

11/20/14
3:50 pm
K Boyde



PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print Form

In accordance with RCW 34.05.330, the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at <http://apps.leg.wa.gov/wac/default.aspx?cite=82-05>.

CONTACT INFORMATION *(please type or print)*

Petitioner's Name WA REALTORS; Building Industry Association of Washington; WA Farm Bureau; Just Water Alliance; + other
Name of Organization c/o Bill Clarke
Mailing Address 1501 Capitol Way Suite 203
City Olympia State WA Zip Code 98501
Telephone (360) 943-3301 Email bill@clarke-law.net

COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
- Provide relevant examples.
- Include suggested language for a rule, if possible.
- Attach additional pages, if needed.
- Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: <http://www.leg.wa.gov/CodeReviser/Documents/RClst.htm>.

INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: Department of Ecology

1. NEW RULE - I am requesting the agency to adopt a new rule.

The subject (or purpose) of this rule is: _____

The rule is needed because: _____

The new rule would affect the following people or groups: _____

2. AMEND RULE - I am requesting the agency to change an existing rule.

List rule number (WAC), if known: _____

I am requesting the following change: _____

This change is needed because: _____

The effect of this rule change will be: _____

The rule is not clearly or simply stated: _____

3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.

List rule number (WAC), if known: Chapter 173-503 WAC - Skagit Basin Instream Flow Rule

(Check one or more boxes)

It does not do what it was intended to do.

It is no longer needed because: _____

It imposes unreasonable costs: _____

The agency has no authority to make this rule: _____

It is applied differently to public and private parties: _____

It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: _____

It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: _____

Other (please explain): See Attachment A



November 20, 2014

Bari Schreiner, Rules Coordinator
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

**RE: Petition for Repeal of Chapter 173-503 WAC
Skagit Basin Instream Flow Rule**

VIA HAND DELIVERY

Dear Ms. Schreiner:

Enclosed is a Petition for Repeal of Chapter 173-503 WAC, the Skagit Basin Instream Flow Rule. This Petition is submitted on behalf of the Washington REALTORS®, Building Industry Association of Washington, North Puget Sound Association of REALTORS®, Skagit-Island County Building Association, Snohomish-Camano Association of REALTORS®, MasterBuilders of King and Snohomish Counties, Washington State Farm Bureau, and the Just Water Alliance.

We are requesting that Ecology repeal the Skagit Basin Rule and replace it with a rule that balances instream and out-of-stream water needs, as required by law. In the alternative to repealing the Skagit Basin Rule and developing a new rule, Petitioners request a determination by Ecology that the Skagit Basin Rule does not require tributary-based mitigation for exempt groundwater uses, and that compliance with the rule is based on the measurement of impacts at the Skagit River mainstem gauge in Mt. Vernon, as provided in WAC 173-503-040.

If you have any questions, please contact me.

Sincerely,

Bill Clarke

Enclosures

cc: Maia Bellon, Director
Tom Loranger, Water Resource Program Manager
1996 Skagit Water Resource MOA Parties
Skagit Basin Legislators

**ATTACHMENT 1
PETITION FOR REPEAL OF RULE
WAC CHAPTER 173-503
SKAGIT INSTREAM FLOW RULE**

“Ecology has not proposed to limit the statutory right to develop an exempt well.”

Washington Department of Ecology, 2001 Responsiveness Summary and Explanatory Statement for adoption of Chapter 173-503 WAC, Skagit Instream Flow Rule, p. 24.

1. SUMMARY OF PETITION

For the past 13 years, Ecology has been attempting to somehow “fix” the 2001 Skagit Basin Rule through negotiation, amendment, legislation, litigation, and more recently, mitigation. But after 13 years of effort, it is clear that the 2001 Skagit Basin Rule cannot be “fixed.” Through all of the public and private meetings, hearings, work sessions and other discussions over the past 13 years, Ecology staff has never defended the Skagit Basin Rule as fair, logical, balanced, or even lawful. The rule should be repealed, and Ecology should initiate a rulemaking process that provides for reasonable levels of water uses in rural parts of Skagit County while protecting instream resources.

If Ecology does not repeal the Skagit Basin Rule, it should then interpret and apply the rule, flawed as it may be, according to its actual language – which protects only Skagit River mainstem flows as measured at the Mt. Vernon gauge. Petitioners can no longer support efforts that perpetuate an unlawful and unbalanced rule through costly mitigation programs that aren’t required by the rule and that provide little or no actual benefit to instream resources. We don’t oppose water resource mitigation or reasonable limits on water supply – but we do oppose them when they achieve so little.

Our organizations would support an effort by Ecology to adopt a new Skagit Rule that provides both rural water supplies and protects tributary flows and habitat. But we can no longer support the use of state, local, or private funds for mitigation programs that aren’t required by the rule, and that serve to perpetuate a state regulation that has been divisive for water resource interests and disastrous for the residents and businesses of Skagit County. Beyond the Skagit Basin, the rule is causing collateral damage to Ecology’s efforts to manage water in the rest of Washington State.

Over the past few years, our organizations have participated in or witnessed countless meetings and hearings about Ecology's efforts to "fix" the Skagit Rule or implement mitigation programs. These discussions are increasingly painful and pointless. We know the Skagit Rule is fundamentally flawed – and we know that Ecology knows the Skagit Rule is fundamentally flawed. Our request is that Ecology either repeal the rule and replace it with something that actually makes sense, or in the alternative, apply the rule accordingly to its plain meaning that only requires mitigation of flow impacts at the Skagit River mainstem gauge in Mt. Vernon and protection of the Cultus Mountain tributaries.

2. HISTORY AND BACKGROUND OF THE SKAGIT BASIN RULE

Ecology adopted the Skagit Basin Rule in 2001 to fulfill its commitments under the 1996 Skagit Basin Water Resource Memorandum of Agreement ("1996 Skagit MOA"):

"Ecology's role in the MOA was to participate on the Lower Skagit Instream Flow Committee, and to move an instream flow recommendation to rule-making. The recommendation came with the concurrence of state agency fish biologists who represented the departments of Ecology and Fish and Wildlife on the Committee. After the flow recommendation was forwarded to Ecology (May 8, 1999), a proposed rule was to be filed within 18 months, for final adoption within two years. If these conditions were not met, the Agreement would no longer be binding on the parties."

2001 Ecology Concise Explanatory Statement, p. 10.

As originally drafted and explained to the public, the rule included a provision expressly exempting from the instream flow and closure in the rule certain types of exempt groundwater uses. This exempt well language was modeled after language used in numerous other Ecology instream flow rules in Western Washington. This draft rule language stated as follows:

"Single domestic shall be exempt from the provisions established in this chapter, except surface and ground waters specially closed to any further appropriation, including otherwise exempted single domestic uses. For all other streams, when the cumulative impact of single domestic diversion begin to significantly affect the quantity of water available for instream uses, then any water right issued after that time shall be issued for in-house use only."

Draft WAC 173-503-090 (February 7, 2000)

Later in the rulemaking process, Ecology's documents indicate that the agency would allow exempt wells under the rule, in part because Ecology did not know if exempt wells were causing adverse impacts. For example, notes from an Ecology meeting state:

"3. Ground water

- No way to regulate against instream flows.

- Dan would like to exclude exempt wells – but there does not seem to be a clear justification.
- We don't know the effect of permitted wells on instream flows and would be forced to deny; or allow under 'overriding considerations of public interest.'"

Notes from Ecology Rulemaking File.

Later, in response to comments during the rulemaking process, Ecology acknowledged that it had not reviewed exempt well impacts as part of the rulemaking:

"4. Does DOE have any solid proof that an exempt well or group of exempt wells has a negative impact on instream flow?"

Response: No information that would relate to this comment has been available for the environmental documents or public hearings. This is not to say that the information does or does not exist."

Ecology Response to Comments, 2001 Skagit Basin Rule.

At some point, Ecology removed the exempt well language from the rule so that the rule as published for adoption did not include any provisions expressly addressing exempt groundwater uses. The significance of this change was never explained to the public, and perhaps never understood by many within Ecology. Ecology then adopted the final proposed rule language, so that the Skagit Basin Rule includes no language expressly relating to exempt groundwater uses. The history of the removal of this language is recounted in a 2007 Skagit Herald article, "The Mystery of the Missing Water Rights Clause." (*Attachment 2*)

The removal of this exempt well language by Ecology was either an act of dishonesty or negligence. There is not a single document from this time period indicating that Ecology knew what it had done, and not a single document explaining the legal effect of such a significant modification of the draft rule language. In fact, even for a number of years after the adoption of the Skagit Basin Rule in 2001, Ecology did not know if the rule had any effect on exempt groundwater uses, as it allowed Skagit County to continue to issuing building permits to rural homeowners relying on exempt wells. We understand that our assertion of dishonesty or negligence by Ecology is a strong statement, but we are comfortable with it because the history is clear, and the acts in question were not made by Ecology's current water resource staff and leadership – who have the thankless job of trying to fix the mess created in 2001.

3. SKAGIT BASIN RULE VIOLATES THE 1996 WATER RESOURCE MOA

One of the premises of the historical and recent opposition to modifying the Skagit Basin Rule is that the Skagit Basin Rule is somehow necessary to implement the 1996 Water Resource Memorandum of Agreement ("1996 Skagit MOA") signed by Ecology and other governmental water stakeholders in the Skagit Basin. (*Attachment 3*) A review of that document shows that this is simply not true – the Skagit Basin Rule vastly exceeds the extent of

exempt well regulation described in the 1996 Skagit MOA. Nothing in the 1996 Skagit MOA can be interpreted to mean that the parties agreed to a complete prohibition on new exempt wells in the Skagit Basin. In fact, the actual language of the 1996 Skagit MOA says just the opposite.

Section I of the 1996 MOA lists the five main purposes of the agreement – none of which relate to the prohibition or even regulation of exempt wells in Skagit County. Other parts of the 1996 MOA discuss objectives relating to use of exempt wells, but none of these parts discuss a complete prohibition on exempt wells. For example, Section IV.A.5 states “The Tribes agree to the following . . . to work towards establishing satellite system as defined in the CWSP . . . [with a] primary objective to reduce the use of exempt wells in those areas of the County experiencing inadequate instream flows that may be occurring as a result of groundwater withdrawal.” Section IV.B.7 states that the City of Anacortes will seek amendment of the CWSP to connect new homes to existing water systems, and “limit the use of the 5,000 gallons per day exemption in those areas of the County experiencing inadequate [Skagit River instream flows.” Under Section IV.D.2, Skagit County agreed to “work with all parties to address the 5,000 gallon permit exemption” while the County “reserves the right to allow exempt wells for single family systems in the Skagit River Basin above the PUD Pipeline Crossing.” (emphasis added) Obviously, an agreement to “reduce,” “limit,” “address,” or “allow” exempt wells is not an agreement seeking a complete prohibition on exempt wells.

The 2005 deposition of Bob Wubbena, who represented the City of Anacortes and Skagit PUD in developing the 1996 Skagit MOA, describes the intent of the parties to allow continued exempt well use above the PUD pipeline crossing, and allow exempt well use in other areas until service from water systems was provided:

“Q: In terms of the agreements with the county, how did you understand those objectives would be achieved?

A: In the '96 agreement there is a -- I think it is the second paragraph of the County's was -- because this became the key issue to the county commissioners -- was we reserve the right to continue to use exempt wells above the pipeline crossing. That was because we didn't have the knowledge or the ability to measure any differently than that. So we were to meet the rural water needs of Skagit County above the pipeline. We knew we had to continue to exempt wells. Below the pipeline on an inner [sic: “interim”] basis we knew we had to use exempt wells, but eventually the piped water would get to most of the lower part of the county.”

May 3, 2005 Deposition of Bob Wubbena, Page 60 (*Attachment 4*).

While the 1996 MOA is not a model consistency, the document shows an intention by the parties to increase the availability of water supply through new or expanding water systems and require new development to connect to those systems when feasible - thereby reducing the reliance in individual exempt wells. There is nothing in the 1996 Skagit MOA that evidences an agreement to prohibit exempt wells in the entire Skagit Basin, or that directs Ecology to prohibit exempt wells as part of the Skagit Basin Rule. Rather, the 1996 Skagit MOA

can be read to seek less reliance on, and more regulation of, exempt wells in the area West of the PUD Pipeline Crossing, which is located just East of Sedro Woolley. If the 1996 Skagit MOA parties had agreed to an outright prohibition of exempt wells in all of Skagit County, certainly the document would say so – and there would be at least one document from Ecology during the time period from 1996 through the 2001 rule adoption supporting this – but there is not.

4. SKAGIT BASIN RULE VIOLATES STATE WATER CODE

Ecology's Skagit Basin Rule violates the water code by adopting an instream flow level consisting of water that does not exist, and does not include any amount of uninterrupted water supply for residential, commercial, industrial, or agricultural purposes. Ecology's rulemaking authority under the Administrative Procedures Act, Chapter 34.05 RCW, is governed by Chapter 90.54 RCW, the Water Resources Act. Yet the Skagit Basin Rule clearly violates a number of provisions of Chapter 90.54 RCW.

a. RCW 90.54.050(1) requires Ecology to "reserve and set aside waters for beneficial utilization in the future, . . ." In the Skagit Basin Rule, there is no water reserved or allocated for future beneficial that cannot be interrupted – which includes domestic and municipal supply.

b. RCW 90.54.020(5) directs Ecology that "adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." Under the rule, the minimum flow of 10,000 cubic feet per second is considered a water right under RCW 90.03.345. Municipal water rights were protected through the 1996 MOA and 2001 Rule in the amounts of 85 cdfs for the City of Anacortes and 42.5 cdfs for Skagit PUD. No water for human domestic needs is preserved or protected by the Skagit Basin Rule, a clear violation of Ecology's duty under RCW 90.54.020(5).

c. RCW 90.54.020(1) states that "[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions." During the process leading up to the Skagit Basin Rule, Ecology misled the affected public by including a rule provision that protected single domestic exempt groundwater use, then removed that language from the rule prior to adoption without any explanation to the public of the effect of not including such language, and then adopted the rule while continuing to mislead the public that "Ecology has not proposed to limit the statutory right to develop an exempt well." *Washington Department of Ecology, 2001 Responsiveness Summary and Explanatory Statement for adoption of Chapter 173-503 WAC, Skagit Instream Flow Rule, p. 24.*

d. Instream flows are considered appropriations of water under RCW 90.03.345. This was confirmed in the Supreme Court's *Swinomish* decision, in which the Court stated that the instream flow adopted by Ecology is subject to "the same requirements as any appropriation of water under the water code . . ." This refers to the four-part test for new water rights in RCW 90.03.290 of (1) a proposed beneficial use; (2) of water that is available; (3) with no impairment of existing rights; and (4) no detriment to the public

welfare.” Between 1940 and 1997, the average flows in the Skagit River mainstem do not meet the minimum instream flow level of 10,000 cfs in August and September, nor the minimum flow level of 13,000 cfs in October. The water required for the instream flow level established by Ecology is on average, not available, and therefore fails to meet the four-part test in RCW 90.03.290.

e. Ecology is authorized to protect baseflows, yet the Skagit Basin Rule adopted flow levels are far beyond baseflow levels. RCW 90.54.020(3)(a) states that “[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.” The meaning of this statute was explained in a 1986 agency memo by then Senior Assistant Attorney General Charles B. Roe, who wrote:

The intent was, simply stated, that streams with certain values were not to be dried up or reduced to trickles. Rather, flows, usually of an amount extending to a limited portion of a stream’s natural flow, were to be retained in order to protect instream flow values of the stream from total extinguishment. Of import here, the thrust of the 1967 legislation was not designed to maintain a flow in excess of the smallest amount necessary to satisfy the protection and preservation values and objectives just noted . . .

