the river's mouth (Smith, 1960). The watershed upstream of the USGS Gage 12213100 Nooksack River at Ferndale is 786 square miles. The average discharge for the period of 1967 through 2013 is 3,864 cfs, which is equivalent to either 2,799,000 af/yr, or 66.79 inches distributed over the entire 786 square mile watershed. The maximum recorded discharge of 57,000 cfs occurred on November 10, 1990, and the minimum recorded discharge of 463 cfs occurred during October and November, 1987 (United States Geological Survey, 2013).

Figure 1. Nooksack Basin Schematic Flow Diagram (USGS)



Nooksack River Regulation

The State of Washington adopted Chapter 173-501 WAC in 1986. WAC 173-501-030 includes the establishment of stream management units and control stations for those stream management units. This water right application requests to divert water from the Nooksack River (at Ferndale) stream management unit, which includes the reach of the Nooksack River from influence of mean annual high tide at low instream flow levels. This is located at approximately river mile 4.5, where the river historically bifurcated, with part of the flow going to Bellingham Bay and part moving down what is now referred to as the Lummi or Red River (Robinson Noble, 2013) and extending upstream to the confluence with, and including Smith Creek. Smith Creek flows into the Nooksack River just downstream of river mile 30 and is located approximately one mile downstream from where State Highway 542 (Mount Baker Highway) crosses the Nooksack River near Nugents Corner. The control station within this stream management unit is USGS gage 12213100, which is referred to as the Nooksack River at Ferndale, WA and is located at river mile 5.8 (**Figure 1**). **Figure 2** shows the established minimum instream flows for this control station.

