

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

SWINOMISH INDIAN TRIBAL
COMMUNITY, a Federally
Recognized Indian Tribe,

Appellant,

vs.

WASHINGTON STATE
DEPARTMENT
OF ECOLOGY,

Respondent.

No. 41636-1-II

OPENING BRIEF OF
APPELLANT

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I. INTRODUCTION AND SUMMARY.

The Swinomish Indian Tribal Community (“Tribe”) filed this case to preserve instream flows in the Skagit River basin that are needed to support fish populations and the Tribe’s treaty fishing rights. In 2006, the Department of Ecology (“DOE”) amended the Skagit River Instream Flow Rule, WAC Ch. 173-503 (“Rule”), to authorize new appropriations of water that will impair minimum instream flow levels established in the Rule. For reasons discussed below, the 2006 amendments exceeded DOE’s statutory authority and were arbitrary and capricious.

The Washington Legislature has enacted a series of increasingly protective statutory provisions to preserve instream flows needed to protect fish and other environmental, aesthetic and recreational values. The statutory scheme mandates preservation of base flows for these purposes and provides that instream flow levels established by rule are water rights that may not be impaired by subsequent appropriations. There is a narrow exception that authorizes withdrawals of water that conflict with base flows, but only in those situations where it is clear that overriding considerations of the public interest (“OCPI”) will be served.

For over 30 years after its enactment, the OCPI exception was rarely invoked and narrowly construed. However, in this case, DOE invoked the exception to reserve about 25 cubic feet per second (“cfs”) of

water for new appropriations for domestic, municipal, commercial, industrial, agricultural and stockwatering uses in the Skagit River basin. DOE acknowledged that these appropriations would impair the Rule's minimum instream flow levels, but asserted that overriding considerations of the public interest would be served because the aggregate economic benefits of the appropriations would outweigh the economic costs of impairing instream flows. Almost all of the asserted benefits were derived from use of about 0.8 to 1.5 cfs of the reserved water; DOE estimated that the combined benefits of *all* other uses of the reservations over the next 20 years would be *less* than the estimated costs of impairing instream flows.

DOE's approach exceeded its statutory authority under the narrow OCPI exception and substantially eroded instream flow protections under Washington law. First, DOE effectively reduced instream flow rights from statutory water rights that may not be impaired by new appropriations to one factor in an economic balancing test, and then allowed them to be impaired by new appropriations for *any* beneficial use. Second, by aggregating the benefits of new appropriations, DOE authorized entire categories of new appropriations whose benefits will not exceed the economic costs (let alone other, non-economic costs) of impairing instream flows. Third, by authorizing new appropriations for broad categories of beneficial uses, DOE authorized numerous individual

appropriations that would not serve any, let alone overriding, public interests. And, fourth, DOE authorized many new appropriations that would impair instream flow rights for uses that could be served by alternative sources of supply that would *not* impair instream flow rights.

The 2006 amendments were also arbitrary and capricious. DOE recognized it was essential to place certain limits on the total volume of new appropriations to minimize adverse impacts on fish and to enable DOE to make an OCPI finding. However, the amended Rule allows the new appropriations to exceed those limits. The amended Rule does not require measurement of and places no limitation on new groundwater withdrawals serving individual residences. Instead, the amended Rule adopts a “standard” amount to account for such withdrawals. However, the standard amount is less than the usage rates in the study on which DOE purported to rely and other evidence in the record. As a result, the amended Rule allows withdrawals by individual residences to exceed DOE’s standard amount and allows cumulative withdrawals to exceed the total amount of reserved water, *i.e.*, to exceed the very limits DOE deemed critical to protect fish and on which it based its OCPI finding.

II. ASSIGNMENTS OF ERROR.

The Superior Court erred in denying the Tribe’s claims that DOE exceeded its statutory authority and acted arbitrarily and capriciously in

authorizing new appropriations that impair senior instream flow rights and in adopting an accounting system that underestimates actual water use. The Court denied these claims in a December 3, 2010, Order Denying Petition for Review (CP 307-09) on the basis of a November 9, 2010, Letter Opinion (CP 310-16).¹ The issues pertaining to these errors are:

1. Did DOE exceed its statutory authority by using the OCPI exception to reserve water for new appropriations that will impair senior instream flow rights where:

- a. DOE relied on a cost-benefit analysis in which the value of instream flow rights is measured in economic terms only and in which appropriations for *any* beneficial use can outweigh such rights;
- b. the estimated benefits of most of the new appropriations are less than the economic costs of impairing the instream flow rights;
- c. the authorized categories of new appropriations include individual appropriations that do not clearly serve overriding considerations of the public interest; and
- d. the new appropriations include appropriations for uses that

¹ In its Letter Opinion, the Court erred in concluding, on the basis of its review of the administrative record, that: (1) DOE's OCPI determination was supported in the record; (2) it was permissible to analyze new appropriations by category of use; (3) DOE properly considered the benefits of making water available to classes of individual users; (4) it was not for the court to second-guess DOE's OCPI determination; (5) *any* beneficial use of water could be equated with a use serving OCPI; (6) DOE explained its deviation from a 2004 guidance document regarding the OCPI exception; (7) the reservations were not larger than necessary; (8) the stockwatering reservation was supported by the record; (9) the reservations were protective of fish; (10) the Tribe did not meet its burden to show that a standard accounting figure of 350 gallons per day ("gpd") was arbitrary and capricious; and (11) DOE's determination of a 50% recharge credit was not arbitrary and capricious. CP 312-16.

can be served by alternative sources of supply that would not impair instream flow rights?

2. Was it arbitrary and capricious for DOE to adopt standard accounting rates for unmetered and unlimited new water uses that are less than the water use rates in the study on which it relied, and which allow new appropriations to exceed the critical limitations on which DOE based its OCPI finding?

III. STATEMENT OF THE CASE.

A. The Tribe and the Skagit River System.

Since time immemorial, the Tribe and its forebears have occupied lands and waters in the northern Puget Sound region, including those in the Skagit River basin. CP 38. Salmon and other anadromous fish have played a central and enduring role in the Tribe's subsistence, culture, identity and economy. *Id.* In *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975), the court found that the Tribe's usual and accustomed fishing places included, among others, the Skagit River and its tributaries and the marine areas of northern Puget Sound. The Tribe has a federal treaty right to take fish at these places. *Id.* at 1039.

The Skagit River system is the third largest river system in the western United States. *Swinomish Indian Tribal Cmty. v. Skagit County*, 138 Wn. App. 771, 773, 158 P.3d 1179 (2007) ("*Skagit County*"). More than 3,000 rivers and streams flow into the Skagit River system,

accounting for one-quarter of the fresh water flowing into Puget Sound. *Id.* It is the only river system in the lower 48 states that is home to all six species of Pacific salmon. *See Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 425, 166 P.3d 1198 (2007) (“*WWGMHB*”); *Skagit County*, 138 Wn. App. at 773.

Development in the Skagit River basin has led to declines in its salmon runs, in part due to the reduction of stream flows necessary for spawning, rearing and migration. *Id.* The river system is home to three species now listed as threatened under the Endangered Species Act, 16 U.S.C. §§ 1531-44 (“*ESA*”). *See* 50 C.F.R. § 17.11 (Coastal-Puget Sound Bull Trout); *id.* § 223.102 (Puget Sound Steelhead and Puget Sound Chinook). The State has identified the Skagit and Samish River watershed as the most significant watershed in Puget Sound for salmon recovery. *WWGMHB*, 161 Wn.2d at 425.

For many years, the Washington Department of Fish and Wildlife and its predecessors (“*WDFW*”) have recommended that new appropriations from small Skagit River tributaries be denied or conditioned to preserve low flows needed for fish. In the 1940s and 1950s, *WDFW* found that one tributary, Nookachamps Creek, was already

“over-appropriated for water withdrawal.” RA003815.² The WDFW 1975 Stream Catalog stated that “[t]he curtailment of both consumptive and non-consumptive water withdrawals are . . . *essential to maintain this drainage basin for salmon production.*” RA009017 (emphasis added). In 1992, WDFW recommended that DOE “continue to close Nookachamps Creek to further ground water and surface water withdrawals” and noted that “[o]ne of the main problems in the . . . basin is low summer flow.” RA003815-16; *see also* RA036230 (reiterating this concern in 2001).