Inter-office Memorandum from Charles B. Roe, Senior Assistant Attorney General, to Eugene F. Wallace, Program Manager for Water Resources, Department of Ecology (February 20, 1986) at 8-9. (Attachment 5).

f. RCW 90.54.010(1)(a) requires that Ecology provide water supplies for human needs and instream flows “at the same time.”

“Growth and prosperity have significantly increased the competition for this limited resource. Adequate water supplies are essential to meet the needs of the state’s growing population and economy. At the same time instream resources and values must be preserved and protected so that future generations can continue to enjoy them.”

The Water Resource Act and other parts of the water code direct Ecology to balance instream flows protections with water supply for human needs. It is time for Ecology to do so.

5. SKAGIT BASIN RULE APPLIES ONLY TO MAINSTEM FLOW AT MT. VERNON GAUGE AND DESIGNATED TRIBUTARIES

If Ecology cannot repeal the rule, then Petitioners request that it apply the Skagit Basin Rule consistent with its flawed drafting and adoption. Just as the rule does not include any specific provision for exempt groundwater uses, it also lacks any protections for Skagit River tributaries not specifically regulated in the rule. As adopted by Ecology, the Skagit Basin Rule protects only Skagit River mainstem flows, as measured at the Mt. Vernon mainstem gauge,

and four Skagit River tributaries – Mundt, Turner, Gilligan, and Salmon Creeks. There is no indication in any rulemaking documents that the Skagit Basin Rule had any applicability to other water sources. For example, the comment letter from the Skagit Systems Cooperative in support of the rule stated as follows:

“On behalf of the Upper Skagit, Swinomish, and Sauk-Suiattle Indian Tribes, the Skagit System Cooperative would like to provide the following comments on the instream flows proposed for the Skagit River and Salmon, Turner, Mundt, and Gilligan Creeks. We believe the instream flow levels established in this rule are an appropriate exercise of the State’s obligation to act to protect anadromous [fish] in the lower Skagit River and the four above named tributaries. We therefore support the adoption of the rule as written.”

Letter from Skagit Systems Cooperative to Ecology, December 5, 2000 (p. 66 of Ecology’s 2001 Concise Explanatory Statement).

These comments from tribal interests are consistent with the recollection of the purpose of the 1996 Skagit MOA of Bob Wubbena, who worked on the agreement for both the City of Anacortes and Skagit PUD. In response to a 2005 deposition question regarding whether the 1996 Skagit MOA was to apply to specific tributaries, Mr. Wubbena stated as follows:

I remember the debate was going on about the saying of instream flows, was it related to all of the basin, part of the basin, and if part of the basin, what part of the basin. **Because the issue was the main stem of the Skagit River and the Cultus Mountains tributaries. We clearly did not get into the context of the other tributaries.** We just didn't. So, in fact, if you will track it through the presumption that the MOA has is that the instream flows were only set in the lower Skagit not the upper Skagit. That was added by Ecology without any input from anybody as far as I know.

May 3, 2005 Deposition of Bob Wubbena, Page 66 (*Attachment 6*). (emphasis added)

The Skagit Basin Rule also considers other Skagit River tributaries, but such tributaries are not subject to any regulatory restriction under the rule. This is because the section of the rule that applies to perennial streams is not a closure or mitigation requirement for those streams, but rather, a “policy objective” of protecting these streamflows through certain water supply strategies that are “encouraged” but not required by the rule:

“Consistent with the provisions of chapter 90.54 RCW, it is the policy of the department to preserve an appropriate minimum instream flow in all perennial streams and rivers as well as the water levels in all lakes in the Lower and Upper Skagit watershed (WRIA 3 and 4) by encouraging the use of alternative sources of water which include:

- (a) Reuse;
- (b) Artificial recharge and recovery;

(c) Conservation; and

(d) Acquisition of existing water rights.”

WAC 173-503-080(2)(emphasis added)

Clearly, if Ecology intended to limit or prohibit exempt withdrawals based on impacts to specific tributaries, it would have included such language in the rule. Further, evidence of intent to regulate tributaries would be seen in the 1996 Skagit MOA or in the comments of groups such as the Skagit Systems Cooperative. But no such evidence exists. Had Ecology intended the rule to apply to all exempt uses regardless of location, it would have used language similar to what it has done in other state water resource regulations. For example, the applicability of the Upper Kittitas County Groundwater Rule is described as follows:

This rule applies to new uses of groundwater relying on the authority of the exemption from permitting found at RCW 90.44.050, as defined in WAC 173-539A-030, and to any new permit authorizing the withdrawal of public groundwater within the upper Kittitas area boundaries issued on or after July 16, 2009

WAC 173-539A-025. Another example is Ecology’s Dungeness Basin Rule, which adopted explicit closures of the Dungeness River mainstem, 9 named tributaries, and all “unnamed tributaries to the Dungeness River.” *WAC 173-518-050.*

In contrast, the Skagit Basin Rule names only four tributaries, uses the mainstem Skagit River gauge as the point of compliance for the instream flow, and does not include a closure of any other Skagit River tributaries. The relevant section of the Skagit Basin Rule addressing groundwater states:

“If the department determines that there is hydraulic continuity between surface water and proposed groundwater source, a water right permit or certificate shall not be issued unless the department determines that withdrawal of ground water from the source aquifer would not with stream flows during the period of stream closure or with maintenance of minimum instream flows. If such findings are made, then applications to appropriate public ground waters may be approved subject to the flows established in WAC 173-503-040(2).

WAC 173-503-060. Consistent with this section of the rule, impacts to the Skagit River are determined based on the mainstem gauge in Mt. Vernon, while impacts to those four named tributaries are based on measurements on those tributaries. No other specific reaches of the Skagit River or tributaries are protected under the rule:

“ . . . and withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be expressly subject to instream flows established in WAC 173-503-040 (1) through (3) as measured at the appropriate gage, and also subject to WAC 173-503-060.

WAC 173-503-040(5)

An initial observation is that like the rest of the entire Skagit Basin Rule, these subsections apply only to water right “permits or certificates,” and does not by their plain language apply to exempt uses. But even if Ecology interpreted this subsection to apply to exempt uses, the regulation prohibits impacts to (1) “stream flows during the period of stream closure” or (2) “maintenance of minimum instream flows.” Under the rule, stream closures and minimum flows exist only for the four Cultus Mountain tributaries and the Skagit River mainstem. Groundwater uses under the rule can be allowed “subject to the flows established in WAC 173-503-040(2)” – but such flows only exist for the Cultus Mountain tributaries and Skagit River mainstem.

Further, the fact that the Skagit Basin Rule does not require mitigation of tributary impacts is evidenced by both Ecology’s 2006 Amendments to the Skagit Basin Rule, and by Senate Bill 6312, legislation supported by Ecology in 2011. Under the 2006 Skagit Rule amendments, Ecology established limited reservations of water for domestic use for 27 Skagit River tributaries, and closures of each tributary when the reservation was depleted. *Former WAC 173-503-051; 060; 073; 074. (Attachment 4)* The 2006 Skagit Rule also includes provisions requiring preparation of a mitigation plan to obtain uninterrupted water supply after a tributary reservation was depleted. *Former WAC 173-503-060.*

Similarly, the 2011 legislation would have modified the Skagit Basin Rule to require tributary basin specific mitigation plans that would offset the consumptive use of exempt groundwater in each tributary basin. The legislation would have required Ecology to approve and implement “domestic water budget action plans” that would

“Augment summer subbasin streamflows with water quantities sufficient to offset total summer consumptive use impacts from permit exempt domestic groundwater withdrawals occurring within the subbasin and commenced after April 14, 2001.”

ESSB 6312 – H. AMD 1351 (Dunshie floor amendment)(emphasis added)(Attachment 7)

In rejecting the 2006 Skagit Rule amendments, the Supreme Court’s *Swinomish* decision eliminated both the limited reservations of groundwater for domestic use and the prohibition of impacts to the 27 specific tributaries when the groundwater reserved were exhausted. The 2011 Legislature did not pass ESSB 6312, which like the 2006 Skagit Rule amendment, would have added specific tributary protections to the rule.

The Skagit Basin Rule does not require tributary mitigation, and both the legislative and judicial branches have rejected Ecology’s efforts to create specific tributary protections – yet Ecology appears to be focused on imposing tributary-based mitigation programs. This approach is not required by the rule, and would likely take decades and tens of millions of dollars – if it even can be achieved at all. Our organizations do not oppose efforts to protect tributary resources and habitat in Skagit Basin basin – but it is clear that the Skagit Basin Rule does not require it in order for a lawful exempt withdrawal to occur.

6. ECOLOGY-FUNDED MITIGATION EFFORTS REVEAL THE SCIENTIFIC FLAWS IN THE SKAGIT BASIN RULE

One of the ironies from recent mitigation efforts is that while such efforts have been unsuccessful, they have largely confirmed that exempt groundwater withdrawals are causing little if any impacts to tributaries. Of course, as noted above, Ecology staff as far back as 2000 questioned the extent of impacts from exempt withdrawals.

Prior to adopting the Skagit Basin Rule, Ecology and the Washington Department of Fish & Wildlife studied a number of Skagit River tributaries, including the Fisher/Carpenter Creek Basin. As to whether groundwater withdrawals were impacting surface water flows, Ecology's study found low permeability geology and thus, low contribution from groundwater to baseflow. Ecology's 2000 study concluded that:

Streamflow rates for the Fisher Creek/Carpenter Creek basin are very low during late summer, dry-season conditions. The discharge rate for the combined drainage area of approximately 25 square miles is estimated to be less than 3 cfs ($< 0.12\text{cfs}/\text{mi}^2$). The low flow rates are consistent with the fact that a significant percentage of the drainage area is located over a low permeability geologic setting, suggesting dry-season groundwater baseflow contributions to streams will be limited in scale.

Summary of Streamflow Conditions, September 2000: Fisher Creek and Carpenter Creek Basin Abstract, p. 18.

More recent state-funded studies confirm Ecology's 2000 conclusion regarding the low permeability of geology in the Fisher/Carpenter Basin area, and further conclude that because of this, there is little impact from groundwater withdrawals on those surface waters.

The glacial till confining unit (Qgtv) creates significant hydraulic separation between the advance outwash aquifer and the surficial outwash aquifer for a vast majority of the project area. This hydraulic separation means that ground water withdrawals from the advance outwash aquifer likely have limited impact on the surface water bodies, including Fisher Creek and its tributaries, in hydraulic continuity with the surficial outwash aquifer. Ground water in the advance outwash aquifer likely discharges predominantly into the alluvium in the Skagit River valley as the Vashon advance outwash sediments (Qgav) are truncated at the valley margin (Figure 7A).

Technical Report – Preliminary Draft, Skagit River Basin Ground Water Recharge Mitigation Program, Prepared by Upper Skagit Indian Tribe, Project No. EH130580A, March 12, 2014, p. 12.

This study later concludes that 95 to 97 percent of domestic groundwater wells in the Fisher Creek basin are completed in the deeper aquifer that is connected only to the Skagit Valley alluvium – and not to the surface waters of Fisher Creek:

Based on this preliminary review, we estimate that approximately 3 to 5 percent of the water supply wells in the Fisher Creek basin are completed in the surficial outwash aquifer. The remaining wells (95 to 97 percent of wells) are likely completed in one of the deeper aquifers. As discussed above, there is generally significant hydraulic separation between these deeper aquifers and the surficial outwash aquifer that is in presumed hydraulic continuity with Fisher Creek.

Id. at 14.

These recent findings are generally consistent with conclusion of the United States Geological Survey (USGS) that approximately 1% of domestic groundwater withdrawals have any impact on streamflows in Fisher Creek. *Id.* To the extent that Skagit Basin tributaries have low flow issues, the cause is generally not high levels of consumptive water uses.

7. SKAGIT RULE CAUSING SIGNIFICANT COLLATERAL DAMAGE TO STATE WATER LAW, ECOLOGY'S AUTHORITY AND REPUTATION, AND ECOLOGY'S STAFF

The damage caused by the Skagit Basin Rule extends far beyond the Skagit Basin, and this will continue until Ecology changes course. Since the adoption of the Skagit Basin Rule in 2001, multiple lawsuits have been initiated because of the rule – had Ecology simply adopted the rule that it originally drafted – none of this would have occurred. The outcome of Skagit litigation has done nothing to improve the situation in the Skagit Basin, and has caused considerable damage to water resource management efforts around Washington State.

The Supreme Court's *Swinomish* decision is especially troubling, as it called into question and limited Ecology's use of its "overriding considerations of public interest" ("OCPI") authority. Ecology's OCPI authority has been used in recent years to achieve successful water rights permitting and rulemaking outcomes throughout the state, but now its use is in question. Because of the rural water supply problems in the Skagit Basin and elsewhere, Ecology has recently initiated efforts to make changes in how water supply and instream flow issues are addressed. Our organizations would prefer that Ecology focus its resources on solving specific problems caused by Ecology's own rules instead of engaging in policy work that would provide no relief to those in the Skagit Basin who need it most.

Another outcome of the Skagit Basin Rule that concerns us greatly is the impact of the rule on Ecology's water resource program staff. In recent years, numerous Ecology staff members have soldiered on, attempting to defend, fix, or create mitigation for a rule that we do not believe today's Department of Ecology would ever adopt. Some employees have now left Ecology, others have moved to different positions within the agency – and why shouldn't they? Trying to "fix" the Skagit Basin Rule is a thankless, if not hopeless, task. It is increasingly difficult to watch people who are skilled water resource managers, and our professional colleagues, devote so much time, energy, and effort. The same can be said of the many outside consultants being funded by the state to "fix" the Skagit Basin Rule – their ideas and skills are being wasted. The current direction of Ecology's efforts to "fix" or "find mitigation for" the

Skagit Basin Rule on a tributary-by-tributary basis simply perpetuates a fundamentally flawed, unlawful, and unfair regulation.

8. ECOLOGY'S AUTHORITY TO REPEAL THE SKAGIT RULE NOT CONSTRAINED BY SUPREME COURT SWINOMISH DECISION

We contemplate that one of Ecology's responses to our request to repeal the Skagit Basin Rule may be that the agency's authority to do so is constrained by the Supreme Court's *Swinomish* decision. However, while the *Swinomish* decision does constrain Ecology's authority in the use its "overriding consideration of public interest" authority (see above discussion of collateral damage), nothing prohibits Ecology from repealing a rule that is unlawful. In fact, as the Supreme Court ruled in the *Theodoratus* decision, an unlawful agency decision is *ultra vires* and therefore void:

"As counsel for Appellant conceded at oral argument, if the Department's action in abandoning a system capacity method of quantifying the water right was because using that method was *ultra vires* and unlawful, then it did not act arbitrarily and capriciously. We agree, and because we have determined that the Department acted *ultra vires* in utilizing an unlawful system capacity measure of a water right, we conclude the Department did not act arbitrarily and capriciously in switching to an actual application of water to beneficial use standard."

Ecology v. Theodoratus, 135 Wn.2d 582, 598 (1998). See also *Tesoro Refining and Marketing Co. v. Revenue*, 164 Wn.2d 310, 324-325 (2008): "Regulations that are inconsistent with statutes are void."