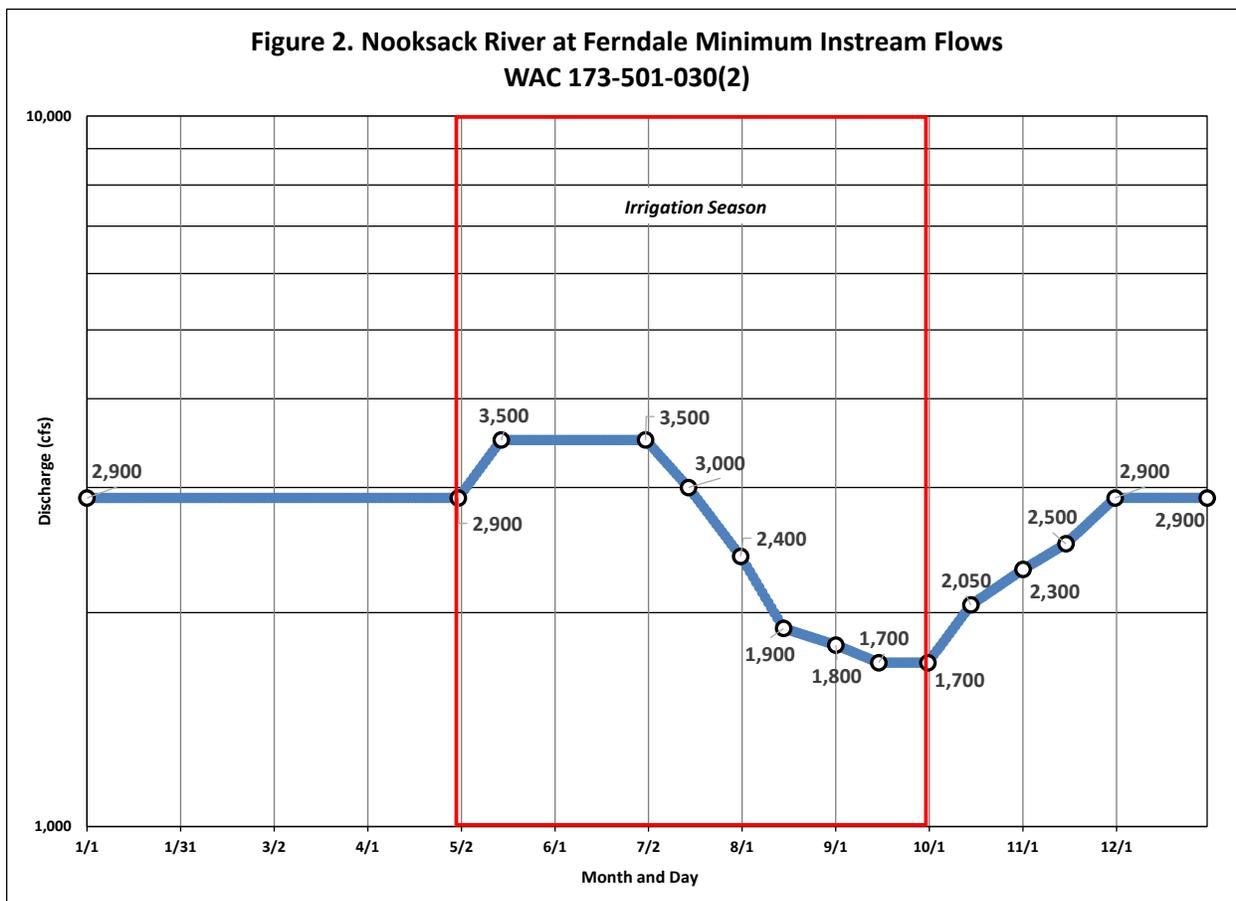
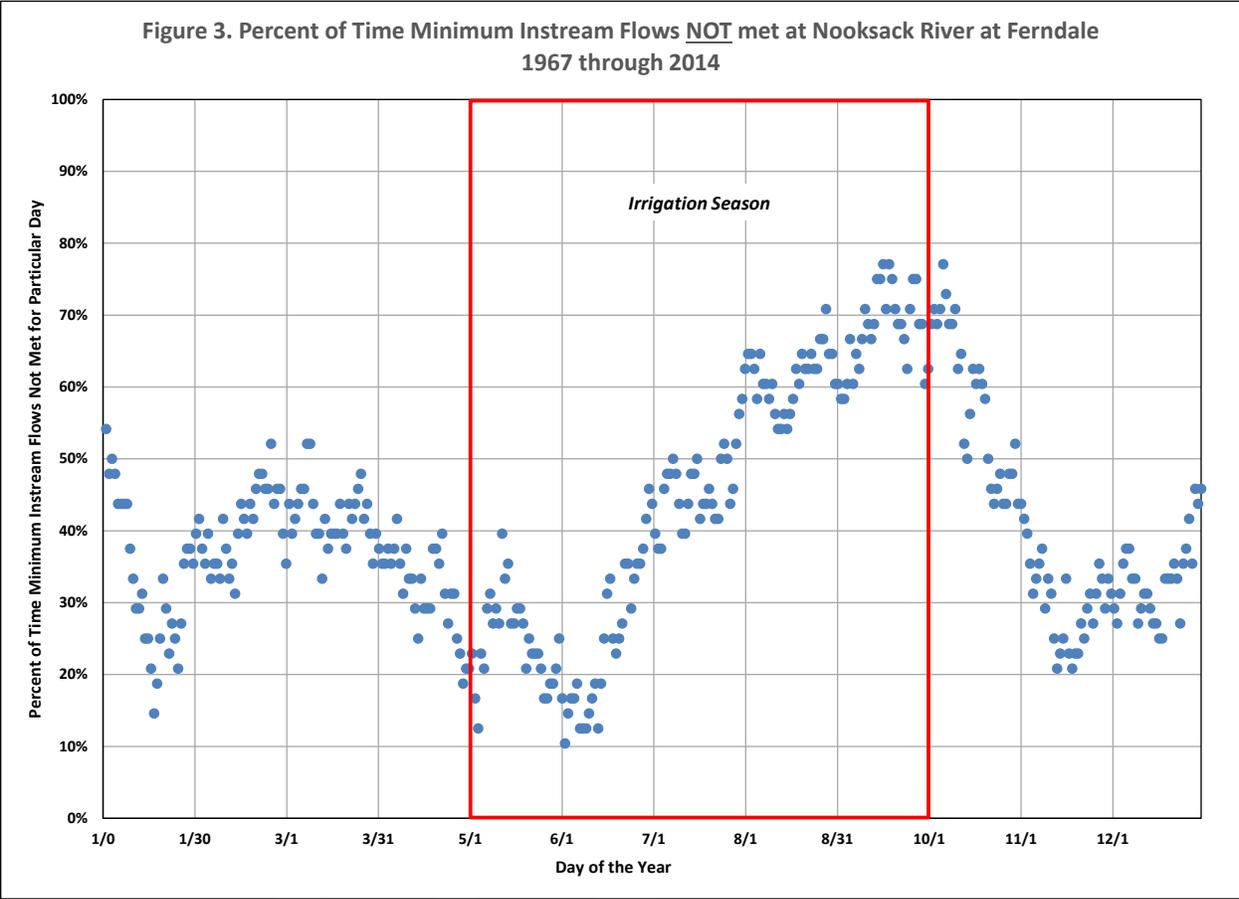