In 2005, WDFW reaffirmed its closure recommendations for Nookachamps Creek and other small Skagit River tributaries. RA014135. It explained that scientific studies demonstrated a relationship between stream flow, fish habitat and fish production, particularly in smaller streams. *Id.* For this reason, WDFW was “more likely to recommend denial of a water right application [in 2005] than [it was] years ago.” *Id.*

The decline in Skagit River basin salmon production has adversely affected the Tribe’s ability to harvest fish and thus has impaired its subsistence, culture, identity and economy and undermined its federal treaty fishing rights. *See WWGMHB*, 161 Wn.2d at 425-26. As discussed

² “RA” refers to the certified administrative record DOE filed in the Superior Court. The entire administrative record has been transferred to this Court pursuant to RAP 9.7(c). The Tribe will submit excerpts of record with its reply brief containing all of the record documents cited by the Tribe on appeal.

below, the new appropriations authorized by the 2006 amendments will further impair salmon populations and these important tribal interests, giving the Tribe a direct and substantial interest in the amendments' validity. *See Postema v. PCHB*, 142 Wn.2d 68, 74, 11 P.3d 726 (2000) (although not directly at issue, tribes' "treaty rights form the basis for their interest in these cases").³

B. The Skagit River Instream Flow Rule.

In a 1996 Memorandum of Agreement ("MOA"), the Tribe, DOE, Skagit County ("County") and others sought to "ensure the establishment of instream flows to protect fisheries resources" in the Skagit basin and to provide for "mitigation of any interference with such established flows." RA004685; *Skagit County*, 138 Wn. App. at 774. A "primary objective" of the MOA was 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." RA004687; *Skagit County*, 138 Wn. App. at 774.⁴

³ As in *Postema*, the Tribe's claims in this case rest solely on state law. The Tribe makes no claim based on its federal treaty right to take fish or any other right under federal law, and the parties stipulated that all such claims are reserved. Supp. CP (Joint Stipulation Regarding Federal Treaty and Reserved Rights Claims).

⁴ RCW 90.44.050 exempts certain groundwater withdrawals of up to 5,000 gpd from permitting requirements. However, these withdrawals are subject to all other aspects of the water code, including the first-in-time rule found in RCW 90.03.010. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

DOE developed the Rule in accordance with the MOA. RA013535. In proposing the Rule, it explained that, with the listing of Puget Sound Chinook under the ESA and increasing population growth, “state rules to ensure adequate water to protect salmon in the region must be adopted . . . as soon as possible.” *Id.* The Rule, which was “specifically intend[ed] to protect fisheries habitat,” *id.*, became effective on April 14, 2001. WAC 173-503-010 Note. It established instream flow levels based on scientific studies of flows needed for spawning and rearing of chinook, chum and steelhead. WAC 173-503-040(1)–(3); RA013539-43. DOE believed flows based on these species’ habitat needs “should protect other species and aquatic resources” RA013542.

The Rule provided that “[f]uture consumptive water right permits issued hereafter for diversion of surface water in the [Skagit River] and perennial tributaries, and withdrawal of ground water in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be expressly subject to [the Rule’s] instream flows” WAC 173-503-040(5). DOE found that these instream flow levels and restrictions were “necessary to protect and preserve wildlife, fish, scenic, aesthetic and other environmental values,” WAC 173-503-030(4); *Skagit County*, 138 Wn. App. at 775, and that “[l]ess burdensome instream flow levels would

not provide adequate instream resources protection.” RA038185

(emphasis added).

C. The 2006 Rule Amendments.

1. Development of Reservations Exempt from Instream Flow Rights.

In February 2005, in response to a County lawsuit, DOE published proposed Rule amendments that invoked the OCPI exception to reserve about 1.6 cfs of water for year-round domestic use that would not be subject to the 2001 instream flow rights. RA000780; RA004062 (proposed WAC 173-503-073(1)). The proposed 1.6 cfs reservation was divided among 26 subbasins, including Nookachamps and other tributary subbasins where WDFW had long recommended that new appropriations be denied or conditioned to preserve low flows. RA004064-66 (proposed WAC 173-503-074). In each tributary subbasin, the proposed reservation was limited to 2% of a flow rate known as the 7Q10 flow.⁵ RA000783-85.

DOE and WDFW biologists initially recommended the tributary reservations be limited to 1% of 7Q10 flows, and objected when DOE management proposed to increase them. *See* RA006894; RA038069; RA032638. Although the biologists later stated reservations based on 2% of 7Q10 flows were “defensible,” RA038793, they made it clear that this

⁵ The 7Q10 flow is the lowest consecutive seven-day flow to occur an average of every ten years. RA002992-93.

was not based on a biological determination that there would be *no* adverse impacts on fish, but on a management decision to allow *some* adverse impacts on fish in order to provide water for out-of-stream uses. RA038068; RA035434. Numerous scientific studies summarized by DOE show that even a 1% reduction in low flow will cause a loss of salmon habitat and a reduction in salmon populations. RA003006-09; *see also* RA003047 (“[f]low is always an issue for fish”).

DOE’s February 2005 proposal limited outdoor watering to 1/12th of an acre (3,630 square feet) per connection, but did not require metering of water uses. RA002929; RA000790; RA004063-64 (proposed WAC 173-503-073(2)(f), (2)(g), (6)(b)). DOE also proposed to establish a small stockwatering reserve, but stated it could not be used by “feedlots and other activities which are not related to normal grazing land uses.” RA004066 (proposed WAC 173-503-075(1)(a)); *see also* RA002930.

In the face of the County’s continued objections and litigation, *see* RA033581; RA038997; RA003924; RA007912, DOE withdrew this proposal and, after settlement discussions with the County, made a new proposal to amend the Rule in October 2005. RA000246. The new proposal continued to invoke the OCPI exception to establish reservations that would not be subject to instream flow rights. However, DOE now proposed to reserve *15 times* more water for a much wider array of uses:

15 cfs for domestic, municipal, commercial, industrial, and stockwatering uses, and 10 cfs for agricultural uses. RA000093-94 (proposed WAC 173-503-073(1)(a)-(b)). Moreover, DOE removed the previously proposed limits on outdoor watering and use of the stockwatering reservation by feedlots and other activities not related to normal grazing land uses. *See* RA000094-95; RA000099 (proposed WAC 173-503-073(3), WAC 173-503-075). However, the proposal would have required metering of all new appropriations, including permit exempt uses. RA000095 (proposed WAC 173-503-073(3)(d)).

As finally adopted, the 2006 amendments established reservations for three categories of use that are exempt from the instream flow rights established in 2001: (1) about 10 cfs for agricultural irrigation; (2) about 14.5 cfs for domestic, municipal, and commercial/industrial (“DMCI”) uses; and (3) about 0.5 cfs for stockwatering. WAC 173-503-073(1)(a) - (b); WAC 173-503-075. The DMCI reservation is allocated among 25 subbasin management units (including tributary subbasins where WDFW had long recommended that new appropriations be denied or conditioned to preserve low flows). WAC 173-503-074. DOE purportedly limited each tributary reservation to “maximum average consumptive daily use”

of 2% of the 7Q10 flow, *see* WAC 173-503-073(1)(b); RA002994,⁶ but at least some of them exceed that amount. WAC 173-503-074; RA002994.⁷

A water measuring device must be used, *except* for permit exempt appropriations serving a single residence. WAC 173-503-073(3)(d).

There is no limit on outdoor watering or use of the stockwatering

⁶ The Rule defines “maximum average consumptive daily use” as “the use of water measured over the highest period of use divided by the number of days in that period, less any applicable return flow recharge credit.” WAC 173-503-025. “The highest period of use ... typically correlates with the period in which stream flows are lowest (late summer months)”, RA003107, and fish are at greatest risk. *See, e.g.*, RA002292, RA003006-09.

⁷ During most of the time it was developing the Rule amendments, DOE treated Carpenter and Fisher Creeks as separate subbasins with separate reservations. *See, e.g.*, RA000786 (Feb. 2005 background paper). DOE’s hydrologist estimated their 7Q10 flows at 0.5 and 0.2 cfs, respectively. *See* RA002432 (April 21, 2005 spreadsheet); *see also* RA003010-31 (memoranda explaining 7Q10 calculations). Since 1 cfs equals about 646,717 gpd, 2% of these 7Q10 flows yields reservations of about 6,467 and 2,587 gpd, respectively ($0.5 \times 0.02 \times 646,717 \approx 6,467$; $0.2 \times 0.02 \times 646,717 \approx 2,587$). *Cf.* RA000786 (proposing Carpenter and Fisher reservations of 5,837 and 2,480 gpd, respectively).