Further, to the extent that the few supporters of the Skagit Basin Rule would seek to claim harm from the repeal of the rule, the law does not recognize third party claims of harm from an invalid regulatory action: "A third party may not rely upon a void regulation." *Id.*, citing *Campbell & Gwinn*, 146 Wn.2d at 20 n. 10 ("Equitable estoppel does not apply when the acts of a governmental body are *ultra vires* and void.") See also *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 176, (2014) (No vested rights exist in reliance on void agency action).

Finally, to the extent Ecology chooses not to repeal the Skagit Basin Rule and replace it with something that is lawful and reasonable, the *Swinomish* decision also invites legislative action to resolve the matter:

Insofar as this case implicates policy determinations about reallocating the water that is presently needed to satisfy minimum flow water rights to other uses to encourage development in rural areas of the Skagit River basin, the policy determinations are for the legislature. If reallocation of instream flow necessary to meet minimum flow water rights is to be a part of state water policy, it should come by way of legislative action.

Swinomish Indian Tribal Community v. Ecology, 178 Wn.2d 571, 601 (2013).

The Water Resource Act already directs Ecology amend water resource regulations that do not meet the provisions of the Act, such as the directive in RCW 90.54.020(5) that “adequate and safe supplies of water shall be preserved and protected in potable condition for human domestic needs.”

In relation to the management and regulatory programs relating to water resources vested in it, the department is further directed to modify existing regulations and adopt new regulations, when needed and possible, to insure that existing regulatory programs are in accord with the water resource policy of this chapter . . . “

RCW 90.54.040(2). Under this provision, Ecology could simply acknowledge what most observers have already concluded: “Wow, Ecology really screwed up when it adopted the Skagit Basin Rule in 2001” – and then replace it with something that complies with state law, is consistent with 1996 Skagit Basin MOA, and balances water supply with instream flow protections – including tributary protections that don’t exist in the current rule.

Even if a new Skagit Basin Rule was subject to litigation, we would prefer that the state spend its limited resources adopting and defending a balanced instream flow rule, rather than spending money trying to prop up the current rule that is the source of misery in the Skagit Basin and elsewhere. Specifically, our organizations oppose Ecology spending any remaining funds on tributary mitigation programs that would be a requirement of the rule, and oppose the State Legislature appropriating any additional funds for this purpose. Tributary flow and habitat protections can still be pursued, but they should not be part of the Skagit Basin Rule. If Ecology maintains the existing rule, water resource mitigation should be limited to complying with the mainstem flow requirements of the rule.

9. CONCLUSION

We ask that you repeal the rule and initiate rulemaking to adopt a Skagit Basin Rule that is balanced and lawful. Failing this, we request a determination that the rule requires mitigation of impacts measured at the mainstem Mt. Vernon gauge, as stated in the rule. To complement this determination, we would support the use of state funds to implement programs that actually restore and protect fish habitat and flows in key tributaries. But we oppose additional state funding to establish tributary mitigation requirements not required by the rule.

The Skagit Basin Rule was badly drafted, dishonestly presented, and continues to be disastrous for rural landowners in the Skagit Basin - while accomplishing little, if anything, for instream resources. Now is the time for Ecology to acknowledge “we messed this up” – start over, and get it right.

Attachment 2

The 'mystery' of the missing water-rights clause

Absence of provision isn't all that mysterious

Second of two parts

By JAMES GELUSO

Staff Writer

At the heart of the long-running dispute over Skagit River water rights is one clause that was missing from the 2001 rule allocating water from the river.

But the mysterious disappearance of the clause may not be so mysterious after all.

The clause that's been the source of contention allowed "exempt wells," wells for single homes, upstream of Sedro-Woolley. Such wells are necessary for homes that are too far away from each other for public water systems.

The rule gives specific water rights, primarily to the county's major water providers, the Skagit PUD and Anacortes. And it also gives a water right to the river itself, aimed at guaranteeing enough water for fish.

But without the clause allowing exempt wells, if the river ran low — as it does most summers — residents who used wells dug after the 2001 rule went into effect would have to shut off their well pumps.

The exempt well clause was in the 1996 agreement that led to the 2001 rule, but was somehow omitted from the rule itself. Nobody seemed to know how it happened, and the conventional story has been that it was accidentally dropped during the bureaucratic process.

And the county has been protesting, negotiating, appealing, suing and being sued ever since.

The county settled with the state Department of Ecology last year. But the Swinomish Tribe says the agreement gives away too much water. Anacortes, concerned the tribe could sue in federal court and invalidate the 2001 rule, sued the county and Ecology.

Skagit County Chief Civil Deputy Attorney Will Honea, in his response to Anacortes' settlement offer last week, pinned the blame on Larry Wasserman, the environmental services director for the Skagit River Systems Cooperative, the group that then represented all three tribes with fishing rights on the Skagit River. Munce told Honea that Wasserman "misled Ecology staff into doing so at the last minute prior to rule publication," Honea wrote.

But, it turns out, maybe not.

Dan Swenson, a water resources manager for Ecology, said last week that the clause was removed in a meeting of the eight parties at the request of local governments.

Not so mysterious

"It wasn't mysterious to me because I know exactly the meeting where it was decided," said Swenson, who was there and took notes.

That meeting was Feb. 17, 2000. Ecology staffers brought a draft version of the rule, which was scheduled for a public comment period, Swenson said. The draft version included an exemption for single residential wells, although well users would be required to hook up to public water systems — water provided by Anacortes or the Skagit PUD — if it ever became "practical."

But the feedback from the stakeholders was that the rule should be slimmed down to its essence — river flows, withdrawals and existing stream closures. Clauses concerning lakes, exempt wells and wetlands were to be taken out, according to Swenson's handwritten notes of the meeting.

The county's sole representative at the meeting was then-Commissioner Harvey Wolden.

Reached last Wednesday, Wolden told the Skagit Valley Herald that he had only a faint recollection of the meeting. But he remembered that Ecology was going to make a determination that there was enough water in the Skagit River basin to allow exempt wells.

"It was part of the planning process. I believe it was felt that there was enough water to go around,"

he said.

And Wolden said he probably told his fellow commissioners, Ted Anderson and Bob Hart, what had happened. That was how they operated, he said.

But Woldren stressed that the commissioners never voted to give up on the right to allow exempt wells.

Anderson, who was county commissioner until last year and who had been the loudest voice pursuing rights for rural wells, backed Wolden. He said Wolden would never have sold out the right to develop those wells.

"My feeling was that Ecology was going to continue to allow them," Wolden said.

Wolden's recollections match Swenson's. Exempt wells weren't to be disallowed, Swenson said, just dealt with later — in what was then an upcoming process for watershed planning.

But when the watershed planning process actually began, it got stuck on the Samish River.

The group dealing with the area that includes the lower Skagit River and the Samish River basin attempted first to deal with the Samish. Ecology had \$1 million to do planning for both rivers. But those negotiations collapsed early when the parties involved — mainly the state and farmers in the Samish basin — couldn't agree on starting points. As a result, all the money was spent on the Samish basin, and watershed planning for the lower Skagit never happened, which meant Ecology never revisited the subject of residential wells.

The definition of 'exempt'

Even before the rule was adopted, Ecology made moves to put limits on wells. In 2001, in the responses to public comments on the draft rule, the department specified that exempt wells aren't exempt — at least, not the way the county thought.

"An exempt well is exempt from the permitting process, but it's not exempt from other elements of the water code," Swenson said.

Wells drilled after the rule was adopted in April 2001 would be considered junior to the "instream flow rule," the river's own water right, and would have to be shut off if the river level dropped below a certain point. Had that rule been enforced last year, such wells would have been shut off in early August and not allowed back on until the storms that led to November's floods.

Anderson said he was surprised to hear Swenson's interpretation.

"Usually when you say exempt, you mean exempt," Anderson said. "But I guess they've got different ways of interpreting things."

The state's water laws back Swenson. One section allows wells without a permit for homes. But a different section requires that groundwater withdrawals can't impair surface water rights.

The catch is that in most parts of the state, there's no single water right for the river like there is for the Skagit. And in basins where the rivers have water rights, the state has dealt with residential wells in different ways over the last 60 years, Swenson said.

The agreement between the county and Ecology gets around the issue by creating a "reservation," a block of water that's available for well users regardless of how low the river flows.

Scott Fowler, a partner in Dahlman Pump and Well Drilling, argues that's not even necessary. In the Skagit basin, wells are drilled to deep aquifers that have little or no impact on rivers and streams, he said. Part of the county's deal with Ecology calls for a study by the U.S. Geological Survey to find which aquifers are actually connected to the river, and Fowler hopes that will prove his point.

As for the Wasserman connection, Munce disputes Honea's account.

"His characterization of my version is a total fabrication," Munce said.

Munce said he told Honea that he didn't know how the omission happened, but it was "generally attributed to Larry Wasserman."

Honea turned the blame back on Munce.

"I apologize for any embarrassment (to Wasserman), but I can only go on what people tell me," he said.

Wasserman did not indicate any embarrassment.

"The county's free to make any statements it'd like to make," he said. "It'd be nice to see them substantiate it with something."

Attachment 3

A RESOLUTION APPROVING AN INTERLOCAL AGREEMENT CONFIRMING SKAGIT COUNTY PARTICIPATION AND PARTNERSHIP IN THE MEMORANDUM OF AGREEMENT REGARDING UTILIZATION OF SKAGIT RIVER BASIN WATER RESOURCES FOR INSTREAM AND OUT OF STREAM PURPOSES.

WHEREAS, R.C.W. 39.34.030 allows two or more public agencies to enter into agreements with one another for joint or cooperative action; and

WHEREAS, The Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes has identified Skagit County as one of the public agencies with an interest in, and responsibility for, the future utilization of Skagit River water; and

WHEREAS, The Skagit County Board of Commissioners held a public meeting on September 4, 1996 to question staff and to take public testimony concerning this matter; and

WHEREAS, All other parties to the agreement have signed it and the Instream Flow Study called for in the memorandum has commenced; and

WHEREAS, The Board of County Commissioners has determined that it is in the best of interest of the citizens of Skagit County for the County to participate as a full partner to this agreement and as member of the Skagit River Flow Management Committee.

NOW THEREFORE BE IT RESOLVED BY THE SKAGIT COUNTY BOARD OF COMMISSIONERS THAT: Skagit County agrees to sign the attached interlocal agreement known as "The Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes" and authorizes the Administrative Official of the Planning and Permit Center and/or the Director of the Public Works Department to act as County representative.

IN TESTIMONY WHEREOF, we hereunto set our hands and affix the official seal of our office.

Approved this 23rd day of Dec., 1996.

BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON



TED ANDERSON, Chairman

Harvey Wolden
HARVEY WOLDEN, Commissioner

Robert Hart
ROBERT HART, Commissioner

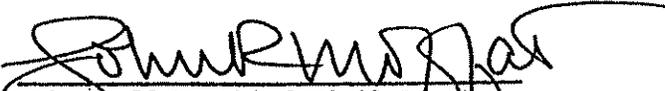
APPROVED BY:



Roxanne Michael, Director
Skagit County Planning & Permit Center

16397

Approved as to form:



John Moffat, Chief Civil Deputy
Skagit County Prosecuting Attorney

Attest:



Debby Sims, Clerk of the Board of County Commissioners

**MEMORANDUM OF AGREEMENT
REGARDING UTILIZATION OF SKAGIT RIVER BASIN WATER
RESOURCES FOR INSTREAM AND OUT OF STREAM PURPOSES**

I. PURPOSE OF AGREEMENT

- A. To ensure the establishment of instream flows to protect fisheries resources, and the mitigation of any interference with such established flows;
- B. To provide a mechanism for the coordinated management of water resources in areas described by the Skagit County Coordinated Water System Plan, Regional Supplement, July 1993 ("CWSP") to meet the out-of-stream needs of the Swinomish Indian Tribal Community, Upper Skagit River Tribe, and Sauk-Suiattle Indian Tribe (collectively "the Tribes"), local governments, and public water purveyors within Skagit County;
- C. To avoid litigation or adjudication of water resources within the Skagit River Basin between the Parties to this Agreement;
- D. To assist in expediting the Department of Ecology's water right decision-making within the CWSP service area;
- E. To modify the CWSP to conform to this Agreement and to incorporate this Agreement into the City of Anacortes' and Public Utility District No. 1 of Skagit County's Joint Operating Agreement.

II. PARTIES TO THIS AGREEMENT ("THE PARTIES")

City of Anacortes ("the City")
Public Utility District No. 1 of Skagit County ("PUD")
Skagit County ("the County")
Upper Skagit Indian Tribe
Swinomish Indian Tribal Community
Sauk-Suiattle Indian Tribe
(collectively "the Tribes")
Washington State
Department of Ecology ("Ecology")
Department of Fish and Wildlife ("WDFW")

30.135

III. DEFINITIONS

- A. **Instream Flow** - The quantity of flow necessary to maintain sufficient water in a stream to support in harvestable numbers the natural production of food and game fish.
- B. **Established or establishing instream flows** - Instream flows that are established by rule and thus enforceable by law.
- C. **Out-of-Stream Use** - The quantity of water identified for withdrawal from the Skagit River and its tributaries, or from groundwater in continuity with the Skagit River or its tributaries, for use by the City, PUD, and Tribes.
- D. **Effective Date and Term of Agreement** - The Effective Date of this Agreement shall be when the last Party has signed the Agreement and shall continue for 50 years from the effective date.
- E. **Claims or Adjustments** - Existing, recorded, pending, and proposed new water right documents consisting of registered claims, certificates, permits, applications, and proposed changes to such documents related to place of use, point of diversion, and/or authorized instantaneous and annual quantities of water, all of which are specifically identified in Sections IV.B.1.a, IV.B.1.b (1), and IV.C.1.a-d of this MOA.
- F. **Skagit River Basin** - The water resource basin as generally defined by the State of Washington Water Resource Inventory Areas 3 and 4.
- G. **CWSP** - Skagit County Coordinated Water System Plan, Regional Supplement (July 1993).
- H. **Lower Skagit River Instream Flows** - Established instream flows for the segment of the Skagit River below the Skagit River PUD Pipeline Crossing east of Sedro Woolley ("PUD Pipeline Crossing") measured at the existing USGS Station 12200500, near Mt. Vernon.
- I. **Future claims or adjustments** - any claims or adjustments not specifically identified in this MOA.
- J. **Cultus Mountain Streams Instream Flows** - Established instream flows for the Salmon, Turner, Mundt, and Gilligan Creeks located in the general Cultus Mountain area.
- K. **Ecology Low-Flow Streams**: Those streams on Ecology's Surface Water Source Limited (SWSL) list that have been identified to have limitations in available supply as a result of fisheries concerns.

IV. AGREEMENTS

- A. The Tribes agree to the following, conditioned upon the other Parties meeting their obligations as outlined in this Agreement, which includes establishing Lower Skagit River Instream Flows as defined in this Agreement, and as jointly or individually recommended by the parties, within the time period established in subsections IV.B.2.c. and IV.C.2.c., unless such time period is extended in the manner described in such sections.