Figure 3 shows the historic percentage of time that the minimum instream flows are not met for each particular day of the year over the period of record (1967 – 2014) which spans 48 years. This figure shows that, in early May, the actual discharge of the river should be greater than minimum instream flows in 7 out of 10 years. In early June, the actual discharge of the river should be greater than the minimum instream flows in 8 out of 10 years. By mid-July the actual discharge of the river should be greater than the minimum instream flow in 5 out of 10 years. By late September, the actual discharge of the river should be greater than the minimum instream flows in only 2 out of 10 years. This graph shows that the holder of an interruptible water right should be prepared to shut-off on any particular day and the likelihood of having to shut off generally increases as the irrigation season progresses. Comparison of the irrigation season data through time suggests that the actual flow in the river during the irrigation season has decreased over the period of record. These data suggest that if that trend continues, there will be a greater probability of interruption than indicated by the historic record. Based on the likelihood of interruption and acknowledging that this is not a firm source of supply, it is advised that only crops that can survive without supplemental irrigation be grown.



Proposed Use and Basis of Water Demand

The proposed use is irrigation. The proposed irrigated crops to be grown are grass and corn. The Washington Irrigation Guide (WIG) (1985 and 1992) provides estimated crop irrigation requirements for a variety of crops in an average (1 in 2 year return interval) irrigation demand year. The highest duty crop grown in this region, which can tolerate an interruptible irrigation supply, is pasture/turf (WIG, 1992). From the WIG (1992) monthly breakdown of crop irrigation requirement, it is determined that irrigation should occur in the months of April through September to meet the crop irrigation requirement. However, all applicants participating in the coordinated cost-reimbursement process indicated that they would never irrigate in April. So, an irrigation season of May 1 through September 30 is reasonable for the typical crops grown in this region and was acceptable to the applicant.

Whatcom County has three WIG climate stations located in the western portion of the County. Those stations are Blaine, Bellingham, and Clearbrook (located near the City of Sumas). Since the project location falls between these three stations, an average of the three crop irrigation requirements (WIG, 1992), excluding the April data, was used (Table 2).

Table 2. May through September Crop Irrigation Requirement Calculation

WIG Climate Station	Pasture/Turf crop irrigation requirement (inches)
Bellingham	14.33
Blaine	13.85
Clearbrook	12.26
Average	13.48

For moving big gun sprinklers, estimates for application efficiency range from 55 to 75 percent with an average application efficiency of 65 percent (Water Resources Program Guidance 1210). An average application efficiency of 65 percent was used in this calculation.

The following equation is used to calculate the total irrigation requirement needed for a particular crop.

$$TIR = \frac{CIR * 100}{E}$$

TIR – Total Irrigation Requirement
 CIR – Crop Irrigation Requirement
 E – Irrigation System Efficiency in percent

$$TIR = \frac{13.48 \text{ inches} * 100}{65}$$

$$TIR = 20.74 \text{ inches [equal to 1.73 feet]}$$

The following equation is used to calculate the annual volume of water needed to irrigate pasture/turf with a moving big gun on the desired number of acres.

$$Qa = \frac{TIR}{12 \text{ inches/foot}} * \text{Irrigated Acres}$$

Qa - Water Right Annual Volume
 Irrigated Acres - Acres authorized to be irrigated under this application (100 acres)

$$Qa = \frac{20.74 \text{ inches}}{12 \text{ inches/foot}} * 100 \text{ acres}$$

$$Qa = 173 \text{ acre-feet}$$

Based on the above calculations, the WIG calculated demand for this request will be 173 acre-feet per year. Additional water to account for drier than average years was not added in due to the likelihood that the water right holder will not be able to take additional water because the minimum instream flows will be met less often in those years. As is, it is likely that the full annual volume might not be able to be diverted due to interruption of the water right due to the minimum instream flow not being met during the irrigation season.