Six weeks before the final amendments were published, DOE developed various options to accommodate the County’s demands for additional water in the Fisher Creek subbasin. RA036167; RA032638. One option, which DOE ultimately adopted, was to combine the Carpenter and Fisher units and establish a single reservation for both units, the entire amount of which could be taken in the Fisher unit. *See id.* DOE’s hydrologist stated that the 7Q10 flow for the combined Carpenter-Fisher unit could be determined by adding the previously determined 7Q10 flows for Carpenter and Fisher Creeks. RA003030-31. At the same time, DOE’s hydrologist specifically rejected the County’s argument that the 7Q10 flow in Fisher Creek was more than 0.2 cfs. *Id.* Nevertheless, when DOE added the 7Q10 flows for Carpenter and Fisher (0.5 and 0.2 cfs, respectively), it somehow came up with a combined 7Q10 flow of 0.9 cfs. RA002994. This increased the size of the combined reservation from approximately 9,054 gpd ($6,467 + 2,587$) to 11,633 gpd, a 28% increase. *See* WAC 173-503-074; RA002994. Moreover, since all of these withdrawals could take place in the Fisher unit, the effect was to permit withdrawals in that unit that are about **4.5 times** DOE’s estimate of 2% of the 7Q10 flow in Fisher Creek.

DOE also miscalculated the limit for the Nookachamps Creek-Upper unit. DOE’s hydrologist estimated the 7Q10 flow for the Upper Nookachamps at 0.8 cfs, RA002432, yielding a reservation (at 2% of 7Q10) of about 10,347 gpd ($0.8 \times 0.02 \times 646,717 \approx 10,347$). However, the Nookachamps Creek-Upper reservation in the amended Rule is 12,279 gpd, a 19 % increase. *See* WAC 173-503-074.

reservation for feedlots or other activities not related to normal grazing land uses. *See* WAC 173-503-073(3)(a)-(h); WAC 173-503-075(1).

2. DOE’s OCPI Finding.

In amending the Rule, DOE acknowledged that it had to “apply the statutory four part test for a water right since the reservation constitutes an appropriation (RCW 90.03.345).” RA002986. Under that test, water is legally unavailable if its use “would impair a senior appropriation to instream flows.” *Id.* (citing RCW 90.03.290 and RCW 90.44.100). DOE stated that its “basis for . . . overriding the legal unavailability is a conclusion that OCPI exists.” *Id.* Similarly, while the test requires DOE to find that the proposed use will not impair existing instream flow rights, DOE asserted that the “conflict” between those rights and the new appropriations “is addressed in the OCPI analysis.” *Id.*

DOE found that overriding considerations of the public interest would be served by the reservations. *See* WAC 173-503-073(1). In the background paper required by RCW 34.05.328(2), *see* RA002984, DOE stated it used the following three-step analysis to make this finding:

1. [DOE] determines whether and to what extent important public interests would be served by the proposed appropriation. The public interests served may include benefits to the community at large, such as providing water for homes, businesses and farms, as well as environmental benefits such as fish and wildlife habitat, scenic, aesthetic, recreational and navigational values.

2. [DOE] assesses whether and to what extent the proposed appropriation would harm any public interests, including economic and environmental benefits.
3. [DOE] determines whether the public interests served (as determined in step 1) clearly override any harm to public interests (as determined in step 2).

RA002987.

a. Public Interests Served.

In discussing the first step, DOE stated the Legislature directed it “to allocate waters of the state in order to secure the maximum net benefits for the people of the state,” and that “[b]enefits and costs include both economic ones and environmental and aesthetic benefits and costs.” *Id.* DOE also stated it was directed by statute “to seek expressions of the public interest at all stages of water planning and allocation decisions,” and that comments from the public and key stakeholders indicated “a significant public interest in having secure water supplies for domestic and municipal, agricultural irrigation, commercial/industrial, and stock watering uses, in addition to providing water for instream purposes.” *Id.*

DOE stated the reservations would “allow residents, businesses and farms to use water for those purposes during low flow periods [*i.e.*, when minimum instream flows are not met] without interruption.” *Id.* According to DOE, it was “likely that low flow periods would occur about 2/3 of the time during some months under the existing [2001] rule,” and

that houses, businesses and farms obtaining future water rights subject to the instream flows “could be required to completely curtail use in times of low flow.” *Id.* DOE then asserted:

Curtailing use would have economic and human health impacts to residences, businesses and farms. For most users, an interruptible water right could not be considered a reliable water source. The proposed rule amendment will eliminate the cost of [1] constructing storage and treatment for use during interruption periods, [2] abandoning the land, or [3] developing and implementing a mitigation project to mitigate for the impact to instream flows. *These avoided costs can be viewed as a measure of the benefit of this rule amendment.* Using the avoided cost as a measure of benefit, [DOE] has preliminarily estimated that the probable economic benefit for the proposed rule amendment is more than \$55.9 – 32.9 million in a 20-year time horizon

Id. (emphasis added).

DOE’s cost-benefit analysis provided separate estimates of benefits that would be derived from the reservations by: (1) rural public water system and exempt well users; (2) large public water purveyors; (3) agricultural users; and (4) stockwatering users. RA002863-73. The vast majority of the claimed benefits – \$29 to \$52 million – were allegedly derived from rural public water system and exempt well users utilizing between 0.81 and 1.50 cfs of water from the DMCI reservation over a 20-year period. RA002864-68. This estimate rested on the assumption that, without the reservation, 90% of undeveloped lots that might be served by a rural public water system or exempt well in the future would “be

downgraded” to the value of unirrigated farm land, because the cost of acquiring storage or developing a mitigation plan would be prohibitive. RA002865-66. DOE acknowledged that the benefits of the reservation were much less for lot owners who, without the reservation, would purchase and transfer uninterruptible water rights to develop their lots. RA002865. Assuming 10% of the lot owners were able to use this strategy, DOE estimated the benefits of making the reservation available to them amounted to only \$41,000 to \$73,000 over the 20-year period. *Id.*⁸ DOE was uncertain how many lot owners would actually be able to use this strategy in the absence of the reservations, and performed analyses in which it allowed the percentage to vary from 0% to 50%. *Id.*

DOE estimated only \$104,000 in benefits from use by large water purveyors of 5.5 cfs of the DMCI reservation (and did not anticipate any use of or benefits from the remainder of the DMCI reservation over its 20-year time horizon). RA002868-69.⁹ It estimated \$3.7 million in benefits

⁸ DOE asserted that, because the transfers might be subject to high transaction costs, this estimated benefit “would be a lower limit on the reduced cost of transfers.” *Id.*

⁹ This calculation was based on the cost of temporary use of agricultural water. RA002869. DOE asserted that the cost was “likely to be higher, if the purveyors were unable to obtain water and the use of property within their jurisdictions were affected,” but did not evaluate the likelihood of either occurrence. *Id.* Indeed, DOE also noted that there was sufficient water available for the large water purveyors to appropriate interruptible water supplies, which could “be useful to them because storage has been available to them” *Id.* In this case, the savings from permitting them to appropriate uninterruptible supplies under the reservations would amount to “savings on storage costs . . . assuming water could be stored in their existing storage facilities.” *Id.* DOE did not

from use of the 10-cfs agricultural reservation, based on the avoided cost of purchasing existing water rights for additional irrigated acreage. RA002869-71. DOE did not quantify any benefits associated with the 0.5-cfs stockwatering reservation. RA002871-72. It stated the reservation was large enough to provide for more than a 100% increase in dairy cows in the County, but noted that the number of dairy cows in the County had been *declining* since 1985. RA002872. It asserted that “[n]ot allowing for a rapid shift in this market may impose a risk that losses could occur,” and that, “should the need not arise, the instream value would accrue to this reservation” so there “would be no cost and no gain.” *Id.*

b. Public Interests Impacted.

In the second step in its OCPI analysis, DOE stated “the reservations could impact instream uses such as aquatic resources and some associated recreational uses.” RA002987. However, it asserted that it designed the reservations “to minimize potential impacts on fish and river ecosystem functions” and listed eight provisions that were “*critical* to avoid and minimize impacts to stream flows from the reservations.” RA002988 (emphasis added). The most important of these was to limit the size of the reservations. *Id.* In particular:

have enough information to quantify this benefit, but stated it would “not impact the final conclusion of [its] cost benefit analysis.” *Id.*

The size of each of the reservations has been limited to amounts that [DOE] and WDFW fish biologists believe are unlikely to significantly impact the long term sustainability of the fish population. . . . Additionally, the reservations have been sized to prevent any measurable reduction in aesthetic, navigational or recreation values.