1. To not challenge any Skagit River Basin water rights claims or adjustments, made by the City or PUD within 50 years from the effective date of this Agreement, as long as such claims or adjustments are consistent with this Agreement. An inconsistent claim or adjustment would include, but not be limited to, claims or adjustments other than specifically identified in this Agreement as not subject to Lower Skagit River Instream Flows that in any way interfere with established instream flows.
2. That established Lower Skagit River Instream Flows will constitute the full instream flow agreed to by the Parties for 50 years from the effective date of this Agreement;
3. That any challenges made by the Tribes after the 50-year period of this Agreement will be made only against future claims or adjustments by the City or PUD that are additional to those identified in Sections IV.B.1.a, IV.B.1.b(1), and IV.C.1.a, b, c, and d of this Agreement;
4. To collaborate with the Parties to secure adequate flows for instream and out-of-stream uses for areas identified in the CWSP;
5. To work towards establishing satellite systems as defined in the CWSP with the objectives of reducing groundwater or surface water withdrawals that adversely impact Skagit River Basin Instream Flows, improving water use efficiency, and providing public water delivery to existing and planned communities in Skagit County. A primary objective is to reduce the use of exempt wells in those areas of the County experiencing inadequate instream flows that may be occurring as a result of groundwater withdrawal;
6. To seek funding sources to: contribute towards the development and implementation of long-term watershed management programs; develop a coordinated water delivery system throughout the CWSP service area; and achieve the objectives of this Agreement.

B. The City of Anacortes agrees to the following:

1. The following certificates presently held, pending water right applications, and future claims or adjustments to water rights will be recognized and put to use by the City in accordance with the relative order of priorities set forth below.
 - a. City Water Rights Not Subject to Lower Skagit River Instream Flows: 85 cubic feet per second (cfs) (54.94 mgd) as comprised in the following:
 - (1) Certificate #C-709 (2/14/1963) which provides 70 cfs (45.24 million gallons per day or mgd) for the "area served by the City of Anacortes Water Supply System".
 - (2) Certificate #C-1161 (7/2/1930) which provides 15 cfs (9.70 mgd) for the "City of Anacortes." This Agreement provides for a change in the point of diversion under this right downstream

approximately 1,500 feet to coincide with the existing intake for Certificate #C-709.

- b. City water rights subject to Lower Skagit River Instream Flows developed as a condition of this Agreement:
 - (1) Certificate #C-3959 (9/13/1954) which provides 32.30 cfs (20.88 mgd). This Agreement provides for a change in the point of diversion of Certificate #C-3959 from the original "Ranney Well" Skagit River bed subsurface diversion to coincide with the existing intake for Certificate #C-709.
 - (2) The following may be subject to results of state-of-the-art instream flow studies, regardless of the date of the application: 1) future rights acquired by the City in excess of those specified in Section IV.B.1.b(1) above for service to parties within or outside the service areas as defined in the CWSP; and 2) future claims or adjustments.
2. The City will participate in identifying instream flow needs through an IFIM instream flow study process. The City and PUD, with consultation from the Tribes, will fund and contract for the IFIM studies, which will apply only to the segment of the Skagit River described in subsection III.H.
 - a. The City, PUD, and any other parties that desire to assist with financing, will fund and contract for the necessary studies to establish Lower Skagit River Instream Flows. The Tribes and WDFW will provide the fisheries and fisheries habitat management criteria for input into the IFIM study and recommended Skagit River Instream Flows.
 - b. The Parties to this Agreement will jointly develop the recommended instream flows using the Water Resources Forum process (Instream Flow Policy Working Draft, 8th Draft, Revised May 19, 1993) as a guide. The Tribal IFIM study input criteria will be limited to fisheries and fisheries habitat management and will not include other instream objectives. The Parties will utilize all appropriate methods to establish an agreed upon instream flow for managing the Skagit River below the PUD Pipeline Crossing, including mediation.
 - c. Schedule.
 - (1) The City agrees that the following events must occur within two years of the effective date of this Agreement: 1) the necessary Lower Skagit River instream flow studies are completed; 2) the City, PUD, and Tribes agree on the recommended instream flows; and 3) the City, PUD, and Tribes submit jointly recommended instream flows to Ecology, or, if these parties cannot agree in writing, submit the differing recommendations for Lower Skagit River Instream Flows to Ecology for its decision as to what to include in the rule proposal. This two-year schedule may only be

extended by written agreement of the City, PUD, and Tribes. If these parties cannot agree to an extension, the City shall take all necessary actions to ensure that changes to existing water rights documents identified in section IV.B.1. shall not remain or become effective as further described in subsection (3) below. The City may then remove any commitment of water service to the Tribal Reservations identified in subsection IV.B.(3) except as required under a separate contract.

- (2) Upon receipt of either the joint or differing recommendations described in subsections IV.B.2.c. and IV.C.2.c., Ecology shall immediately file a Preproposal Statement of Inquiry Code Revision (CR) 101, indicating its intention to adopt the Cultus Mountain Instream Flows and Lower Skagit River Instream Flows. Ecology shall seek to complete formal rulemaking by filing a CR 102 within eighteen (18) months of its receipt of the joint recommendation or deferment described in IV.B.2.c(1) and IV.C.2.c(1), with a goal of adopting final rules within two years of its receipt.
 - (3) If Lower Skagit River Instream Flows have not been established by the end of two years following Ecology's receipt of the recommendations described in subsection (1), the City, PUD, and Tribes may extend the deadline only by written agreement. If the City, PUD, and Tribes cannot agree to an extension, the City shall immediately request Ecology to rescind any water right change action submitted to Ecology since the Agreement became effective, even if Ecology has taken final action. The City may immediately reapply for the change. The intent of this provision is to secure the Tribes' right to challenge these changes in the event that Lower Skagit River Instream Flows are not established within the specified schedule.
- d. In the event that Ecology approves the changes referred to in subsection IV.B.2.c(3) above, the City shall ensure that any water rights documents issued by Ecology that purport to effectuate these changes shall be expressly and clearly conditioned to require compliance with this Agreement. Regardless of whether or not Ecology so conditions the document(s), the City shall, by its own authority, enforce the conditions of this Agreement when using these water rights.
 - e. The City may, at its option, negotiate with upstream Skagit River dam operators for release of flows to maintain the agreed upon flow levels downstream from the PUD Pipeline Crossing.
3. To guarantee in perpetuity to the Swinomish Indian Tribal Community for non-discriminatory use by all residents within the Swinomish Indian Reservation a water quantity of 2.8 million gallons per day based on demands identified annually and projected for five and twenty years by the Swinomish Indian Tribal Community and based on amendment to the existing wholesale contract with the

Swinomish Tribe. Government-owned and operated uses will be subject to conservation and curtailment programs for both the Reservation and off-Reservation water uses as outlined in Exhibit A, which is incorporated herein. Government-owned and operated economic development on the Reservation, such as the Tribe's marina, gaming facilities, hotels, and similar facilities will be considered services that generate governmental revenue and will receive the second highest priority after residential domestic use. Similar government-owned and operated commercial services within the City's and PUD's service area will receive the same status.

4. The City, including its Public Works Department, agrees not to provide any water service to users or property located within the Swinomish Indian Reservation without the prior written approval of the Swinomish Indian Tribal Community.
5. To assist Ecology in adopting Lower Skagit River Instream Flow rules within the time period set forth in subsection IV.B.2.c..
6. To actively support and provide input at both a policy and technical level to County officials regarding implementation of Section 63 of the Growth Management Act, such that building permits will only be issued if there is an adequate supply of potable water that can be withdrawn from groundwater without adversely impacting instream flows, other than as agreed herein.
7. To actively seek amendment of the CWSP and adoption of County ordinances that: a) require, in lieu of individual wells, connection of new individual/single family homes to public water systems where the proposed development is within the designated service area of existing utilities and timely and reasonable service is available; and b) limits the use of the 5,000 gallons per day exemption in those areas of the County experiencing inadequate Skagit River Basin Instream Flows that may be occurring as a result of groundwater withdrawals.
8. To seek funding sources to contribute: towards the development and implementation of long-term watershed management programs; towards the development of a coordinated water delivery system throughout the CWSP service area; and towards achieving the objectives of this Agreement. This provision does not supersede or in any way affect the City's financial commitment as set forth in Section IV. B.2.

C. The PUD agrees to the following:

1. The following certificates presently held, pending and new water right applications, and future claims or adjustments to water rights will be recognized and put to use by the PUD in accordance with the relative order of priorities set forth below.

- a. PUD water rights subject to established Cultus Mountain Instream Flows, but not subject to established Lower Skagit River Instream Flows.

Document No.	Priority Date	Source	Maximum Appropriation	
			cfs	mgd
Claim 9332	Pre-1917	Salmon Creek	1.80	1.16
Certificate 411	10/10/1929	Gilligan Creek	1.50	0.97
Certificate 724	10/30/1963	Gilligan Creek	7.39	4.77
Claim 9333	Pre-1917	Turner Creek	4.30	2.78
Certificate 739	10/30/1963	Turner Creek	6.20	4.01
Certificate 26	9/28/1917	Mundt Creek	2.50	1.62
Certificate 737	10/30/1963	Mundt Creek	8.00	5.17
Certificate 8738	1/16/94	Judy Reservoir	Storage	Storage
Certificate R-673	4/24/1963	Judy Reservoir	Storage	Storage
Subtotal			31.69	20.48

- b. PUD water rights not subject to established Lower Skagit River Instream Flows.

Document No.	Priority Date	Source	Maximum Appropriation	
			cfs	mgd
Certificate 1904	3/26/1953	Sedro Woolley Well	2.00	1.29
Certificate 2107	5/12/1954	Ranney Well	8.90	5.75
Cultus Mountain Water Rights (See Section IV.C. 1 (a))			31.69	20.48
			42.59	27.52

- c. Pending and new PUD Cultus Mountain water right applications subject to Cultus Mountain and Lower Skagit River Instream Flows.

The purpose of these pending and new applications is to make full use of the hydraulic capacity of existing collector lines. When the rights listed below are combined with rights Cultus Mountain streams listed in subsections a and b above, the total diversion will not exceed 35.8 mgd.

Document No.	Priority Date	Source	Maximum Appropriation	
			cfs	mgd
18219 (pending)		Salmon Creek	4.00	2.59
25129 (pending)		Gilligan Creek	13.15	8.50
New		Turner Creek	6.60	4.27
New		Mundt Creek	16.06	10.38

- d. New application partially not subject to Skagit River Instream Flows for proposed Skagit River pumping plant delivering water to Judy Reservoir.

Memorandum of Agreement

The PUD's combined capacity of the gravity collector lines that presently supply Judy Reservoir is 55.39 cfs/35.80 mgd. The PUD is dependent on the ability to withdraw water from the streams, river, or combination of river and streams in the amount of 55.39 cfs/35.80 mgd when available. A new application for a water right will be filed on the Skagit River in the amount of 12.80 cfs/8.28 mgd. This application for 12.80 cfs/8.28 mgd, when combined with the water rights listed in subsection IV.C.1.a above (31.69 cfs/20.48 mgd) with the new point of diversion on the Skagit River and the existing Sedro-Woolley Well (2.0 cfs/1.29 mgd) and Ranny Well (8.90 cfs/5.75 mgd), both of which are to be transferred to the new pumping station, will result in a total water right of 55.39 cfs/35.80 mgd. Of this amount, 42.59 cfs/27.52 mgd is not subject to Lower Skagit River Instream Flows, and the remainder is subject to such flows.

- e. The instream flows being developed on the Cultus Mountain streams through the completion of an IFIM Study will be recognized as a higher priority than the Cultus Mountain stream: 1) certificates and claims listed in Section IV.C.1.a; 2) pending and new water rights applications listed in Section IV.C.1.c.; and 3) future claims and adjustments.
- f. Based on this Agreement, the PUD:
- (1) will manage the Cultus Mountain supply to meet the jointly agreed upon Cultus Mountain Instream Flows;
 - (2) may periodically divert up to 35.80 mgd from the Cultus Mountain streams into Judy Reservoir subject to the Cultus Mountain Instream Flows;
 - (3) may provide for an additional point of diversion at the PUD Skagit River Pumping Station on each of the water rights listed in subsection IV.C.1.a above;
 - (4) may transfer the Ranney Well and Sedro Woolley well water right points of diversion to the new PUD Skagit River pumping station; and
 - (5) may periodically divert a maximum of 35.80 mgd from the Skagit River into Judy Reservoir as an alternate source of supply to the Cultus Mountain system as explained above, with 27.52 mgd of this amount not subject to Skagit River Instream Flows and 8.28 mgd subject to Skagit River Instream Flows; and/or.
 - (6) The PUD will continue investigations regarding instream flow needs on Salmon, Mundt, Gilligan, and Turner Creeks. Upon completion of these investigations and establishment of instream flows, the PUD will ensure the retroactive application of the instream flows to existing and pending PUD water rights related to Cultus Mountain streams. As a condition of this subordination of water rights, the PUD may: (1) utilize the full hydraulic

The PUD may then remove any commitment of water service to the Tribal Reservations identified in subsection IV.C.(3) except as required under a separate contract.

- (2) Upon receipt of either the joint or differing recommendations described in subsections IV.B.2.c. and IV.C.2.c. Ecology shall immediately file a Preproposal Statement of Inquiry (CR 101), indicating its intent to adopt Cultus Mountain Instream Flows and Lower Skagit River Instream Flows. Ecology shall seek to complete formal rulemaking by filing a CR 102 within eighteen (18) months of its receipt of the joint recommendation or deferment described in IV.B.2.c(1) and IV.C.2.c (1), with a goal of adopting final rules within two years of its receipt.
 - (3) If Lower Skagit River Instream Flows have not been established by the end of two years following Ecology's receipt of the recommendations described in subsection (1), the City, PUD, and Tribes may extend the deadline only by written agreement. If the City, PUD, and Tribes cannot agree to an extension, the PUD shall immediately request Ecology to rescind any water right change action that is submitted to Ecology since the Agreement became effective even if Ecology has taken final action. The City may immediately reapply for the change. The intent of this provision is to secure the Tribes' right to challenge these changes in the event that Lower Skagit River instream flows are not established within the specified schedule.
- d. In the event that Ecology approves the changes referred to in subsection IV.C.2.c(3) above, the PUD shall ensure that any water rights documents issued by Ecology that purport to effectuate these changes shall be expressly and clearly conditioned to require compliance with this Agreement. Regardless of whether Ecology so conditions the document(s), the PUD shall, by its own authority, enforce the conditions of this Agreement when using these water rights.
 - e. The PUD may, at its option, negotiate with upstream Skagit River dam operators for release of flows to maintain the agreed upon flow levels downstream from the PUD Pipeline Crossing.

3. To guarantee in perpetuity to the Upper Skagit Indian Tribal Community for non-discriminatory use by all residents within the Bow Hill Indian lands and the Upper Skagit Indian Reservation a water quantity of 0.75 mgd based on demands identified annually and projected for five and twenty years by the Upper Skagit Indian Tribal Community and based on amendment to the existing wholesale contract with the Upper Skagit Tribal Community. Government-owned and operated uses will be subject to conservation and curtailment programs for both the Reservation and off-Reservation water uses as outlined in Exhibit A, which is incorporated herein. Government-owned and operated economic development on the Reservation, such as the Tribe's gaming facilities, hotels, and similar facilities,

will be considered services that generate governmental revenue and will receive the second highest priority after residential domestic use. Similar government-owned and operated commercial services within the City's and PUD's service area will receive the same status.