Other Rights Appurtenant to the Place of Use

The Department of Ecology's Water Resources Explorer

(<https://fortress.wa.gov/ecy/waterresources/map/WaterResourcesExplorer.aspx> accessed on April 15, 2015) was used to identify water rights that are appurtenant to the proposed place of use.

There are two water right certificates and three new applications for which the places of use include the proposed place of use for this water right. These water rights are listed in **Table 3**, along with the purpose of use.

Table 3. Water Rights Appurtenant to the Proposed Place of Use Not Held By Mr. Polinder

Water Right Name	Water Right Number	Purpose of Use
Skookumchuck Water Association	GWC 6620 (G1-*09728CWRIS)	Municipal
Skookumchuck Water Association	GWC 2313 (G1-*03784CWRIS)	Municipal
Skookumchuck Water Association (New Application)	G1-28071	Municipal
Fred Polinder (New Application)	G1-27180	Irrigation
Fred Polinder (New Application)	S1-27179	Irrigation

The first three water rights/applications in the table above are for different purposes of use (municipal). Therefore, the overlap of these water rights with this water right proposed place of use does not present a problem.

In addition to this application, Fred Polinder has two older pending applications, one groundwater and one surface water, for irrigation of this property. These applications are G1-27180 and S1-27179 respectively, both with priority dates of June 10, 1993. The groundwater application requests withdrawal of 350 gpm and 120 afy for irrigation of 60 acres. The surface water application requests 0.4 cfs and 60 afy for irrigation of 30 acres. These applications are not being processed at this time.

Impairment Considerations

Impairment is an adverse impact on the physical availability of water for a beneficial use that is entitled to protection. A water right application may not be approved if it would:

- Interrupt or interfere with the availability of water to an adequately constructed groundwater withdrawal facility of an existing right. An adequately constructed groundwater withdrawal facility is one that (a) is constructed in compliance with well construction requirements and (b) fully penetrates the saturated zone of an aquifer or withdraws water from a reasonable and feasible pumping lift.
- Interrupt or interfere with the availability of water at the authorized point of diversion of a surface water right. A surface water right conditioned with instream flows may be impaired if a proposed use or change would cause the flow of the stream to fall to or below the instream flow more frequently or for a longer duration than was previously the case.

- Interrupt or interfere with the flow of water allocated by rule, water rights, or court decree to instream flows.
- Degrade the water quality of the source to the point that the water is unsuitable for beneficial use by existing users (e.g., via sea water intrusion).

This diversion is subject to the minimum instream flows set in WAC 173-501-030, and the water right will be provisioned to protect the established minimum instream flows. The provision will prevent this water right from impairing the minimum instream flows.

The most recent rating curve for the USGS gage 12213100 Nooksack River at Ferndale shows that at a flow of between 3,500 cfs and 1,700 cfs, which is the range of minimum instream flow levels during the irrigation season, the stage of the river will drop by a maximum of 0.001 feet for every 1 cfs decrease in flow. 0.001 feet is less than 1/64 of an inch.

This application requests to divert 0.67 cfs. This rate of diversion, which can only be exercised when the actual flow in the river exceeds the established minimum instream flow, will lower the level of the river by approximately 0.00067 feet as measured at the Nooksack River at Ferndale control station. This reduction in river level is likely not large enough to physically impair any existing senior water rights.

Water Availability

For water to be available for appropriation, it must be both physically and legally available.

Physical availability

For water to be physically available for appropriation, there must be surface water present in quantities and quality and on a sufficiently frequent basis to provide a reasonably reliable source for the requested beneficial use or uses.