Id.

Although DOE stated the reservations were “unlikely to significantly impact fish populations,” it “estimated that full use of all the reserved water could result in losses of fish productivity, which has been estimated to represent a \$5.3 million loss” *Id.* In its cost-benefit analysis, DOE explained that this estimate was based on an average year, with “a potential range from zero to \$19 million.” RA002879. These estimates were for losses in steelhead, spring chinook, coho and cutthroat trout populations, but did not include potential losses to other species. *Id.* DOE also noted that there might be losses associated with recreational activities, such as rafting, kayaking, canoeing, fishing, swimming, picnicking, camping and hiking. *Id.* However, it did not have data to provide a quantitative analysis of these costs. *Id.*

c. DOE’s OCPI Conclusion.

DOE concluded its OCPI analysis as follows:

Based on [DOE’s] determination that (1) the important public interest of providing reliable supplies of water for domestic, municipal, agricultural irrigation, commercial/industrial and stock watering needs is significantly served by the reservations, and (2) that the public interest of protecting instream flows is not

significantly impacted when use of water under the reservations is limited as here, [DOE] therefore finds that there is a clear showing of overriding consideration of public interest under RCW 90.54.020(3)(a).

RA002988.

3. DOE’s “Standard Accounting Figures.”

As noted above, the 2006 amendments do not require measurement of withdrawals from the reservations by exempt wells serving single residences. *See* WAC 173-503-073(3)(d). Instead, DOE adopted a “standard amount” of 350 gpd to account for the average daily withdrawal by such wells during the highest period of use. *See* WAC 173-503-073(7)(b); RA002884. For users with on-site septic systems, DOE reduced this amount by 50% to account for groundwater recharge from the septic system, resulting in a standard *consumptive* use amount of 175 gpd during the highest period of use. WAC 173-503-073(7)(c).

DOE stated that its “standard accounting figures” were based on an analysis by Economic and Engineering Services, Inc. (“EES”) that used “basic water use assumptions to look at four different water use scenarios – low water use; medium water use; high water use and maximum water use.” RA002999.¹⁰ According to DOE, “[t]he medium water use

¹⁰ DOE stated it also relied on a 2004 U.S. Geological Services (“USGS”) report. RA002999; RA002884. That report estimated per capita domestic water use in Skagit County in 2000, but did not estimate average household use during the *highest* period of use and did not estimate *consumptive* use during any period. *See* RA000825.

scenario” was “based on three people per household using 70 gallons per person per day for inside use and irrigation of 50’ x 50’ or 2500 square feet of lawn and garden, as representing typical uses in the basin.” *Id.* DOE noted, however, that the “‘medium water use’ scenario . . . is *not* the middle or average scenario, as the word medium typically denotes[,]” but is the “2nd lowest of 4 different scenarios,” and that it would be appropriate to consider an “approximation for all scenarios.” RA003182 (emphasis added). The next highest scenario (high water use) was based on the same inside use and irrigation of 20,000 square feet (about one-half acre) of lawn. RA022747.

EES’s water-use estimates for the dry season (the highest period of use, *see* RA003107) are higher than DOE’s “standard accounting figures” for the same period. Under its “medium water use” scenario, EES estimated average household use at 433 gpd,¹¹ and average consumptive use, after accounting for groundwater recharge, between 201 and 264 gpd.¹² Under the “high water use” scenario, EES estimated average household use at 1,991 gpd, and average consumptive use between 1,603

¹¹ This is the sum of the EES estimates for indoor and outdoor use. *See* RA022748 (Table 2).

¹² This is the sum of the EES estimates of indoor and outdoor use minus the EES estimates of groundwater recharge or “return flow.” *See id.* The range reflects different estimates of return flow from indoor use. *Id.*

and 1,666 gpd.¹³ Under both scenarios, estimated household use during the period of highest use (443 or 1,991 gpd) is higher than DOE's figure of only 350 gpd, and estimated consumptive use during the period of highest use (201-264 or 1,603-1,661 gpd) is higher than DOE's figure of only 175 gpd. Although DOE stated it developed its "standard accounting figures" from the EES study, it did not attempt to reconcile its figures with the EES study's higher estimates. *See* RA002999; RA002884.

D. Proceedings Below.

The Tribe filed a Petition for Judicial Review in Thurston County Superior Court on June 11, 2008, CP 4-36, and a First Amended Petition for Judicial Review on October 10, 2008, CP 37-52. The First Amended Petition seeks judicial review of the validity of the 2006 amendments pursuant to the Washington Administrative Procedure Act ("APA"), Ch. 34.05 RCW. CP 37. The Tribe alleged, *inter alia*, that:

- [DOE] acted arbitrarily and capriciously and unlawfully in relying upon a wholesale application of the [OCPI] doctrine. . . to globally justify all of the reservations of water for a multitude of out-of-stream uses throughout the entire Skagit River Basin[;]
- [DOE's] reliance upon the [OCPI] doctrine to justify the creation of the reservations of water for agricultural and stockwatering uses, for domestic use in . . . specified tributary subbasins, and for commercial and industrial uses and municipal supply is . . . arbitrary and capricious and contrary to law . . . [;]

¹³ These figures are calculated in the same way as the medium water use estimates. *See* notes 11 and 12 above.

- [DOE's] assumption, for purposes of calculating the extent to which reserved water is utilized, that a single residence uses an annual average of 350 [gpd] is arbitrary and capricious . . . [;] and
- [DOE's] adoption of a 50% return flow recharge credit or septic system credit . . . is unsupported by substantial evidence, arbitrary and capricious, and is contrary to law.

CP 47-50. As noted above, the Superior Court denied these claims in a December 3, 2010, Order Denying Petition for Review (CP 307-09) on the basis of a November 9, 2010, Letter Opinion (CP 310-16). The Tribe filed a timely notice of appeal on December 30, 2010. CP 317-19.

IV. ARGUMENT.

A. Standard of Review.

Under RCW 34.05.570(2)(c), a court shall declare a rule invalid if it finds that “the rule exceeds the statutory authority of the agency . . . or the rule is arbitrary and capricious.” A “rule that conflicts with a statute is beyond [the] agency’s authority and requires invalidation of the rule.” *Edelman v. Pub. Disclosure Comm’n*, 116 Wn. App. 876, 886, 68 P.3d 296 (2003), *aff’d*, 152 Wn.2d 584, 99 P.3d 386 (2004); *see also Superior Asphalt & Concrete v. Dep’t of Labor & Indus.*, 84 Wn. App. 401, 405, 929 P.2d 1120 (1996) (court will “invalidate a regulation if it is in conflict with the intent and purpose of the legislation . . .”).

A party attacking a rule must present compelling reasons why the rule is in conflict with the intent and purpose of the statute. *See Postema*,

142 Wn.2d at 77; RCW 34.05.570(1)(a). While an agency's interpretation of a statute is accorded great weight if the statute is ambiguous and within the agency's special expertise, the agency's view will not be accorded deference if it conflicts with the statute, *Postema*, 142 Wn.2d at 77, or if its interpretation "is entirely inconsistent with the agency's prior administrative practice." *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001). Ultimately, the court determines the meaning and purpose of a statute and may substitute its interpretation for that of an agency. *Postema*, 142 Wn.2d at 77.

Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Willman v. Wash. Util. & Transp. Comm'n*, 154 Wn.2d 801, 806, 117 P.3d 343 (2005). Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002). A reviewing court must consider the rulemaking file and the agency's explanations for adopting the rule to determine whether the agency's action was arbitrary and capricious. *Wash. Ind. Telephone Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003).

In reviewing agency action, this Court sits in the same position as the Superior Court and applies these standards directly to the agency record. *See Postema*, 142 Wn.2d at 77. Where, as here, the Superior Court took no new evidence, its findings are not relevant to this Court’s review of agency action. *Id.* at 100 n.10.

B. DOE Exceeded Its Statutory Authority in Amending the Skagit River Instream Flow Rule.

1. Rules of Construction.

“Statutory interpretation is a question of law reviewed de novo.” *Bowie v. Dep’t of Revenue*, 171 Wn.2d 1, 248 P.3d 504 (2011). “The primary objective of any statutory construction inquiry is ‘to ascertain and carry out the intent of the Legislature.’” *Id.* (quoting *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009)) (internal quotation omitted). “Where statutory language is plain and unambiguous, a statute’s meaning must be derived from the wording of the statute itself.” *Id.*

Plain meaning is not derived from reading a statutory provision in isolation; rather, it “is discerned from the ordinary meaning of the language at issue, the *context* of the statute in which that provision is found, *related provisions*, and the *statutory scheme as a whole . . .*” *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010) (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007)) (emphasis

added); *see also Campbell & Gwinn*, 146 Wn.2d at 10, 12 (“examination of the statute in which the provision at issue is found, as well as *related statutes* or other provisions of the same act in which the provision is found, is appropriate” because “it is more likely to carry out legislative intent”) (emphasis added).