4. The PUD agrees not to provide any water service to users or property located within the Swinomish Indian Reservation without prior written approval of the Swinomish Indian Tribal Community. The PUD agrees not to provide any water service to users or property located on Upper Skagit Reservations or other Indian Lands at Bow Hill without the prior written approval of the Upper Skagit Indian Tribe.
5. To assist Ecology in the adoption of instream flow rules for the Lower Skagit River and Cultus Mountain streams within the time period set forth in subsection IV.C.2.c. of this Agreement.
6. To actively support and provide input at both a policy and technical level to County officials regarding implementation of Section 63 of the Growth Management Act, such that building permits will only be issued if there is an adequate potable supply of water that can be withdrawn from groundwater without impacting instream flows;
7. To actively seek amendment of the CWSP and adoption of County ordinances that require, in lieu of individual wells, connection of new individual/single family homes to public water systems where the proposed development is within the designated service area of existing utilities and timely and reasonable service is available. Also, to limit the use of the 5,000 gallons per day exemption in those areas of the County experiencing inadequate Skagit River Basin Instream Flows that may be occurring as a result of groundwater withdrawals.
8. To seek funding sources to contribute towards the development and implementation of long-term watershed management programs; towards the development of a coordinated water delivery system throughout the CWSP service area; and towards achieving the objectives of this Agreement. This provision does not supersede or in any way affect the PUD's financial commitment as set forth in Section IV.C.2.

D. The County agrees to the following:

1. To implement Section 63 of the Growth Management Act, such that building permits will only be issued if the parcel is served by a public water system or if there is an adequate supply of potable water that can be withdrawn from groundwater without adversely impacting Skagit River Basin Instream Flows, other than as agreed herein;
2. To actively work with all parties to address the 5000 gallon permit exemption for all public water systems and for all individual water systems in those portions of Skagit County that are impacted by inadequate Skagit River Instream Flows that may be occurring as a result of surface or groundwater diversions. Skagit County

reserves the right to allow exempt wells for single family systems in the Skagit River Basin above the PUD Pipeline Crossing.

3. To seek amendment of the CWSP and related County implementing ordinances to require connection of new individual/single family homes to public water systems to achieve conservation of resources where the proposed development is within the designated service area of existing utilities and timely and reasonable service is available.
4. To assist Ecology in establishing instream flow rules for the Skagit River below the PUD Sedro Woolley Pipeline Crossing, with the goal of establishment within four years from the effective date of this Agreement.
5. To seek the goals of; (1) providing certainty and stability for water supplies for citizens of Skagit County; (2) to secure adequate streamflow for Ecology designated Low Flow Streams during critical periods to meet fisheries needs; (3) to encourage public water suppliers to provide water from the mainstem of the Skagit River for water users near Ecology Low Flow Streams where withdrawals may have direct impacts on in-stream resources; and (4) to evaluate, jointly with other parties, streams for possible designation by Ecology as Low-Flow Streams.

E. Ecology agrees to the following:

1. To process any City or PUD requests for changes identified in this Agreement, and to expressly and clearly condition any documents effectuating changes to existing rights to require compliance with this Agreement. Ecology agrees to seek to the extent possible, to enact all necessary rule and water right changes necessary to implement this Agreement;
2. Upon receipt of either the joint or differing recommendations described in subsections IV.B.2.c. (1) and IV.C.2.c.(1), Ecology shall immediately file a Preproposal Statement of Inquiry (CR 101), indicating its intent to adopt Cultus Mountain Instream Flows and Lower Skagit River Instream Flows. Ecology shall seek to complete formal rulemaking by filing a CR 102 within eighteen (18) months of its receipt of the joint recommendation or deferment described in IV.B.2.c(1) and IV.C.2.c (1), with a goal of adopting final rules within two years of its receipt; and
3. Until the adoption of Lower Skagit River and Cultus Mountain Instream Flows provides a framework for determining the availability of water for future appropriations, no final decisions will be made on any water right permit applications within that portion of the Skagit River Basin which lies within WRIA3 which could affect or be affected by those instream flows.
4. In signing this Agreement, Ecology is only obligated to take those actions set forth in this section and is not obligated by or agreeing to any other specific provisions of this Memorandum of Agreement.

F. The Department of Fish and Wildlife agrees to the following:

1. The Tribe and WDFW will provide the fisheries and fisheries habitat management criteria for input into the IFIM study and recommended Lower Skagit River Instream Flows.
2. WDFW will make a recommendation regarding the adequacy of the jointly developed recommended instream flow for Lower Skagit River Instream Flows to Ecology. WDFW's recommendation decision will be based upon the jointly developed recommendations consistency with the fisheries and fisheries habitat management criteria.
3. In the event that the parties cannot reach an agreement on jointly developed recommended instream flow for Lower Skagit River Instream Flows, WDFW will make a recommendation regarding the differing recommendations for Lower Skagit River Instream Flows to Ecology.
4. WDFW will provide appropriate technical support for developing recommended instream flows for the Cultus Mountain Streams.
5. WDFW is in no way obligated or bound by any other provision of the Memorandum of Agreement, except as outlined in the above four items.

G. All Parties agree to the following:

1. That the long term objective is to develop a comprehensive watershed management plan for the Skagit River Basin designed to manage the use of the water resources to meet both instream and out of stream objectives defined by the City, PUD and Tribes.
 - a. To collaborate in investigating all alternatives so as to secure adequate flows to meet instream needs for portions of the Skagit River upstream from the PUD pipeline crossing at Sedro Woolley and out-of-stream needs within the surface areas defined within the CWSP. The Parties will establish a Skagit River Flow Management Committee (SRFMC) comprised, at a minimum, of representatives of signatories to this Agreement. This Committee will investigate alternatives towards securing adequate flows to meet instream and out-of-stream needs, design a study process for the Skagit River, and develop a management and monitoring plan to this end. The Parties anticipate completion of a management plan over a period of two to five years.
 - b. To actively attempt to establish by rule, within a period beginning on the effective date of this Agreement and extending for five years, instream flows for the entire Skagit River Basin and its tributaries. The Parties agree to develop funding mechanisms to contribute to investigations that will establish these flows.

2. To reach agreement prior to expanding service areas beyond those identified in the CWSP. Such agreement will be based on evaluations of additional needs existing at the time, and after considering additional needs that may exist after the 50-year term of this Agreement. If the Parties cannot agree, then they may not seek or approve any changes relating to water quantity associated with the expansions of service areas for a period of 50 years from the effective date of this Agreement.
3. A work plan and budget for implementing this Agreement will be developed by the City and PUD in draft form within 60 days of the effective date of this Agreement. An adopted work plan and budget will be prepared by the City and PUD within six months of the effective date of this Agreement.
4. The Skagit River Flow Management Committee (SRFMC) shall be responsible for identifying and recommending studies and management responses, and in guiding the development, review, and approval of Skagit River Watershed Management strategies for the signators to this Agreement related to activities that have a measurable impact on the flow in the Skagit River while taking into consideration previously settled hydroelectric agreements. The objective of the instream flow studies is to establish a recommended flow upstream of the Sedro Woolley pipeline crossing for use in the SRFMC Management Plan. The signators to this Agreement agree to establish written response plans based on monthly climatic and flow criteria to help establish an appropriate management response as generally described below.
5. The parties recognize that there is a possibility that the City's 54.94 mgd and the PUD's 27.52 mgd recognized in this agreement as not subject to the Lower Skagit River Instream Flows may reduce Skagit River flows below the established flows. The attached Water Shortage Response Plan is incorporated by reference into this Agreement, and will be implemented in the event that this occurs.
6. No rights, claims, and adjustments identified in this agreement can be confirmed through this Agreement. Confirmation can only be done through an adjudicative process.
7. WDFW is in no way obligated or bound by any other provision of the Memorandum of Agreement, except as outlined in section IV.F.

V. GENERAL PROVISIONS

- A. **Duration.** The term of this Agreement is 50 years from its effective date. The Agreement may only be amended or modified during the 50-year term by mutual written agreement of all signatories. The Agreement will extend beyond 50 years if all parties agree.
- B. **Severability.** If any provision of this Agreement, or the application thereof to any person or circumstance, is found to be invalid or unenforceable, the remainder of the provisions of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid or unenforceable, as the case may be, shall not be affected thereby.

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- C. **Dispute Resolution.** If a dispute arises between two or more parties concerning any provision of this Agreement, or application thereof, any such disputing party may send a written request to the other parties requesting a meeting, to be scheduled within 15 days of the parties' receipt of the request. The parties shall then meet together to discuss the dispute and attempt resolution.
- D. **Enforcement.**
1. **Between the City, PUD, and Tribes:**
- a) **Notice of Failure.** If any party(ies) ("Notifying Party") believes that another party (ies) is in violation of this Agreement or that a violation is threatened, the Notifying Party shall give written notice ("Notice") to the allegedly violating party (ies) of such violation and demand corrective action sufficient to cure the violation.
- b) **Failure to Respond.** If the allegedly violating party (ies):
1. Fails to cure the violation within 30 days after receipt of the Notice; or
 2. Under circumstances where the violation cannot be reasonably cured within the 30-day period, fails to begin curing such violation within the 30-day period; or
 3. Fails to continue diligently curing such violation until it is finally cured; the Notifying Party may bring an action as provided in subsection c. of this Section.
- c) **Actions.** The Notifying Party may bring an action at law or in equity in a court of competent jurisdiction: to enforce the terms of this Agreement; to enjoin the violation by temporary or permanent injunction; to recover any damages to which it may be entitled for violation of the terms of this Agreement; and to require restoration of resources (which includes, but is not limited to, water and fisheries) to the condition that existed prior to any such injury.
- d) **Nature of Remedy.** The Notifying Party's rights under this Section apply equally in the event of actual or threatened violations of the terms of this Agreement. The Notifying Party may be entitled to injunctive relief in addition to such other relief, including specific performance of this Agreement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing in law or in equity.
- e) **Enforcement Discretion.** Enforcement of the terms of this Agreement shall be at the discretion of each Party entitled to performance, and any forbearance by such party to exercise its rights under this Agreement in the event of any breach of any terms of this Agreement by another party
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shall not be deemed or construed to be a waiver, laches, or estoppel of such rights. No delay or omission by a party in the exercise of any right or remedy upon breach shall impair such rights or remedy or be construed as waiver, laches, or estoppel.

2. By the City, PUD, and/or Tribes against Ecology.
 - a) The City, PUD, and Tribes agree to together take action to ensure, by all appropriate legal means necessary, that Ecology;
 - 1) Does not take final action on any water rights-related applications, claims, or adjustments, submitted by any person or entity, in or in any way affecting the Skagit River basin, whether or not the person or entity is subject to this Agreement, until after Lower Skagit River and Cultus Mountain Instream Flows are established, other than those applications specifically set forth in Section IV E.1 of this Agreement; and
 - 2) Acts expediently to establish Lower Skagit River and Cultus Mountain Instream Flows in order to meet the schedule established in this Agreement.
- E. **Rights Against Non-Parties.** As to non-Parties to this Agreement, the Tribes, by signing this Agreement, in no way diminish, relinquish, or waive their respective legal rights, including but not limited to federal reserved water rights and treaty rights, in any administrative or judicial forum at any time.
- F. **Successors and Assigns.** This Agreement shall be binding on the Parties and on their successors in interest and assigns.
- G. **No Third Party Beneficiaries.** No third party is intended to, or shall have, any rights under this Agreement. The Parties intend that this Agreement be strictly between themselves, and therefore, only the Parties have any right to enforce this Agreement or any provision of this Agreement.
- H. **No Release of Third Parties.** This Agreement is not intended by the Parties to act, nor shall it act, to release any third parties not named herein from any claims or liabilities whatsoever.
- I. **The parties recognize that there are significant and material considerations not specifically set forth in the Agreement that make the relationship of the parties hereto unique.** Because of the unique situation herein, it is the express intent and purpose of the parties that this Agreement not be viewed nor provide precedent beyond the express scope and purpose herein. Therefore, it is agreed between the parties that they will not use this Agreement as precedent outside the Agreement nor should anyone not a party hereto attempt to use the Agreement as precedent against any of the parties.
- J. **Headings Not Controlling.** The headings in this Agreement are for convenience and reference only, and are not part of this Agreement, and in no way amplify, define, limit, or describe the scope or intent of this Agreement.

Attachments: Exhibit A - Water Shortage Response Plan, 7 pages

SIGNED:

A. Dean Maxwell Date: 9-9-96
Dean Maxwell
Mayor, City of Anacortes

James P. Kirkpatrick Date: 9-25-96
James P. Kirkpatrick
General Manager
Public Utility District #1 of Skagit County

Ted W. Anderson, Chair
Skagit County Commissioner

Date: _____

Robert R. Hart Date: 12/23/96
Robert R. Hart
Skagit County Commissioner

O. Harvey Wolden Date: 12/26/96
O. Harvey Wolden
Skagit County Commissioner

Floyd Williams Date: 9/16/96
Floyd Williams
Chairman, Upper Skagit Indian Tribe

Wa Walton Date: 9-12-96
Wa Walton
Robert Joe, Sr., Chairman
Swinomish Indian Tribal Senate

James Delano Roberts Date: 9-19-96
James Delano Roberts
Chairman, Sauk-Suiattle Indian Tribe

Mary Riveland Date: 9-26-96
Mary Riveland
Director, Department of Ecology

Bernard Shanks Date: 11/1/96
Bernard Shanks
Director, Department of Fish & Wildlife

EXHIBIT A
WATER SHORTAGE RESPONSE PLAN
to the
MEMORANDUM OF AGREEMENT
REGARDING UTILIZATION OF SKAGIT RIVER BASIN
WATER RESOURCES FOR INSTREAM AND OUT OF STREAM PURPOSES

I. PURPOSE OF THIS EXHIBIT

The purpose of this Exhibit is to outline a plan of action by the City, the PUD, and their customers, to reduce the possible impact the City and PUD diversions may have on the recommended Instream Flows for the Lower Skagit River.

II. DEFINITIONS

For the purpose of this Agreement, the following shall mean:

- A. Commercial/Industrial Customers: Includes, but is not limited to, manufacturing, food processing, restaurant, sales, service, farm operations.
- B. Discretionary Water Use: Water use which is not required for business operations or for general health and safety of the user; usually pertains to outside water use during warmer periods of the year (lawn/flower watering, car washing, washing driveways/sidewalks, etc.).
- C. Governmental Customers: Governmental entities, including, but not limited to: Water-related and other City facility operations in the case of the City; water-related facility operations in the case of the PUD; gaming and other fund-raising operations in the case of the Tribes; schools, parks, administrative operations in the case of other governmental agencies.
- D. Irrigation Use: the application of water to promote botanical development, whether at a residence or a commercial business.
- E. Public Service Announcement (PSA): a media advertisement intended to inform the public in general, whether through television, newspaper or radio mediums.
- F. PUD Pipeline Crossing: The location in Sec. 29, Twp. 35N., Rge.5 E.W.M., where the PUD water transmission main crosses the Skagit River. For purposes of determining Skagit River flows at this location, flows measured and recorded at the U.S. Geological Survey Gaging Station No. 12200500 (Skagit River near Mount Vernon) will be utilized.
- G. Residential Customers: Single family or multifamily domestic water users.
- H. Wholesale Customer: A customer who resells the water for commercial/industrial or residential use.

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III. ACTION PLAN

The City and PUD will monitor the flow in the Skagit River at the PUD Pipeline Crossing. If the flow in the Skagit River is projected to fall below the State Department of Ecology Instream Flow Level, the City and PUD will initiate the Response Plan as outlined in the following matrix.

Each Action Level indicated in the matrix outlines specific actions by the City and PUD depending on the anticipated low flow condition in the Skagit River. The durations indicated in the matrix are the anticipated period of the specified flow condition. The duration for an action level will start when the Skagit River flows drop low enough to first meet that Action Level's definition and stop when the flows increase to no longer meet that definition; a higher Action Level can start and stop as needed, and the duration of the lower Action Level will still be calculated based on its original start date.