The Nooksack River is a perennial river that flows past the proposed point of diversion at all times. Therefore, water is physically available for appropriation from this source, even if it is not considered to be a firm source of supply.

Legal availability

To determine whether water is legally available for appropriation, the following factors are considered:

- Regional water management plans – which may specifically close certain water bodies to further appropriation.
- Existing rights – which may already appropriate physically available water.
 - Volume of water represented by senior water rights, including federal or tribal reserved rights or claims;
 - Water right claims registered under Chapter 90.14 RCW;
 - Groundwater uses established in accordance with Chapter 90.44 RCW, including those that are exempt from the requirement to obtain a permit; and
 - Potential riparian water rights, including non-diversionary stock water.
- Fisheries and other instream uses (e.g., recreation and navigation). Instream needs, including instream and base flows set by regulation. Water is not available for out of stream uses where

further reducing the flow level of surface water would be detrimental to existing fishery resources.

- Ecology may deny an application for a new appropriation in a drainage where adjudicated rights exceed the average low flow supply, even if the prior rights are not presently being exercised. Water would not become available for appropriation until existing rights are relinquished for non-use by state proceedings.

While the Nooksack River has minimum instream flows in Chapter 173-501 WAC, it is not closed to further consumptive appropriation under WAC 173-501-040(1). This basin has not yet been adjudicated and the extent of federal and tribal reserved rights has not been quantified. **Figure 3** shows that, in all years, there is anticipated to be water available at times above the minimum instream flow levels during the irrigation season. Therefore, water is legally available for appropriation under certain specific conditions and at certain specific times, as per WAC 173-501 and the provisions cited above.

Beneficial Use

The proposed use of water for irrigation is defined in statute (RCW 90.54.020(1)) as a beneficial use.

Public Interest Considerations

The proposed new permit will allow the water right holder to divert only at times when it has been determined that there is flow in excess of what is needed for preservation of environmental and aesthetic values in the Nooksack River, as per WAC 173-501.

Consideration of Protests and Comments

In response to the public notice of this application, the Department of Ecology received a protest from the following party:

Protestant	Date of Protest
Lummi Indian Business Council	June 30, 2014

The Lummi Nation objected to the proposed application based on their status as senior water rights holder and on-going negotiations with the United States and the State of Washington over unresolved issues. No specific technical arguments were provided concerning this application. In consideration of senior water right holders, including tribal water rights asserted by the Lummi Nation to the extent they may exist, the following provision is included.

This authorization to make use of public waters of the state is subject to existing rights, including any tribal water rights held by the United States for the benefit of tribes, to the extent they may exist.

Conclusions

The facts in this investigation support findings that water is both physically and legally available, that the proposed diversion will not impair existing water rights (since it will be subject to minimum instream flows), that the proposed use is beneficial, and that the proposed permit will not prove detrimental to the public interest.

RECOMMENDATIONS

Based on the above investigation and conclusions, I recommend that this request for a water right be approved in the amounts and within the limitations listed below and subject to the provisions listed above.

Purpose of Use and Authorized Quantities

The amount of water recommended is a maximum limit and the water user may only use that amount of water within the specified limit that is reasonable and beneficial:

- 0.67 cfs
- 173 af/yr
- Irrigation of 100 acres
- May 1 through September 30
- Subject to minimum instream flows at the Nooksack River at Ferndale (USGS 12213100) Control Station

Points of Diversion

POD #1 and POD #2 - NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 21, Township 40 North, Range 03 E.W.M.

POD #3 - NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 21, Township 40 North, Range 03 E.W.M.

Place of Use

See Page 2 and Attachment 1

Jim Bucknell – RH2 Engineering, Inc.

Date

Andrew B. Dunn, L.G., L.H.G., CWRE – RH2 Engineering, Inc.

Date

Adam Neff, L.G. – RH2 Engineering, Inc.

Date

Kasey Cykler – Department of Ecology

Date

If you need this publication in an alternate format, please call Water Resources Program at (360) 407-6600. Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call 877-833-6341.

Selected References

Robinson Noble, Inc, October 2013, Nooksack River Tidal Influence Monitoring.