“[A] plain reading of a statute must ‘consider the sequence of all statutes relating to the same subject matter.’” *Hirschfelder*, 170 Wn.2d at 545 (quoting *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001)). Where statutory provisions appear to conflict, Washington courts “generally give preference to the more specific and more recently enacted statute.” *In re Marriage of Brown*, 159 Wn. App. 931, 935, 247 P.3d 466 (2011) (quoting *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000)). In addition, “generally exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions.” *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

2. Statutory Context of the OCPI Exception.

The OCPI exception is a single, narrow exception to a series of statutory provisions that have provided increasing protection for instream flows and that reflect a strong public policy to preserve the quality of the natural environment. Legislative efforts to preserve instream flows for

fish date to at least 1953, when the Legislature required DOE's predecessor to notify the state's fish and game agencies of water rights applications. Laws of 1953, ch. 275, § 1 (RCW 90.03.280). In 1955, the Legislature declared that "[i]t 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," and authorized the rejection of water right applications that might impair such flows. Laws of 1955, ch. 12, § 75.20.050 (codified as amended at RCW 77.57.020).

In 1969, the Legislature authorized DOE's predecessor to adopt regulations establishing "minimum water flows" to protect "fish . . . or other wildlife resources, or recreational or aesthetic values." Laws of 1969, 1st Ex. Sess., ch. 284, §§ 3-4 (RCW 90.22.010-020). The Legislature provided, *without exception*, that "[n]o right to divert or store public waters shall be granted . . . which shall conflict with regulations . . . establishing [such] flows" *Id.* § 5 (RCW 90.22.030).¹⁴

In 1971, the Legislature enacted the Water Resources Act, which included a "general declaration of fundamentals" to guide "[u]tilization and management of the waters of the state." RCW 90.54.020. Subsection

¹⁴ In addition, the Legislature declared that it is the policy of the state "to retain sufficient minimum flows . . . to provide adequate waters . . . to satisfy stockwatering requirements for stock on riparian grazing lands[,]" but this policy "shall *not* apply to stockwatering relating to feed lots and other activities which are not related to normal stockgrazing land uses." *Id.* § 6 (RCW 90.22.040) (emphasis added).

(1) declared certain uses to be beneficial (including domestic, commercial, industrial, agricultural, stockwatering and fish and wildlife maintenance and enhancement), and subsection (2) provided that 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.” *Id.* Subsection (3) *mandated* retention of certain “base flows” needed to preserve fish, wildlife and other environmental values, and contained the OCPI exception at issue in this case:

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^[15] necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values 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.

RCW 90.54.020(3).¹⁶

¹⁵ The statute does not define “base flows.” *See In the Matter of Appeals from Water Rights Decisions of DOE*, 1996 WL 514630 at *6 (PCHB July 17, 1996) (“*Water Rights Appeals*”). DOE has stated that, “[i]n a hydrologic sense, the term base flow normally refers to flow sustained in a stream during extended periods without precipitation or, that component of streamflow primarily derived from ground water effluent.” *Id.*

¹⁶ In its declaration of fundamentals, the Legislature also provided that “[a]dequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs[,]” and “[e]xpressions of the public interest will be sought at all stages of water planning and allocation discussions.” RCW 90.54.020(5), (10). It then directed DOE “to develop and implement in accordance with [the Water Resources Act] a comprehensive state water resources program[,]” RCW 90.54.040(1), and authorized DOE, when necessary to carry out the policy of the Act, to “[r]eserve and set aside waters for beneficial utilization in the future[.]” RCW 90.54.050(1).

Eight years later, in 1979, the Legislature provided, *without exception*, that “[w]henver an application for a permit to make beneficial use of public waters is approved relating to a stream . . . for which minimum flows . . . have been adopted and are in effect . . . , the permit shall be conditioned to protect the . . . flows.” RCW 90.03.247 (emphasis added). Later in 1979, the legislature declared that the establishment of reservations under RCW 90.54.050(1) or “minimum flows . . . under RCW 90.22.010 or 90.54.040 shall constitute *appropriations* within the meaning of [the water code] with priority dates as of the effective dates of their establishment.” RCW 90.03.345 (emphasis added). Under RCW 90.03.010, “as between appropriations, the first in time shall be the first in right,” and, under RCW 90.03.290(3) and 90.44.030, an application for a new surface or ground water right *must* be denied if it would impair a prior, existing right.

In *Postema*, the Supreme Court held that under this statutory scheme, “[o]nce established, a minimum flow constitutes an appropriation with a priority date as of the effective date of the rule establishing the minimum flow.” 142 Wn.2d at 81 (citing RCW 90.03.345). “Thus, a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals.” *Id.* (citing RCW 90.03.345 and 90.44.030). According to the Court, “[t]he *narrow* exception to this rule is

found in RCW 90.54.020(3)(a), which provides that withdrawals of water which would conflict with the base flows ‘shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.’” *Id.* (emphasis added).

The *Postema* Court held that DOE has no authority to create “*limited* minimum flow water rights” that are subject to impairment for economic reasons:

The statutes plainly provide that *minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows. RCW 90.03.345; RCW 90.44.030. A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired.

Id. at 82 (emphasis in original). Indeed, even a *de minimis* impairment of a minimum flow mandates denial of a water right; “RCW 90.03.290 . . . does not distinguish between impairment of existing rights based on whether [it] is *de minimis* or significant.” *Id.* at 90.

The *Postema* Court was aware of “no statute which requires any further weighing of interests once minimum flows have been established, and none requiring that economic considerations influence permitting decisions once minimum flows are set.” *Id.* at 82. The Court acknowledged that “[s]everal statutes [including RCW 90.54.020(1)

(describing beneficial uses) and 90.54.020(2) (describing the maximum net benefits policy)] recognize that water is essential to the state’s growing population and economy as well as necessary to preserve instream resources and values[,]” but held that “none of these statutes indicate that they are meant to override minimum flow rights once established by rule, none conflict with the statutes authorizing or mandating rules setting minimum flows, and none conflict with the specific statutes respecting priority of minimum rights.” *Id.* at 82-83. Thus, “even if [DOE’s] regulations could be read as establishing a limited minimum flow right . . . they would be inconsistent with the statutes and invalid.” *Id.* at 83.

3. Prior Administrative Practice.

For over 30 years after its enactment, the OCPI exception was construed narrowly and utilized rarely. In the Superior Court, DOE asserted it had “enacted numerous instream flow rules that create class-based OCPI exceptions to instream flow rules for domestic uses and/or stockwatering.” DOE’s Br. in Resp. to Tribe’s Opening Br. at 10-11 n.6 (Feb. 19, 2010) (CP 228-29). DOE cited 17 rules in support of this assertion, 14 of which were adopted before 2005. *See* Appendix A. These rules did not explicitly invoke the OCPI exception, but purported to exempt certain appropriations for domestic and/or stockwatering uses from stream closures, low flow limitations, and/or instream flows that

were adopted *simultaneously* with the exemptions. *Id.* Most of these exemptions were for *in-house* uses and *normal* stockwatering operations (*excluding feedlots*), and many required a showing that *no alternative source* of water was available. *Id.* None reserved water for municipal, commercial, industrial, or agricultural uses. *Id.* To our knowledge, none has been subject to judicial review.¹⁷

In 1996, the PCHB addressed the scope of the OCPI exception in a consolidated summary judgment ruling and two individual determinations. To our knowledge, these are the *only* formal adjudications that have interpreted the OCPI exception.¹⁸ The PCHB held, *inter alia*: (1) the OCPI exception authorizes only withdrawals of groundwater, not diversions of surface water; (2) the proposed appropriation must serve a public as opposed to a private interest; (3) the public interest must be so great as to override the public values protected by base flows (preservation of wildlife, fish, scenic, aesthetic and other environmental and

¹⁷ The *Postema* Court noted DOE's assertion that a provision in the 1979 instream flow rule for the Cedar-Sammamish basin, WAC 173-508-080(2), which exempted "[d]omestic *inhouse* use for a single family residence and stock watering, *except that related to feedlots*," was based on the OCPI exception. 142 Wn.2d at 90 (emphasis added). However, the provision itself made no reference to the OCPI exception, and, because no party challenged the provision, the Court did not consider its validity. *Id.*