ACTION LEVEL	DURATION		
	1 to 2 Days	3 to 14 Days	15 Days or More
I Alert Phase	Action I.1	Action I.2	Action I.3
II Management Phase	Action II.1	Action II.2	Action II.3

A. ACTION LEVELS

The Skagit River Flow Management Committee (SRFMC) will meet in May of each year to review the projected stream flows and to identify possible management strategies to meet the collective water needs of the participants. The SRFMC will also outline the proposed Water Response Plan based on the guidelines outlined in this document and for the two Action Levels.

1. Throughout Action Levels I and II as defined below, the City and PUD will coordinate the execution of the following:
 - a) Monitor water supply forecasts provided by State and federal agencies and dam operators. Stream flow projections identified in sections III.4.2 and III.4.3 of this Response Plan shall be based on these forecasts.
 - b) Establish and maintain regular communications with upstream dam operators in the Skagit River Basin to track planned water releases, with the explicit motive of increasing releases to help maintain minimum Lower Skagit River Instream Flows. Monitor the current operating rule curves used for up-ramping and down-ramping for each dam and establish communications and protocol for those

situations when the City and PUD may request additional releases to augment projected deficiencies below the PUD Pipeline Crossing.

The upstream dam operators will be asked to determine the level of flow augmentation they can provide and to document their intent to provide such flow augmentation, or to provide timely notice if they cannot deliver such augmentation.

- c) Establish and maintain regular communications with the Tribes' fisheries manager(s) regarding actual Skagit River flows relative to Lower Skagit River Instream Flows; and seek to coordinate water withdrawal patterns of the City and the PUD with projected fish passage patterns.

- 2. Action Level I, Alert Phase. Applies when flow in the Skagit River is projected to reach the Lower Skagit River Instream Flow level plus 20 percent or at an alternative level defined at the annual SRFMC meeting and as measured at the PUD Pipeline Crossing in Sedro-Wooley.

The City and the PUD will execute the following action(s) during the Alert Phase for the duration of the action level indicated:

- a) Action I.1 (1 to 2-day duration):

- (1) No change in water withdrawal/treatment plant operations.
- (2) The PUD will evaluate the flow conditions in their Cultus Mountain project for the period(s) of low flow and will implement a program to maximize storage in Judy Reservoir. The PUD will also use peaking flows from up- and down-ramping at the upstream dams in the Skagit River to keep Judy Reservoir full.
- (3) On behalf of the SRFMC, outline the route of flows from the upstream Skagit River dams downstream to the PUD pipeline crossing using the upstream dam operating rule curves, projected flows from the intervening areas, historical records of streamflows at the upstream gaging stations, and standard routing procedures.
- (4) Prepare PSA #1¹.

- b) Action I.2 (3 to 14 days duration):

¹ Seek voluntary 10 percent water use reduction in peak day use.

- (1) No change in water withdrawal/treatment plant operations.
 - (2) The PUD will continue its program to maximize storage in Judy Reservoir.
 - (3) Promote a program of voluntary water use reduction by all City and PUD water customers, with a goal of ten percent (10%) reduction in peak day demand.
 - (4) Issue PSA #1 to newspaper and radio media requesting voluntary reduction of discretionary use of water.
 - (5) In conjunction with the Tribes, monitor and evaluate critical elements of the Lower Skagit River Instream Flows against planned and projected fisheries and habitat management plans for the period(s) of projected low flow. Elements of the Lower Skagit River Instream Flow to be evaluated include: the projected timing of use and passage of fish through the reach of the Skagit River downstream of the PUD river crossing; a comparison of routed flows (provided by the City and PUD) with flows required by the Instream Flow; and the effects of the routed flows on habitat conditions existing or projected to exist during the low flow period(s). Results of the Lower Skagit River Instream Flow critical elements monitoring and evaluation will be provided by the City and PUD.
 - (6) The City and PUD will develop/refine a "Contingency Plan of Operation" for the period(s) of low flow using: the routed flows from the upstream reaches of the Skagit River; maximized storage in Judy Reservoir; results from the Instream Flow monitoring and evaluation assessment; estimates of water savings from voluntary water use reduction program(s); and weather and water supply forecasts for the Skagit River Basin. The "Contingency Plan of Operation" will provide for conjunctive use of the PUD's Cultus Mountain Project and the City's and PUD's Skagit River facilities. The "Contingency Plan of Operation" will optimize the PUD's use of water from Judy Reservoir during periods when demands exceed available withdrawals from the City's and PUD's Skagit River facilities and the PUD's Cultus Mountain project due to established instream flows on those water courses.
- c) Action I.3 (15 days or more duration):

- (1) No change in water withdrawal/treatment plant operations.
 - (2) The PUD will continue its program to maximize storage in Judy Reservoir.
 - (3) Continue a program of voluntary water use reduction by all City and PUD water customers, with a goal of ten percent (10%) reduction in peak day demand.
 - (4) Continue to refine the "Contingency Plan of Operations" based on additional streamflow information and City and PUD customer demand information.
 - (5) Continue PSA #1 by newspaper and radio media.
3. Action Level II, Management Phase. Applies when flow in the Skagit River falls below the established Lower Skagit River Instream Flow levels, measured at the PUD Pipeline Crossing in Sedro-Wooley and continues until the flows either meet or exceed the regulated instream flow levels.

The City and the PUD will execute the following action(s) during the Management Phase for the duration of the action level indicated:

- a) Action II.1 (1 to 2 day duration):
- (1) Limit water withdrawals to quantities exempt (125.59 cfs/82.46 mgd) from Lower Skagit River Instream Flows.
 - (2) The PUD will continue its program to maximize storage in Judy Reservoir.
 - (3) Implement the "Contingency Plan of Operation". Continue to refine the "Contingency Plan of Operation" based on additional streamflow information and City and PUD customer demand information.
 - (4) Notify the upstream Skagit River dam operators of the downstream flow situation and seek additional releases, if possible, if the situation continues.
 - (5) Continue PSA #1 by newspaper and radio media.
 - (6) Prepare PSA #2² with a program to voluntarily reduce water demand to meet instream flows.

² Mandatory restrictions for discretionary exterior water use to limit diversion to 125.59 cfs/82.46 mgd.

- b) Action II.2 (3 to 14 day duration):
- (1) Limit water withdrawals to quantities exempt (125.59 cfs/82.46 mgd) from Lower Skagit River Instream Flows and seek voluntary reduction in demand.
 - (2) The PUD will continue its program to maximize storage in Judy Reservoir.
 - (3) Continue implementation of the "Contingency Plan of Operation". Continue to refine the "Contingency Plan of Operation" based on additional streamflow information and City and PUD customer demand information.
 - (4) Request the upstream Skagit River dam operators to commence additional releases. Such additional releases should be timed to realize the effect of the release at the PUD Pipeline Crossing at the time of projected deficient streamflow. The City and PUD will base their request(s) on established routing procedures.
 - (5) Issue PSA #2 to newspaper and radio media.
- c) Action II.3 (15 days or more duration):
- (1) Limit water withdrawals to quantities exempt (125.59 cfs/82.46 mgd) from Lower Skagit River Instream Flows and seek voluntary reduction in demand to meet instream flows.
 - (2) The PUD will continue its program to maximize storage in Judy Reservoir.
 - (3) Continue implementation of the "Contingency Plan of Operation". Continue to refine the "Contingency Plan of Operation" based on additional streamflow information and City and PUD customer demand information.
 - (4) Continue to request the upstream Skagit River dam operator to continue additional releases.
 - (5) Continue PSA #2 by newspaper and radio media.

**PUBLIC SERVICE ANNOUNCEMENTS
(Subjects Only)**

PSA #1 Alert Phase

- Seek voluntary 10 percent water use reduction with a focus on discretionary outside use of water.

PSA #2 Management Phase

- Mandatory restrictions for discretionary exterior water use to limit diversion to 125.59 cfs/82.46 mgd and voluntary reduction in demand to seek to meet the instream flows. The voluntary reduction program may include the following:
- Restriction on commercial/industrial/residential irrigation.
 - Reduction in peak day water use by all commercial/industrial customers, including restaurants, on the City and PUD systems.
 - Reduction in peak day water use by all residential customers on the City and PUD systems.
- As the City and PUD demand approaches the out of stream diversion limit of 125.59 during low flow conditions, the use reduction program will include:
- Mandatory restriction of governmental/commercial/industrial/residential irrigation activities from City and PUD systems, including farms.
 - Prohibition of car washing operations at commercial/residential sites.
 - Reduction in peak day water use by all commercial/industrial customers, including restaurants, on the City and PUD systems.

Reduction in peak day water use by all residential customers on the City and PUD systems.

Attachment 4

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

SWINOMISH INDIAN TRIAL)	
COMMUNITY, and SAUK-SUIATTLE)	
INDIAN TRIBE,)	
)	
Plaintiff,)	
)	
vs.)	No. 04-2-05842-1
)	
SKAGIT COUNTY,)	
)	
Defendant.)	
)	

DEPOSITION UPON ORAL EXAMINATION OF
ROBERT L. WUBBENA

May 03, 2005
1101 Capitol Way South
Suite 225
Olympia, Washington 98504

REPORTED BY:
LAURIE BRIGGS, RPR

1 Q. (By Mr. Arum) I will withdraw the question.
 2 Turning back to this list of questions in Roxanne's
 3 memorandum, do you recall anybody from the county
 4 contacting you to discuss these questions?
 5 A. There were discussions going on with them at
 6 times, again, part of the work parties, part of the work
 7 sessions. I don't recall which questions they asked me
 8 about and which ones they didn't.
 9 Q. You mentioned work sessions. Can you tell me
 10 what you are referring to?
 11 A. When I talk about work sessions, you can call
 12 them negotiation sessions or whatever. It was when we
 13 would come together with the tribes and the city. The
 14 city, the PUD, myself and the tribal representatives,
 15 usually Larry and Haensly and sometimes others were the
 16 people that were always there, and then periodically
 17 other people would come.
 18 Again, we were trying to have an agreement that
 19 everybody would sign, so we were trying to make sure
 20 that you are all welcome to come and be a part of it.
 21 If you choose not to, we will try to keep you in the
 22 communication loop in the process.
 23 (Exhibit No. 7 marked.)
 24 Q. (By Mr. Arum) This is a letter from the County
 25 Board of Commissioners to a number of recipients,

1 including yourself, dated January 31st of 1996. Do you
 2 recall receiving this letter?
 3 A. I don't remember one way or the other.
 4 Q. The first paragraph of the letter says that
 5 county commissioners had their staff undertake a cursory
 6 review of the document which was presented on January
 7 17th. Then they go on to say, "We have been advised the
 8 documents incorporates a major change in policy and will
 9 require an in-depth review by our staff including a
 10 comprehensive public input process." What was the major
 11 change in policy that the document required in your
 12 understanding?
 13 A. I don't know.
 14 Q. Did they tell you what they were referring to?
 15 A. I don't recall what the policy issue that they
 16 were referring to was.
 17 Q. It goes on to say that the document may require
 18 some additional input from Mr. Wubbena and other staff.
 19 Do you recall providing that input to the county at this
 20 time?
 21 A. I recall that we had some exchanges and trying to
 22 work on wordsmithing. Again, it gets back to the intent
 23 of the language that we had, and since I had a major
 24 role in drafting the language, what I would do is say,
 25 "This is what it means to me. This is how I interpret

1 the language." And then as I vaguely recall in this
 2 whole part of the process was when the county had
 3 concerns about, "Is this going to preclude us from using
 4 exempt wells before we have all the stuff resolved?" I
 5 said, "We don't -- that is part of a future process."
 6 That is why this second item says -- that is how they
 7 protected their interest. We reserve the right to
 8 continue to use exempt wells above the pipeline.
 9 Q. When did you tell them that?
 10 A. I don't remember when in the process. I don't.
 11 Q. Who did you say it to?
 12 A. It was when the county raised those issues on
 13 exempt wells.
 14 Q. When you say the "County," who is that?
 15 A. The county, broadly.
 16 Q. Who?
 17 A. I don't know.
 18 Q. You can't tell me who you said it to or when you
 19 said it?
 20 A. I only recall that when the county raised the
 21 issues on exempt wells they were concerned about, "Does
 22 this preclude them from using exempt wells?" Because
 23 the issue was, we were working on the problem for the
 24 city and the PUD on taking care of the municipal water
 25 rights issues. That we went into a lot of great detail.

1 Our analysis as it related to the rest of the county was
 2 much more less rigorous, less exacting. So then the
 3 concern came, "Does this preclude them from using exempt
 4 wells? I said in our discussions we did not address
 5 that directly. That was when that provision was added
 6 to make sure that there was no ambiguity about whether
 7 or not exempt wells should be allowed to continue until
 8 the issues around the impact question was more
 9 accurately addressed and resolved.
 10 (Exhibit No. 8 marked.)
 11 Q. (By Mr. Arum) This appears to be a letter dated
 12 February 15th, 1996, to the Skagit County Commissioners
 13 from Mr. Kilpatrick and Mr. Maxwell, signed by them.
 14 There is a blank signature for Mr. Wasserman. Do you
 15 recall this letter?
 16 A. I just vaguely remember the effort to continue to
 17 work with the county to get them into a comfort zone.
 18 Q. Do you know whether this letter was actually
 19 sent?
 20 A. I don't know.
 21 Q. Do you know whether the county was, in fact,
 22 invited to attend the drafting session on March 4th,
 23 1996?
 24 A. I don't know exactly. I'm assuming that they
 25 were, because that was our normal approach to that.

Attachment 5



OFFICE OF THE
ATTORNEY GENERAL

Inter-office Correspondence

Date: February 20, 1986

To: Eugene F. Wallace, Program Manager for
Water Resources, Department of Ecology

From: Charles B. Roe, Senior Assistant Attorney General *CBR*

Subject: Instream Flow Statutes - Chapters 90.22 and 90.54 RCW

You have requested my views as to the meaning of the state's instream flow statutes contained in chapter 90.22 RCW and RCW 90.54.020. This is my response.

Chapter 90.22 RCW, enacted initially in 1967 and re-enacted in 1969, authorizes the establishment by the Department of Water Resources (now the Department of Ecology) of minimum water flows or levels for lakes and streams. A portion of that chapter, RCW 90.22.010, provides:

The department of water resources may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. In addition, the department of water resources shall, when requested by the department of fisheries or game commission to protect fish, game or other wildlife resources under the jurisdiction of the requesting state agency, or by the water pollution control commission to preserve water quality, establish such minimum flows or levels as are required to protect the resource or preserve the water quality described in the request. Any request submitted by the department of fisheries, game commission or water pollution control commission shall include a statement setting forth the need for establishing a minimum flow or level. This section shall not apply to waters artificially stored in reservoirs, provided that in the granting of storage permits by the department of water

Inter-office Correspondence
February 20, 1986
Page 2

resources in the future, full recognition shall be given to downstream minimum flows, if any there may be, which have theretofore been established hereunder. (Emphasis supplied.)

RCW 90.54.020, enacted in 1971, sets forth a comprehensive list of state policy "fundamentals" for utilization and management of the state's waters. Of special relevance to this discussion is the "fundamental" contained in RCW 90.54.020 (3)(a) which reads:

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

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

In addition, RCW 90.54.020 contains another "fundamental" for water management, the importance of which cannot be overstated for purposes of this discussion. It provides in RCW 90.54.020(2):

Allocation of waters among potential uses and users shall be based generally on the securing of maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

The responsibility for implementing the above program and policy is vested primarily in the Department of Ecology, RCW 90.54.040. See generally Stempel v. Department of Water Resources, 82 Wn.2d 109, 117, 508 P.2d 166 (1973). Indeed, as to the establishment of minimum flows under state law, the authority to establish such flows is, by express "affirmation," vested exclusively in the Department of Ecology by RCW 90.03.247. Other state agencies are, by said section, not authorized to establish such flows.