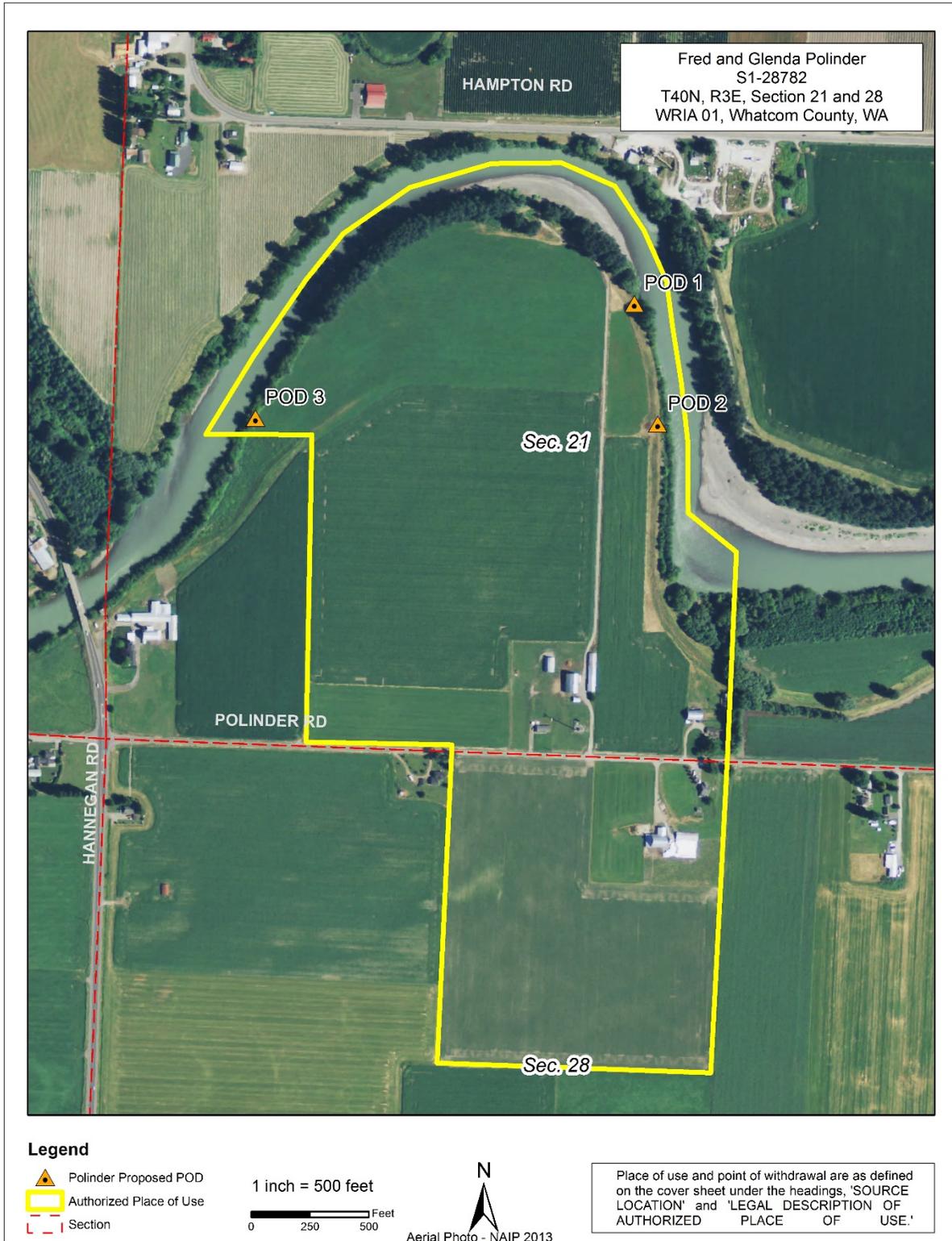
Smith, W.R., 1960, *Water Resources of the Nooksack River Basin and Certain Adjacent Streams*, Water Supply Bulletin No. 12, State of Washington, Department of Conservation, Division of Water Resources.