¹⁸ Although PCHB decisions (like DOE interpretations) are not binding on the courts, *Postema*, 142 Wn.2d at 90, they are important components of the administrative implementation of the water codes and are binding on DOE. *See Port of Seattle v. PCHB*, 151 Wn.2d 568, 592, 90 P.3d 659 (2004) (discussing origin and function of PCHB); RA035919 (recognizing that DOE is bound by prior PCHB decisions when making specific water rights decisions).

navigational values); (4) the exception must be, and has been, very narrowly construed; (5) the exception must be applied on an individualized, case-by-case basis; and (6) a permit granted under the OCPI exception must require the appropriator to actively pursue alternative sources of water. *See Water Rights Appeals*, 1996 WL 514630 at *6, 17; *Black Diamond Assocs. v. Dep't of Ecology*, 1996 WL 755426 at *8-9 (PCHB Dec. 13, 1996); *Auburn School Dist. No. 408 v. Dep't of Ecology*, 1996 WL 752665 at *7-9 (PCHB Dec. 20, 1996).¹⁹

In *Black Diamond Associates*, the PCHB upheld DOE's denial of a permit to a private developer to withdraw water for a golf course and new residences. Noting that over half of the requested appropriation was for a golf course that would serve primarily private homeowners, the PCHB did "not regard Black Diamond Associates' application to be based on an overriding *public* interest." 1996 WL 755426 at *10 (emphasis added).

In *Auburn School District*, the PCHB partially overturned DOE's denial of a permit to a school district to withdraw water to irrigate athletic fields utilized by school children and the general public. The PCHB held that use by school children was an overriding public interest under the

¹⁹ The PCHB also suggested that exemptions for domestic *inhouse* use and *normal* stockwatering in the 1980 instream flow rule for the Green-Duwamish River watershed, WAC 173-509-070, might have their origin in RCW 90.44.050 and 90.54.020(5), but did not rule on their validity. 1996 WL 755426 at *9; 1996 WL 752665 at *8.

unique facts of the case, but that use by the general public was not. 1996 WL 752665 at *8. It added that “a narrow interpretation of the [OCPI] exception requires the Auburn School District to actively pursue obtaining water from all potential future sources” *Id.* at *9.

DOE’s own interpretation of the OCPI exception in these cases was equally (if not more) narrow. For example, in *Black Diamond Associates*, DOE argued: (1) the exception must be narrowly construed; (2) the use of water for a golf course and residential development cannot override the public interest in instream flows; and (3) the exception cannot be invoked where there is a possible alternative supply of water. *See King County et al. v. Dep’t of Ecology*, Transcript of Proceedings at 827-29 (PCHB Oct. 31, 1996) (CP 155-57).

In November 2003, an internal DOE document noted that “only a handful of water right decisions have used OCPI in the past 20 years; its use has been very rare.” RA035920. The document stated that “OCPI is *not used to reserve water* nor is OCPI used to authorize a *class* of proposed appropriations,” and that a “blanket or general finding of OCPI to authorize the withdrawal of water in apparent conflict with established instream flows *has never been done at a watershed scale and is not appropriate.*” RA035919 (emphasis added).

DOE began to abandon its narrow interpretation of the OCPI

exception in September 2004, when it published a formal “Guidance” on “Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses.” RA006955. The Guidance was published at the same time that DOE was developing proposed amendments to the 2001 Skagit River Instream Flow Rule.²⁰ In contrast to the November 2003 document, the Guidance stated the OCPI exception could be used to establish a reservation of water that would not be subject to established instream flows. RA006964. However, the Guidance stated that “there needs to be a clear showing of overriding consideration of public interest.” *Id.* In order meet this standard, the Guidance stated that, in general: (1) the reservations should be limited to domestic use in rural areas where exempt withdrawals or very small community systems are generally the only available water supply; (2) the reservations should be limited to in-house use with the possibility of some limited outdoor use, and be available only until public water supplies become available; (3) the reservations should be limited to the smallest amount practicable that substantially accomplishes the goal of the reservation; and (4) metering and reporting conditions as well as mitigation measures should be considered. RA006964-65; RA006974-75.

²⁰ In November 2004, DOE published an updated development plan for amending the Skagit rule. RA002770. The plan stated the “proposed rule amendment is anticipated to generally follow the policy framework in” the Guidance document. RA02772.

4. Statutory Violations.

a. *Use of an Economic Balancing Test In Which Any Beneficial Use Can Override Instream Flows.*

DOE's OCPI finding was based on a balancing test in which it weighed the benefits of "providing water for homes, businesses and farms" against the economic costs of impairing instream flows. RA002987. This approach effectively treats *any* use declared to be beneficial in RCW 90.54.020(1) – including domestic, municipal, commercial, industrial, agricultural and stockwatering uses – as serving an overriding consideration of the public interest under RCW 90.54.020(3)(a) as long as the estimated economic benefit of such use outweighs the economic cost of impairing instream flows. *Id.*; *see also* Letter Opinion at 4 (CP 313) (finding statutory support for DOE's argument that "domestic, municipal, agricultural, industrial and stockwater users are *beneficial uses* of the waters of the state") (emphasis added).

This approach conflicts with three specific provisions of Washington law: (1) RCW 90.22.030, which provides, *without exception*, that "[n]o right to divert or store public waters shall be granted . . . which shall conflict with regulations . . . establishing [minimum] flows"; (2) RCW 90.03.247, which provides, *without exception*, that "[w]henever an application for a permit to make beneficial use of public waters is

approved relating to a stream . . . for which minimum flows . . . have been adopted and are in effect . . . , the permit shall be conditioned to protect the . . . flows”; and (3) RCW 90.03.345, which provides that the establishment of “minimum flows . . . under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of” the water code.²¹

As *Postema* held, these statutes “plainly provide that *minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent” appropriations, and are not subject to “any weighing of interests” or “economic considerations” in future water right decisions. 142 Wn.2d at 82 (emphasis in original). *Postema* specifically considered the provisions of the Water Resources Act on which DOE relied here – the Act’s declaration of beneficial uses and the maximum-net-benefits policy – and held they do not alter the statutory priority for instream flows. *Id.* at 82-83.²²

²¹ DOE’s use of an economic balancing test in which any combination of any beneficial uses can override instream flows also conflicts with the Legislature’s general intent to preserve instream flows. The intangible public values protected by instream flows are not easily quantified in a cost-benefit analysis, especially in comparison to the monetary value to a private landowner of a secure supply of water. *See* RA002865. If economic benefits for private appropriators can override public instream values in an OCPI finding, instream flows will be subject to “piecemeal impairment,” contrary to these and other statutes. *See Postema*, 142 Wn.2d at 89; § IV.B.2 above.

²² In developing the 2006 amendments, DOE itself recognized that instream flows are *not* “a [use subject] to the maximum net benefits analysis.” RA002882. *See also Ctr. for Env’tl. Law and Policy v. Dep’t of Ecology*, 1998 WL 156699 at *1 n.1 (PCHB Mar. 12, 1998) (maximum net benefits test applies to waters that do *not* conflict with base flows); *In the Matter of a Section 401 Water Quality Certification*, 1989 WL 76525 at *4

The OCPI exception itself does not support DOE's approach. First, by authorizing withdrawals that conflict with base flows "only in those situations where it is clear that overriding considerations of the public interest will be served," the Legislature did not authorize withdrawals that would serve *any* beneficial use. The ordinary meaning of the term "overriding" is "[f]irst in priority; more important than *all* others." See <http://www.thefreedictionary.com/overriding> (May 11, 2011) (citing the American Heritage Dictionary of the English Language (4th ed. 2000)) (emphasis added). If the Legislature had intended the OCPI exception to authorize withdrawals that serve *any* beneficial use identified in RCW 90.54.020(1), it could easily have said so; instead, it limited the exception to withdrawals that "*clearly*" serve "*overriding* considerations of the public interest." See, e.g., *Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976) (where "different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word").