Your inquiry relates primarily to the flows and levels that are provided by the aforementioned legislative enactments of 1969 and 1971.

I. CONCLUSION-SUMMARY

Existing state instream flow laws, contained in the aforementioned legislation, announce a very strong policy of retaining waters in naturally flowing streams of the state. The amount of water flow to be retained for a particular specific stream, or a reach thereof, will vary. These amounts are to be determined through a two-phase evaluation process by the Department of Ecology as set forth primarily in chapter 90.22 RCW and in RCW 90.54.020(2) and (3).

RCW 90.22.020 and RCW 90.54.030(3), which embody the first phase evaluation, provide for the establishment by the Department of Ecology of minimum or base flows to ensure that instream values of a stream, such as aesthetics, fisheries, or recreational values, are protected against termination from lack of water because of future appropriations, i.e., direct diversions from the stream itself. Stated simply, the basic policy of this phase is to keep all streams currently "alive" in that condition. It is not, however, a policy designed to retain flows that are greater than necessary to ensure the continued existence of the instream values associated with the stream on a minimum basis.

The second phase of instream flow retention policy is contained in RCW 90.54.020(2). That section sets forth a "maximum net benefit" test for allocation of future water uses. Under this test, a higher instream flow is required if it is determined by the department that instream values bring about the "maximum net benefit" usage of the waters of the stream. Thus, under appropriate findings derived from a maximum net benefit evaluation of a stream, the department shall require that all or a portion of the naturally occurring waters of stream be retained therein for all or portions of each year.

In sum, the policy of Washington instream flow protection laws today are:

1. To keep streams flowing for protection of instream values through the establishment of "minimum" flows that assure no streams with such instream values are authorized to be dried up in the future; and

2. To provide for instream flows above the "minimum" when such flows provide the people of the state the maximum net benefit return of the use of the state's public waters.

In order to understand the basis for my conclusions, it is necessary to know of the historical events, including the pertinent legislative history,² underlying the enactment of chapters 90.22¹ and 90.54 RCW.

-
1. As to both the 1967 and 1969 versions of chapter 90.22 RCW, please note that writer hereof was not only the drafter thereof but, along with Senator (then Representative) Alan Thompson the legislation's prime sponsor, was the chief proponent for their enactment during their successful legislative journeys. This proponent activity was performed on behalf of both the Department of Water Resources and the Attorney General's Office. Of import to this paper, a major element of this activity was to describe the objectives of the bill and the meaning of legislation's various sections to the pertinent legislative committees.
 2. The writer hereof was also the principal drafter as well as the executive branch proponent for enactment of chapter 90.54 RCW during the 1971 legislative session. This activity was conducted on behalf of Governor Daniel J. Evans, the Department of Ecology (Director John A. Biggs), and the Attorney General's Office (Attorney General Slade Gorton) working in very close coordination with Representative Sid Flanagan, Chairman of the Legislature's Interim Committee on Water Resources and the committee's minority leader, Representative Thompson. Chapter 90.54 RCW was written by the writer early in the 1971 session because the Interim Committee could not reach an agreement on a committee bill for introduction in the 1971 session. While portions of chapter 90.54 RCW, not including its instream flow provisions and "fundamentals," had its roots in the Interim Committee's efforts, chapter 90.54 RCW was drafted independent of that Interim Committee and after it ceased to actively function.

II. BACKGROUND

A. The 1917 Surface Water Code.

Since 1917, the foundation state surface water management statute has been the surface water code, chapter 90.03 RCW. The centerpiece of that code is the water right permit system contained in RCW 90.03.250 through RCW 90.03.340. This permit system has, since its enactment, provided the exclusive means under Washington law for establishing new rights to divert surface waters. RCW 90.03.010.

While the code does not expressly deal with a minimum flow retention policy for streams, it does require the administrator of the permit system to deny an application for a water right permit if it would be "detrimental to the public welfare" or the "public interest." RCW 90.03.290. As a matter of historical implementation, the administrator of the water right permit system has measured applications for water rights against this public interest criteria and, when he determined that it was not "detrimental to the public interest," issued water right permits and certificates that authorized diversions which dewatered (dried up) streams. Decisions having this full "appropriation" impact were applied to many streams of our state, especially those located east of the Cascade Range.

B. The Amendments to the Water Code in the 1940s and Related State Statutory Provisions

The 1917 water code's permit system was modified in 1947 by requiring, in RCW 90.03.290, that:

. . . in the event a permit is issued by the supervisor upon any application, it shall be his duty to notify both the director of fisheries and the director of game of such issuance.

See section 1, chapter 133, Laws of 1947.

Thereafter, in 1949, the legislature modified the relationship of the water resource management agency and the two state fishery management agencies in RCW 75.20.050. That section provides:

It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The director of ecology shall give the director of fisheries and the director of game notice of each application for a permit to divert water, or other hydraulic permit. The director of fisheries and director of game have thirty days after receiving the notice to state their objections to the application. The permit shall not be issued until the thirty-day period has elapsed.

The director of ecology may refuse to issue a permit if, in the opinion of the director of fisheries or director of game, issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.
(Emphasis supplied.)

C. The Water Resources Agency's Implementation of the 1940's Enactments.

During the 1950s and through the mid-1960s, the water agency³ administered the 1917 water code's permit system in accordance with the statutory requirement to notify the fishery agencies of water right permit applications and to consider the recommendations of the agencies as to water needs for fishery resources. Thereafter, following the aforementioned 1917 water code's "public interest" criteria, which included taking into account the information obtained from the departments of fisheries and game, the code's administrator ruled upon water right permit applications.

³ From 1950-1957 the water right permit system of the 1917 code was administered by the department of conservation and development, from 1957-1967 by the department of conservation, and through the remainder of the 1960's by the department of water resources.

In rulings on many water right applications, the administrator issued permits containing a condition that no diversions of public waters may be made which would cause a stream to fall below a specified minimum flow designed to protect instream fishery values. In other fishery value protection situations, the administrator "closed" streams to further appropriation and denied applications for permits. On the other hand, applications were also approved that authorized a stream to be, in effect, dewatered, i.e., dried up.

Of note, all of the above-described decisions were made by the administrator without reference to any published agency criteria or guidelines relating to the interrelationship of the 1917 code and RCW 75.20.050. Indeed, there were no written "rules" or "guidelines" developed by the water code's administrator during this period. Implementation thereof was accomplished through an inter-agency effort administered on an ad hoc basis with regular (twice-monthly) exchanges of fishery "needs" information imparted at meetings of representatives with expertise of the agencies involved. The history of this period is that the recommendations of the fishery agencies were oftentimes accepted and permits so conditioned.

It is against this backdrop that the legislative actions of the 1967-1971 period, central to your inquiry, took place.

III. THE 1967-1971 MINIMUM BASE FLOW LEGISLATION

A. Chapter 90.22 RCW - 1967 version.

The "minimum flow" legislation of 1967 was enacted, in primary part, to establish a policy of retaining water in streams, in order that thereafter various instream values (including fish populations) would not be forever lost through "overappropriation" under the state's water right laws. A major change brought about by the 1967 legislation was the statutory direction to the Department of Water Resources (predecessor agency to the Department of Ecology) to retain waters in streams. Prior to 1967, the "public interests" determinations made by the Department of Water Resources did not require minimum flows to be retained in streams when requested by the fishery agencies. With the coming of the 1967 legislation, the Department of Water Resources was required to establish minimum flows for a stream, when requested by one of several state agencies, namely the department of fisheries, the game commission, or the water pollution control agency. After minimum flows for a stream were formally established by the department,

(n)o right to divert or store public waters shall be granted by the department of water resources which shall conflict with regulations adopted pursuant to RCW 90.22.010. . . . RCW 90.22.030.

The 1967 legislation also required the establishment of all minimum flows for a stream to be "through the adoption of rules." RCW 90.22.020.⁴ Thus, flow-setting actions of the government agency were to be formalized in a context that allowed the public to be fully aware of their impact. See RCW 90.22.020.

In terms of the extent of flows and levels to be maintained, the 1967 legislation contemplates "minimum" flows to be established. These flows are designed to "protect," where appropriate, aesthetic, recreational, fishing, and wildlife values, and to "preserve" water quality necessary to meet water quality standards established by the water pollution control commission.⁵ The intent was, simply stated, that streams with certain values were not to be dried up or reduced to trickles. Rather, flows, usually of an amount extending to a limited portion of a stream's natural flow, were to be retained in order to protect instream values of the stream from total extinguishment.⁶ Of import here, the thrust of the 1967 legislation was not designed to maintain a flow in excess of the smallest amount necessary to satisfy the protection and preservation values and objectives just noted.

-
- 4 This, minimum flows, set pursuant to RCW 90.22.020, must be established pursuant to the rule-making procedures of the state's Administrative Procedures Act. See chapter 34.04 RCW.
 - 5 The powers of the Water Pollution Control Commission contained in chapter 90.48 RCW are now vested in the Department of Ecology. See RCW 43.21A.060.
 - 6 It should be noted that the establishment of minimum flows for a stream does not assure that such flows will be in the stream. In streams which are dewatered or drastically reduced due to the exercise of water rights established prior to the establishment of minimum flows, the minimum flows settings constitute only state policy objectives for the stream rather than a reality.

B. Chapter 90.22 RCW - the 1969 amendment.

During 1967 and 1968, no minimum flow or level establishment proceedings were initiated by the Department of Water Resources. This condition of inactivity came about because neither of the two fisheries management agencies nor the water pollution control commission requested the department to take such steps.

In 1969, the legislature broadened the power of the Department of Water Resources to adopt flows and levels by allowing it to do so on its own initiative. RCW 90.22.010 (section 3, chapter 284, Laws of 1969 ex. sess.). This additional grant of power did not, however, change the basic intent of the 1967 enactment as it pertained to minimum flows to be established for a stream.

C. Water Resources Act of 1971 - Chapter 90.54 RCW

The issue of the degree of flows to be maintained within streams was addressed once again by the legislature two years later. In the Water Resources Act of 1971, chapter 90.54 RCW, the legislature set forth a wide range of water management policies, entitled "fundamentals," together with directions to the Department of Ecology primarily to implement them. Two of the policies are of special note here; namely, RCW 90.54.020 and RCW 90.54.020 (3)(a) both quoted at the outset.

The words of the "fundamental" of RCW 90.54.020(3)(a), while not identical to those of the 1967 enactment contained in RCW 90.22.010, represent an affirmation of the general minimum instream flow policy established in 1967. The Department of Ecology's formal interpretation of the two statutes' interplay appears to be in accord therewith. See WAC 173-549-016, adopted by the Department of Ecology in 1984 pursuant to RCW 90.54.040, which provides:

For the purposes of this chapter, the term minimum instream flow shall be synonymous with the term base flow as defined in chapter 90.54 RCW and the term minimum flow as defined in chapter 90.22 RCW.

See a similar interpretation by the Department of Ecology in WAC 173-509-020.

This interpretation, established by rule by the agency with primary responsibility for implementation of the two statutes noted, is entitled to great weight. See Weyerhaeuser Co. v.

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Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976). The department's position is not only a reasonable one but is one that is, in my view, completely faithful to legislative intent. This conclusion is derived from my direct, extensive participation in the legislative activity leading to the two statutory enactments.

Of import here, this does not mean that the Department of Ecology is without power, under appropriate factual patterns, to establish instream flow requirements that are greater than those established under the limited flows provided by RCW 90.22.010, as affirmed in the fundamental of RCW 90.54.020 (3)(a). Northwest Steelhead and Salmon Council, et al. v. State of Washington, Department of Ecology, et al., PCHB No. 81-148, page 16, Conclusion of Law IX (decided August 3, 1983). Reference is made to the second fundamental of the Water Resources Act of 1971 noted earlier. That section, RCW 90.54.020(2), provides:

Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

When the two above-quoted fundamentals are read together, the Department of Ecology is required, as it performs its water management responsibilities, to make two determinations related to the retention of waters within a stream. The first determination is to provide for "minimum flows" (or "base flows") as contemplated by RCW 90.22.010 and RCW 90.54.020(3)(a). The second is to determine, after conducting a "maximum net benefits" test as described in RCW 90.54.020(2), whether an additional increment of flow should be provided above "minimum" flows to satisfy instream beneficial uses, such as aesthetic and fisheries uses. Accord; Northwest Steelhead and Salmon Council, et al. v. State of Washington, Department of Ecology, et al., supra, Conclusion of Law VIII.

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February 20, 1986
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IV. CONCLUSION

The state's instream water policy of 1967-1971 is solidly founded. It is a progressive one that operates on the basic proposition, contrary to a historical state policy of long standing, that retention of minimum flows is required in most perennial streams not already fully appropriated. In addition to this "first priority" of water allocation for the protection of basic instream values, the Water Resources Act of 1971's mandate to embody "maximum net benefit" principles to the allocation of remaining unappropriated waters of a stream allows, when merited, for increasing instream flows beyond the first priority foundation flows.

This memorandum contains my views and does not constitute a formal opinion of this office.

I trust this is of assistance to you. Please contact me if you have any questions.