State of Washington Irrigation Guide (WIG), 1985 (amended 1992 for specific crops in Western Washington).

United States Geological Survey, 2013, Water-Data Report 2013, 12213100 Nooksack River at Ferndale, WA, Puget Sound Basin, Nooksack Subbasin. Accessed at <http://wdr.water.usgs.gov/wy2013/pdfs/12213100.2013.pdf>

Washington State Department of Ecology Water Resources Program, 10/11/2005, Guidance 1210 – Determining Irrigation Efficiency and Consumptive Use.

ATTACHMENT 1 – MAP



ATTACHMENT 2 – DAILY MINIMUM INSTREAM FLOW VALUES

Minimum Instream Flows for the Nooksack River at Ferndale (USGS Stream Gage 12.2131.00) as Defined in WAC 173-501-030												
Day	January	February	March	April	May	June	July	August	September	October	November	December
1	2900	2900	2900	2900	2900	3500	3500	2400	1800	1700	2300	2900
2	2900	2900	2900	2900	2939	3500	3462	2360	1793	1723	2314	2900
3	2900	2900	2900	2900	2979	3500	3424	2321	1785	1746	2328	2900
4	2900	2900	2900	2900	3019	3500	3386	2283	1778	1770	2341	2900
5	2900	2900	2900	2900	3060	3500	3349	2245	1771	1793	2355	2900
6	2900	2900	2900	2900	3101	3500	3313	2208	1764	1818	2370	2900
7	2900	2900	2900	2900	3143	3500	3276	2171	1756	1842	2384	2900
8	2900	2900	2900	2900	3186	3500	3240	2135	1749	1867	2398	2900
9	2900	2900	2900	2900	3229	3500	3205	2100	1742	1892	2412	2900
10	2900	2900	2900	2900	3273	3500	3170	2065	1735	1917	2427	2900
11	2900	2900	2900	2900	3317	3500	3135	2031	1728	1943	2441	2900
12	2900	2900	2900	2900	3362	3500	3101	1998	1721	1969	2456	2900
13	2900	2900	2900	2900	3407	3500	3067	1964	1714	1996	2470	2900
14	2900	2900	2900	2900	3453	3500	3033	1932	1707	2023	2485	2900
15	2900	2900	2900	2900	3500	3500	3000	1900	1700	2050	2500	2900
16	2900	2900	2900	2900	3500	3500	2961	1894	1700	2064	2523	2900
17	2900	2900	2900	2900	3500	3500	2922	1888	1700	2078	2547	2900
18	2900	2900	2900	2900	3500	3500	2884	1882	1700	2092	2571	2900
19	2900	2900	2900	2900	3500	3500	2847	1876	1700	2106	2595	2900
20	2900	2900	2900	2900	3500	3500	2809	1870	1700	2121	2619	2900
21	2900	2900	2900	2900	3500	3500	2773	1864	1700	2135	2643	2900
22	2900	2900	2900	2900	3500	3500	2737	1858	1700	2149	2668	2900
23	2900	2900	2900	2900	3500	3500	2701	1852	1700	2164	2693	2900
24	2900	2900	2900	2900	3500	3500	2666	1846	1700	2179	2718	2900
25	2900	2900	2900	2900	3500	3500	2631	1841	1700	2194	2743	2900
26	2900	2900	2900	2900	3500	3500	2597	1835	1700	2208	2769	2900
27	2900	2900	2900	2900	3500	3500	2563	1829	1700	2223	2794	2900
28	2900	2900	2900	2900	3500	3500	2529	1823	1700	2239	2820	2900
29	2900	2900	2900	2900	3500	3500	2496	1817	1700	2254	2847	2900
30	2900	2900	2900	2900	3500	3500	2464	1811	1700	2269	2873	2900
31	2900	2900	2900	2900	3500	3500	2432	1806	1700	2284	2900	2900

The discharge of the Nooksack River, in cubic feet per second, as measured at stream gage 12.2131.00 must be greater than the number contained in the table above for the respective day before a water right provisioned to the minimum instream flows at this gage can divert or withdraw water.

For the current discharge at this stream gage, see the following website: <http://waterdata.usgs.gov/mwis/uv?12213100>