Second, the OCPI exception must be construed narrowly to avoid, or at least minimize, conflict with more recent, specific and affirmative statutory enactments. See § IV.B.1 above (discussing rules of

(PCHB Jan. 25, 1989) ("base flows represent a statutory allocation for the environment to be taken out *before* the maximum net benefits formula is applied") (emphasis added).

construction). The Legislature’s 1979 directive that any permit relating to a stream for which instream flows have been established must be conditioned to protect such flows, RCW 90.03.247, and its declaration later that year that the establishment of minimum flows by rule are appropriations within the meaning of the water code, RCW 90.03.345, are both more specific and more recent than the OCPI exception relating to undefined “base flows,” which was enacted in 1971 as part of a “*general declaration of fundamentals*” to guide DOE. RCW 90.54.020 (emphasis added). And, the OCPI exception is just that, an exception to the Legislature’s mandate for the *retention* of base flows. *See* RCW 90.54.020(3). Under these circumstances, it is not surprising that the Supreme Court, PCHB and DOE (prior to 2005) have all recognized that the OCPI exception must be narrowly construed. *See Postema*, 142 Wn.2d at 81; *Water Rights Appeals*, 1996 WL 514630 at *17; *Auburn School Dist.*, 1996 WL 752665 at *7; § IV.B.3 above.²³

In this case, DOE did not construe the OCPI exception narrowly; rather, it construed it so broadly as to swallow the rule. DOE treated senior instream flow rights as limited water rights that are subject to impairment for economic reasons, *i.e.*, it treated them in precisely the

²³ Surprisingly, the Superior Court *never mentioned* the Supreme Court’s, PCHB’s or DOE’s description of the OCPI exception as a “narrow” exception. *See* Letter Opinion (CP 310-16).

manner that the Supreme Court rejected in *Postema*. See § IV.B.2 above. DOE's balancing test allows senior instream flow rights to be impaired whenever the benefits of *any* combination of *any* beneficial uses outweigh the economic cost of impairing instream flows. Under this approach, instream flow rights are not water rights at all: they are merely one factor in a balancing test that can be overridden by any combination of beneficial uses that may generate out-of-stream economic benefits. Because this approach is fundamentally at odds with the statutory scheme, it exceeded DOE's authority and requires invalidation of the 2006 amendments. See *Postema*, 142 Wn.2d at 89 (“instream flow right subject to piecemeal impairment would not preserve flows necessary to protect fish, wildlife and other environmental resources[,]” a result “at odds with the relevant statutes and the obvious legislative intent manifested in them”); see also *Water Rights Appeals*, 1996 WL 514630 at *17 (“establishment of a[n] instream flow right which could then be impaired by some future appropriation of ground water, would render the instream flow meaningless and not a ‘right’ at all”).

b. Authorizing Categories of Appropriations Whose Benefits Do Not Outweigh the Costs of Impairing Instream Flows.

DOE authorized new categories of appropriations whose estimated benefits do *not* clearly outweigh DOE's own estimate of the economic

cost of impairing instream flows. As discussed in § II.C.2.a above, almost all of the benefits DOE attributed to the reservations were associated with the use of 0.81 to 1.50 cfs of water (out of total reservations of about 25 cfs of water) by users of rural public water systems and exempt wells. The following table summarizes DOE’s estimate of the benefits from the remaining reservation uses over a 20-year time horizon, a period in which DOE estimated the economic cost of impairing instream flows to be \$5,300,000, with a potential range up to \$19,000,000:

USERS	ESTIMATED BENEFIT
Lot owners who could purchase and transfer uninterruptible water rights	\$41,000 to \$73,000
Large public water purveyors	\$104,000
Agricultural users	\$3,700,000
Stockwatering users	No estimate

RA002863-73.

DOE’s authorization of new categories of appropriations that would have only minimal benefits, or benefits similar in magnitude to but less than the cost of impairing instream flows, exceeded its authority under the plain language of the OCPI exception. The Legislature authorized withdrawals that conflict with base flows “*only in those situations* where it is *clear* that overriding considerations of the public interest will be served.” This language precludes the kind of aggregate approach DOE employed here, in which categories of appropriations that have only

minimal benefits were authorized by combining them with a category of appropriations that may have larger benefits. *See Black Diamond Assocs.*, 1996 WL 755246 at *9 (“only in those situations” phrase “calls for individualized determinations”). If there is any doubt about this, it is resolved by the applicable rules of construction, which require a narrow interpretation of the OCPI exception.

c. Authorizing Individual Appropriations that Do Not Serve OCPI.

By authorizing categories of new appropriations, DOE authorized individual appropriations that do *not* serve overriding considerations of the public interest. For example, the DMCI reservation can be used for private residential development, golf courses and general public recreation, uses both DOE and PCHB held did *not* serve overriding considerations of the public interest in *Black Diamond Associates* and *Auburn School District*. *See* § IV.B.3 above. Similarly, as a result of DOE’s elimination of any restriction on outdoor watering, the DMCI reservation can be used to water lawns far in excess of the “typical” 2,500 square-foot lawn in the Skagit basin. *See* RA002999. DOE’s analysis provides no basis for concluding that appropriations to water private lawns of up to ½ acre (21,900 square feet) or more in size serve *any*, let alone *overriding*, considerations of the public interest. And, DOE’s

stockwatering reservation can be used for feedlots and other activities not related to normal stockgrazing, despite the Legislature’s declaration that the state policy of retaining minimum flows for stockwatering does *not* apply to such uses. *See* RCW 90.22.040. Given the plain language of the OCPI exception and the applicable rules of construction, DOE’s authorization of these and other appropriations that do *not* serve overriding considerations of the public interest exceeded its statutory authority.

d. Authorizing New Appropriations for Uses that Can be Served by Alternative Sources.

DOE authorized new appropriations for many uses that could be served by alternative sources of supply that would not impair instream flow rights, including the acquisition of existing uninterruptible water rights or a combination of new interruptible rights and storage. *See, e.g.,* RA002858-60; RA003048 (discussing alternative sources to meet domestic and agricultural needs).²⁴ According to DOE, such alternative sources were available to meet at least some of the new uses by rural public water system and exempt well users, and all of the new uses by

²⁴ Skagit County PUD No. 1 and the City of Anacortes, the County’s two largest public purveyors, offered to make their senior water rights available to serve new domestic and agricultural demand and to mitigate the impacts of new uses that could not be served by public purveyors. *See, e.g.,* RA040732; RA002223; RA040953-55; RA040852; RA040870; RA030946-47; RA041014. As the Governor’s water policy advisor stated, “[t]he amount of water available under the *existing water rights* allocated from the Skagit River appear that they *could provide the entire out of stream needs for at least the next fifty years.*” RA040250 (emphasis added).

large public water purveyors and agricultural users. *See* § IV.C.2.a above. DOE’s authorization of new appropriations where there were alternative sources of supply that would not impair instream flow rights, with no requirement that new users pursue such alternative sources, conflicted with: (i) its own interpretation of the OCPI exception (and that of the PCHB) in *Black Diamond Associates* and *Auburn School District*; and, more importantly, (ii) the plain language of the exception and the applicable rules of construction. Authorizing new appropriations that conflict with instream flow rights serves *no*, let alone *overriding*, considerations of the public interest where there is an alternative source of supply that would not impair senior instream flow rights.

5. DOE’s Interpretation Is Not Entitled to Deference.

DOE’s invocation of the OCPI exception in this case cannot be upheld on the grounds that deference is owed to an agency interpretation of an ambiguous statute. DOE’s use of the OCPI exception conflicted with the plain meaning of the statute, violated related statutes requiring preservation of instream flows and the “obvious legislative intent manifested in them,” *Postema*, 142 Wn.2d at 89, and was inconsistent with DOE and PCHB’s administrative practice over a 30-year period (during which, for example, DOE had never invoked the OCPI exception

to reserve water for general municipal, commercial, industrial or agricultural purposes). No deference is owed under these circumstances.

See id. at 77; *Skamania County*, 144 Wn.2d at 43.

C. DOE’s Authorization of New Appropriations that Exceed Critical Limitations on which It Based Its OCPI Finding Was Arbitrary and Capricious.

The DMCI reservation authorizes new, year-round, consumptive appropriations in small tributary subbasins where Washington’s fisheries agencies have long recommended that no new appropriations be permitted in order to protect fisheries resources. *See* §§ III.A and III.C.1 above. According to DOE, it adopted several “critical” provisions “to minimize potential impacts on fish and river ecosystem functions[,]” the most important of which was to limit the size of the reservations to 2% of 7Q10 flows. RA002988.