CBR:sc

Attachment 6

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

SWINOMISH INDIAN TRIAL)
COMMUNITY, and SAUK-SUIATTLE)
INDIAN TRIBE,)
)
Plaintiff,)
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vs.) No. 04-2-05842-1
)
SKAGIT COUNTY,)
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DEPOSITION UPON ORAL EXAMINATION OF
ROBERT L. WUBBENA

May 03, 2005
1101 Capitol Way South
Suite 225
Olympia, Washington 98504

REPORTED BY:
LAURIE BRIGGS, RPR

1 that Larry probably refers to Larry Wasserman, right?
 2 A. That would be my assumption.
 3 Q. There weren't any more Larry's there?
 4 A. No, there wasn't any other Larry's.
 5 Q. All right. Do you recall Larry making the
 6 suggestion to insert the word basin there?
 7 A. I remember the debate was going on about the
 8 saying of instream flows, was it related to all of the
 9 basin, part of the basin, and if part of the basin, what
 10 part of the basin. Because the issue was the main stem
 11 of the Skagit River and the Cultus Mountains
 12 tributaries. We clearly did not get into the context of
 13 the other tributaries. We just didn't. So, in fact, if
 14 you will track it through the presumption that the MOA
 15 has is that the instream flows were only set in the
 16 lower Skagit not the upper Skagit. That was added by
 17 Ecology without any input from anybody as far as I know.
 18 Q. Do you recall Larry explaining why he wanted to
 19 insert the word basin here?
 20 A. I don't recall that particular discussion, but my
 21 recollection on the broader question around that was he
 22 was concerned about the tributaries. So that is why we
 23 dealt with the tributaries the way we did. We knew that
 24 it was a problem. We knew it would become a problem
 25 potentially, but we just didn't have the data to -- one

1 I believe this reflects the discussion of March 4th.
 2 A. If it was in proper sequence, my guess is that
 3 because in the earlier memo it said they had some policy
 4 concerns. This one of January 31st has policy concerns.
 5 I'm sure that was part of the discussion then. So okay.
 6 "County, what is the policy concerns that you have?
 7 What are the implications of those policies that need to
 8 be addressed?" Because that would be our normal
 9 approach to addressing the issues.
 10 Q. Okay. Further down here there is a notation, and
 11 I'll paraphrase. It is something Bob Hart may have
 12 said, which is that every community water system should
 13 have a certificated water right, but not sure if can get
 14 a second vote. Do you recall Mr. Hart saying something
 15 like that?
 16 A. I don't recall it.
 17 Q. You don't recall?
 18 A. But not sure what?
 19 Q. If can get a second vote.
 20 A. A second vote? A second water right?
 21 Q. Do you recall a discussion about community water
 22 systems and certificated water rights?
 23 A. I remember the discussions around them, because I
 24 was in the middle of the Ecology dynamics who were
 25 starting to move into, you know, is an exempt well

1 thing you got to recall is that on a water rights issues
 2 around the city and the PUD situation, we were into
 3 exacting detail. If you hiccup, you got to put a hiccup
 4 in their in the process. That is about the kind of
 5 exacting detail.
 6 Now you are getting into the basin planning
 7 process, which was we had no data. We had no sense that
 8 we -- we were really dealing with two different concepts
 9 in the MOA. One is the exacting detail around the two
 10 cities, the city PUD's water rights that there was
 11 agreement being reached on, and then there is a more
 12 broader conceptual approach to basin planning.
 13 Q. And so what was the -- strike that. Do you
 14 recall any discussion at this meeting about the
 15 questions that Roxanne Michael had proposed in her
 16 January 24th memo?
 17 A. Hers was after this meeting, I think, wasn't it?
 18 Q. Before this meeting. The memo that you looked at
 19 before.
 20 A. I thought that was --
 21 Q. January 24th.
 22 A. When was this meeting?
 23 Q. March 4th.
 24 A. Is there a date on this one?
 25 Q. I don't know if there is a date on this one, but

1 require a piece of paper, in other words a right versus
 2 a certificate of right, which is also tied to some of
 3 the debates that were going on up river. So there was a
 4 lot of discussion around that. Whether this is an exact
 5 statement, I don't know. I don't know when the
 6 statement was made or how it was made.
 7 (Exhibit No. 11 marked.)
 8 Q. (By Mr. Arum) I'm handing you Exhibit 11. These
 9 are also notes that Sharon Haensly made of two different
 10 meetings, but the second one apparently is the March 4th
 11 meeting. She indicates that the county will redraft its
 12 section within the next month and that Tom Karsh
 13 indicated that he was -- County was considering the
 14 Critical Areas Ordinance over the next few weeks. Do
 15 you recall a discussion where the county indicated that
 16 it would provide some redrafts of the agreement?
 17 A. I don't remember.
 18 Q. Do you recall whether the county did, in fact,
 19 provide some redrafts of this section of the agreement?
 20 A. I don't remember if they provided redrafts or if
 21 they provided comments relative to a redrafts that might
 22 suggest editing, same principle. I would suspect -- Tom
 23 Karsh is always a very responsive person. So if he said
 24 it -- and we were looking for their input to make the
 25 agreement so their commissioner would sign it. So I'm

Attachment 7

ESSB 6312 - H AMD 1351

By Representative Dunshee

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature has previously enacted
4 pilot project legislation to address domestic use of permit exempt
5 wells in diverse water resource situations and areas of the state. The
6 intent of this act is to establish an additional pilot project in the
7 Carpenter/Fisher, upper Nookachamps, and east Nookachamps subbasins in
8 the Skagit river basin to provide limited amounts of water for rural
9 domestic water use while maintaining existing instream flow protections
10 adopted by rule, by funding and implementing water budget action plans
11 designed to offset impacts to subbasin streamflows caused by new
12 domestic groundwater withdrawals within each subbasin, and where
13 possible, to enhance instream flows in the subbasin.

14 **Sec. 2.** RCW 90.44.052 and 2003 c 307 s 2 are each amended to read
15 as follows:

16 This section includes water resource pilot projects to address
17 domestic use of permit exempt wells in diverse situations and areas of
18 the state.

19 (1) Skagit river subbasins. The pilot project in this subsection
20 applies to the Carpenter/Fisher, upper Nookachamps, and east
21 Nookachamps subbasins in the Skagit river basin, as follows:

22 (a) As of the effective date of this section, the owner of any
23 legal lot of record that is located within one of these three subbasins
24 may withdraw public groundwater in an amount of, and not exceeding,
25 three hundred fifty gallons per day per dwelling unit if a new dwelling
26 is proposed and the dwelling:

27 (i) Will utilize an on-site septic system for wastewater
28 management;

1 (ii) Is unable to receive a water supply from a public water system
2 pursuant to RCW 43.20.260 and as defined in RCW 70.116.030;

3 (iii) Complies with all county ordinances and project approval
4 conditions and requirements;

5 (iv) Complies with any local jurisdiction provisions that require
6 proof that water is physically available and that the water meets all
7 applicable water quality standards; and

8 (v) Is physically located in a subbasin that has a sufficient
9 quantity of water available in its domestic water budget to offset the
10 impact of the withdrawal before it occurs, in accordance with the
11 criteria in section 4 of this act, or as otherwise provided in this
12 subsection. After the effective date of this section, domestic
13 groundwater withdrawals may occur before a sufficient quantity of water
14 is available in a subbasin's domestic water budget only where:

15 (A) A legal lot of record within the Carpenter/Fisher subbasin is
16 eligible for domestic groundwater withdrawals under this section and a
17 building permit application has been filed before the effective date of
18 this section;

19 (B) A domestic groundwater withdrawal is obtained under and debited
20 against the quantity of water available in a subbasin reservation; or

21 (C) Except as provided in (a)(v)(A) and (B) of this subsection (1),
22 if the applicable subbasin reservation has been fully allocated and the
23 applicable domestic water budget balance lacks a sufficient quantity to
24 offset the consumptive use impact associated with the proposed dwelling
25 and all prior impacts from permit exempt domestic groundwater
26 withdrawals identified in section 4(2)(a) of this act, the building
27 permit for such a dwelling is conditioned to only allow in-home
28 domestic uses until the domestic water budget balance has a sufficient
29 quantity of water available to fully offset such consumptive uses,
30 consistent with the criteria provided in section 4(2) of this act.

31 (b) To the extent groundwater withdrawn under the authority
32 established in this section is regularly used beneficially, that
33 dwelling is entitled to a right equal to that established by a permit
34 issued under the provisions of this chapter.

35 (c) Groundwater withdrawn under the authority established in this
36 section must be limited to permit exempt domestic uses, as that term is
37 defined in chapter 173-503 WAC, as it existed on the effective date of

1 this section. The department shall prioritize enforcement efforts to
2 ensure compliance with the provisions of this section.

3 (d) Domestic groundwater withdrawals already obtained under and
4 debited against such a subbasin reservation prior to the effective date
5 of this section are not subject to the quantity limitations provided in
6 this act. Domestic groundwater withdrawals obtained under and debited
7 against such a subbasin reservation after the effective date of this
8 section are subject to a maximum withdrawal of three hundred fifty
9 gallons per day per dwelling unit.

10 (e) An owner of a legal lot of record may at any time secure an
11 alternate water source, mitigate, or make water available through
12 another option recognized under chapter 173-503 WAC, as it existed on
13 the effective date of this section.

14 (2) Whitman county. The pilot project in this subsection applies
15 to Whitman county, as follows:

16 (a) On a pilot project basis, the use of water for domestic use in
17 clustered residential developments is exempt as described in (b) of
18 this subsection (~~((2) of this section)~~) from the permit requirements of
19 RCW 90.44.050 in Whitman county. The department must review the use of
20 water under this section and its impact on water resources in the
21 county and report to the legislature by December 31st of each even-
22 numbered year through 2016 regarding its review.

23 ~~((2))~~ (b) For the pilot project, the domestic use of water for a
24 clustered residential development is exempt from the permit
25 requirements of RCW 90.44.050 for an amount of water that is not more
26 than one thousand two hundred gallons a day per residence for a
27 residential development that has an overall density equal to or less
28 than one residence per ten acres and a minimum of six homes.

29 ~~((3))~~ (c) No new right to use water may be established for a
30 clustered development under this section where the first residential
31 use of water for the development begins after December 31, 2015.

32 (3) For the purposes of this section:

33 (a) "Subbasin domestic water budget" has the same meaning as
34 defined in section 4(3) of this act; and

35 (b) "Subbasin reservation" has the same meaning as defined in
36 section 4(4) of this act.

1 NEW SECTION. **Sec. 3.** A new section is added to chapter 90.44 RCW
2 to read as follows:

3 (1) The department shall develop domestic water budget action plans
4 for the Carpenter/Fisher, upper Nookachamps, and the east Nookachamps
5 subbasins of the Skagit river basin in accordance with this act.

6 (2) In developing plans under this section, the department must
7 first confer with all parties to the 1996 Skagit river basin water
8 resources memorandum of agreement, which included the Swinomish Indian
9 tribal community, Skagit county, the upper Skagit Indian tribe, the
10 Sauk-Suiattle Indian tribe, the city of Anacortes, public utility
11 district number one of Skagit county, and the department of fish and
12 wildlife. Before finalizing a subbasin's domestic water budget action
13 plan under section 4 of this act, the department shall also consult
14 with all affected federally recognized tribes within the Skagit river
15 basin area.

16 (3) A domestic water budget action plan developed and approved
17 under this act may include any of the following implementing actions to
18 protect and, where possible, enhance summer streamflows:

19 (a) Acquiring water rights;

20 (b) Incentivizing: Water conservation; collection, retention, and
21 release of rainwater; or low-impact development practices;

22 (c) Pursuing any alternate water sources or actions to make water
23 available, as provided under the provisions of chapter 173-503 WAC; or

24 (d) Promoting any other instream flow protection or enhancement
25 projects, including but not limited to: Source exchanges; aquifer
26 recharge; infiltration of storm water; or construction of ponds,
27 wetlands, and other offstream water impoundments designed to capture
28 and retine water from times of relative surplus to benefit streamflows
29 in times of relative scarcity.

30 (4) The department shall dedicate water rights acquired to protect
31 or enhance summer streamflows to the state's trust water program. Such
32 trust water rights, and any other water supplies developed by the
33 department and credited to a subbasin's domestic water budget under
34 this act, shall include reasonable assurance of success in benefiting
35 instream flows on a permanent and ongoing basis.

36 (5) The department must pursue funding required for successful
37 implementation of subbasin domestic water budget action plans. If the
38 department cannot secure sufficient funding, or a subbasin domestic

1 water budget action plan is otherwise unable to meet the criteria for
2 a successful plan as provided in section 4(2) of this act, by the time
3 provided in section 4(1) of this act, the department must report that
4 fact and the reasons behind it to appropriate committees of the
5 legislature, consistent with RCW 43.01.036. Consistent with RCW
6 43.01.036, the department shall report to the appropriate committees of
7 the legislature by January 1, 2014, regarding the status of the pilot
8 project authorized under this act and make recommendations for
9 sustainable funding needed for the ongoing implementation of this act.

10 (6) For the purposes of this section, "subbasin domestic water
11 budget" has the same meaning as defined in section 4(3) of this act.

12 NEW SECTION. **Sec. 4.** A new section is added to chapter 90.44 RCW
13 to read as follows:

14 (1) The department must, consistent with this act, approve and
15 implement domestic water budget action plans for specified Skagit river
16 subbasins as follows:

17 (a) For the Carpenter/Fisher subbasin: A domestic water budget
18 action plan must be approved by the department and implemented by
19 January 1, 2014.

20 (b) For each of the upper Nookachamps and east Nookachamps
21 subbasins, a domestic water budget action plan must be approved by the
22 department and implemented by the time the applicable subbasin's
23 reservation of groundwater is fully allocated.

24 (c) Subbasin domestic water budget action plans approved and
25 implemented consistent with the provisions of this act fulfill the
26 mitigation plan requirements of chapter 173-503 WAC and may be
27 implemented in phases relative to the number and impact of new domestic
28 uses within the subbasin.

29 (2) In approving and implementing a subbasin's domestic water
30 budget action plan under this section, the department shall ensure that
31 the plan meets the following criteria for plan success, and is designed
32 to:

33 (a) Augment summer subbasin streamflows with water quantities
34 sufficient to offset total summer consumptive use impacts from permit
35 exempt domestic groundwater withdrawals occurring within the subbasin
36 and commenced after April 14, 2001;

1 (b) Protect and, where possible, enhance summer streamflows by
2 acquiring or developing water supplies as far up subbasin tributaries
3 as practicable and feasible;

4 (c) Quantify total consumptive water use from all domestic
5 groundwater withdrawals identified in (a) of this subsection,
6 cumulative summer impacts to streamflows within the subbasin resulting
7 from such withdrawals, and the benefits derived from actions taken
8 within the subbasin to offset impacts or benefit subbasin streamflows;
9 and

10 (d) Account for credits and debits within each subbasin domestic
11 water budget. Offsetting water supplies acquired or developed and
12 dedicated as trust water within a subbasin must be credited as deposits
13 to the applicable domestic water budget. Debits against the water
14 budget balance for new domestic groundwater withdrawals occurring
15 within the subbasin must be based on a standard quantity calculated by
16 the department to reflect the average summer daily consumptive use
17 associated with the maximum withdrawal of three hundred fifty gallons
18 per day per dwelling as authorized under this act. Unless otherwise
19 provided in this act, permit exempt domestic withdrawals debited
20 against a subbasin's domestic water budget must be made available,
21 administered, enforced, and accounted for in a manner consistent with
22 domestic water withdrawals obtained under a subbasin reservation.

23 (3) For the purposes of this section, "subbasin domestic water
24 budget" means a mechanism of tracking debits and credits for subbasin
25 water supplies acquired or developed by the department to offset
26 cumulative consumptive use impacts from permit exempt domestic
27 groundwater withdrawals and to protect and, where possible, enhance
28 subbasin summer streamflows as authorized and provided under this act.

29 ~~(4) For the purposes of this section, "subbasin reservation" means~~
30 a reservation of groundwater that has been established under chapter
31 173-503 WAC as it existed on the effective date of this section.

32 (5) The development, approval, and implementation of subbasin
33 domestic water budget action plans under this act may be funded, in
34 part or in whole, by state capital budget or omnibus appropriations
35 funding. Nothing in this chapter prohibits a county, public utility
36 district, or any other special purpose district recognized under RCW
37 39.34.190 from participating in or contributing public funds to support
38 development, approval, and implementation of such plans.

1 NEW SECTION. **Sec. 5.** The provisions of this act override any
2 conflicting provisions contained in chapter 173-503 WAC as it existed
3 on the effective date of this section, and the department of ecology
4 shall commence expedited rule making as needed to ensure consistency
5 with this act.

6 NEW SECTION. **Sec. 6.** In enacting this act, the legislature does
7 not intend to imply legislative approval or disapproval of any judicial
8 interpretation or existing administrative rule or policy regarding the
9 provisions of this act not expressly added or revised.

10 NEW SECTION. **Sec. 7.** If specific funding for the purposes of this
11 act, referencing this act by bill or chapter number, is not provided by
12 June 30, 2012, in either the omnibus appropriations act or the capital
13 budget, this act is null and void."

14 Correct the title.

EFFECT: Provides an avenue for domestic groundwater withdrawals
within specified subbasins of the Skagit river basin of 350 gallons a
day and requires the department of ecology to develop and implement a
domestic water budget action plan for specified subbasins of the Skagit
river basin.

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