The limited nature of the reservations was an essential part of DOE’s OCPI finding. *See, e.g.*, WAC 173-503-073(1) (“limited nature of the reservations” is “[c]ritical to [OCPI] finding”); RA002988 (“public interest . . . not significantly impacted when use of water . . . is limited as here”); RA003166 (“finding of negligible negative impacts . . . allows the OCPI standard to be met”). However, despite the critical importance of these limits, the amended Rule allows actual appropriations to exceed

them.²⁵ As discussed above, the amended Rule does not require the use of water meters for new exempt wells serving single residences, and places no limit on outdoor watering by such residents. *See* § III.C.1 above. As also discussed above and summarized in the following table, the “standard accounting figures” DOE adopted are less than the consumptive water use rates estimated in the very study on which DOE said it relied:

	DOE	EES “Medium” Use (2,500 Sq. Ft. Lawn)	EES “High” Use (20,000 Sq. Ft. Lawn)
Maximum Average Consumptive Use (gpd)	175	201-264	1,603 – 1,666

See § III.C.3 above; RA022748.

The effect of this is illustrated by considering the DMCI reservation for the combined Carpenter-Fisher subbasin of 11,633 gpd. Using DOE’s standard accounting figures, this reservation authorizes 66 new exempt wells serving single residences with on-site septic systems ($11,633 \div 175 = 66.5$). However, if actual consumptive use by each of these new residences is at the low end of the EES “medium” water use scenario, total maximum average consumptive use will be 13,266 gpd ($66 \times 201 = 13,266$), 14% more than the reservation. If water use by only 7

²⁵ As noted above, some of the reservations themselves exceed the 2% of 7Q10 limit. *See* note 7 above. Indeed, by combining the Carpenter and Fisher units, DOE permitted withdrawals from the Fisher Creek subbasin of up to *4.5 times* its estimate of 2% of the 7Q10 flow in Fisher Creek. *Id.*

(i.e., about 10%) of the new residences is at the low end of the EES “high” water use scenario, total maximum average consumptive use will be 23,101 gpd ((59 x 201) + (7 x 1,606) = 23,101), *almost double* the reservation. Thus, even if the Carpenter-Fisher reservation was an accurate estimate of 2% of the 7Q10 flow (*but see* note 7, above), the amended Rule allows actual withdrawals to exceed that critical limit.

In the Superior Court, DOE asserted it had “relied upon actual (not inferred) summer and monthly data to confirm the reasonableness of using 350 gpd as the average summer day use [before applying a groundwater recharge credit].” DOE Br. at 27 (CP 245). According to DOE, “Big Lake Area summer use data for 2002-2004 shows that from July-September average summer use per residence was 258 gpd,” while “[a]ctual monthly data from the adjacent Samish Basin for 2000 showed a peak *month use* (which presumably would be greater than the summer average) of 101 gpd per person or 262 gpd per house (assuming 2.6 persons per residence, the standard value).” *Id.* (emphasis in original) (citing RA000724 and RA040593).²⁶

²⁶ Although DOE cited these data in its argument before the lower court, it should be noted that nowhere in the rulemaking record did DOE assert that it was relying on these data in developing its standard accounting figures; to the contrary, DOE stated expressly that its figures were based on the EES study and 2004 USGS report. *See* § III.C.3 above.

These data do not demonstrate that actual water use under the amended Rule will remain within the critical 2%-of-7Q10 limit on which DOE based its OCPI finding. Rather, the record shows that these data, which are for paying, metered customers of public water purveyors, are not representative of and underestimate water use by exempt well users, who do not pay for water and whose use is unmetered. For example, the Samish basin data is found in a draft watershed management plan and represents an average of data reported by six Samish basin purveyors. *See* RA040592-93. Notably, the plan's authors chose *not* to rely on these data in estimating future water demand because they were of short duration, represented only a small percentage of water systems in the basin, and were *less* than the rural Skagit County average. RA0040592.

The study on which DOE relied to project future Skagit basin water demand sets forth “per capita usage [in the basin] from documented data.” RA002909. The study presents both average and maximum day demand for different categories of users; although neither metric corresponds precisely with DOE’s “maximum average daily use” concept, the data demonstrate significant variation among users, with exempt well users and single domestic water right holders having the *highest* rates during the highest period of use:

USERS	AVERAGE DAY DEMAND		MAXIMUM DAY DEMAND	
	<i>Per Capita</i>	<i>Household</i>	<i>Per Capita</i>	<i>Household</i>
PUD Customers	82	213	156	406
City of Anacortes Customers	65	169	130	338
Potential PUD or City Customers outside Skagit County	100	260	200	520
Rural public water system customers	100	260	240	624
Single domestic water right holders	100	260	590	1,534
Exempt well users	100	260	308	801

RA002909-10.²⁷ These data strongly suggest that the limited data for paying customers in the Big Lake area and Samish basin are not representative of and *underestimate* water use by exempt well users.²⁸

Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Willman*, 154 Wn.2d at 806. Here, DOE found that it was critically important to limit new withdrawals in small tributary subbasins to 2% of 7Q10 flows to protect fish and based its OCPI finding on that limit, but then adopted Rule amendments that allow new

²⁷ The per capita amounts are from the cited water demand study. We calculated the household amounts assuming 2.6 persons per household. *See* DOE Br. at 27 (CP 245).

²⁸ The record contains additional evidence that actual water use by households served by exempt wells will be higher than DOE's standard accounting figures. *See, e.g.*, RA035273 (Skagit Coordinated Water System Plan estimating average daily use of 260 gpd and peak day use of 676 gpd); RA031237 (report prepared for Tribe estimating consumptive use of 663 gpd during summer); RA036769 (state design requirements estimating 800 gpd as maximum use, and 350 gpd as lowest use assuming some outdoor watering restrictions, for unmetered systems); RA029636 (design requirements for Group B wells estimating daily demand of 400 gpd and peak day demand of 750 gpd).

withdrawals to exceed that limit. DOE's decisions to eliminate the requirement that new exempt wells serving single residences be metered, eliminate any restriction on outdoor watering, and adopt standard accounting rates that were less than the usage rates in the study on which it purported to rely were willful and unreasoning and taken without regard to the attending facts and circumstances. DOE's post-hoc attempt to cherry-pick the record to find some data to support its standard figures does not demonstrate otherwise.

V. CONCLUSION.

For the above reasons, the Court should reverse the decision of the Superior Court and declare the 2006 amendments invalid.

Respectfully submitted on May 25, 2011,

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APPENDIX A

Pre-2005 Rules Cited by DOE in Support of Its Assertion
that It Has Enacted Numerous Instream Flow Rules
that Create Class-Based OCPI Exceptions
to Instream Flow Rules for Domestic Uses and/or Stockwatering.

Date	Section	Summary
1/6/1976	173-555-060	Closes certain streams to further consumptive appropriation “except for domestic and normal stockwatering purposes excluding feedlot operation.”
3/10/1976	173-522-050	Closes certain streams to further consumptive appropriation except for “domestic and normal stockwatering where there is no alternative source of water supply.”
7/27/1977	173-559-050(2) & (3)	Closes river segments to further consumptive appropriation from July 16 to Sept. 30, except for “in-house domestic use and normal stockwatering if no alternative source of water supply is available”; “[i]f the cumulative impact of numerous single in-house domestic use diversions is determined to substantially affect a closed stream’s base flow, then new permits for this use may be denied.”
9/6/1979	173-507-050 and 173-508-080	“Domestic inhouse use for a single residence and stock watering, except that related to feed lots,” exempt from chapters establishing instream flows.
12/12/1979	173-512-060	“Stock watering use, except that related to feed lots, exempt from the surface water closures established in this chapter.”
3/21/1980 and 6/6/1980	173-510-070 and 173-509-070	Domestic in-house use for a single residence and stock watering, except that related to feed lots, exempt from chapters establishing instream flows.
6/24/1980	173-513-070	“Domestic use for a single residence and stock watering, except that use related to feedlots, shall be exempt from the

		provisions of this chapter if no alternative source is available. If the cumulative effects of numerous single domestic diversions would seriously affect the quantity of water available for instream uses, then only domestic in-house use shall be exempt.”
2/2/1981, 7/24/1981, 1/23/1984	173-511-070(3) & (4) 173-515-070(3) & (4) 173-514-060(2)	Domestic use for a single residence exempt, but if cumulative effects of numerous single domestic diversions and/or withdrawals would seriously affect the quantity of water available for instream uses, then “only domestic in-house use shall be exempt if no alternative source is available.” Stock water use “except that related to feedlots” is also exempt.
6/20/1984	173-549-025(3)	Stream management unit closed to further consumptive appropriation from June 15 to Aug. 31 with the exception of single-domestic use and stockwatering use, provided that no alternative source of supply is available.
12/4/1985	173-501-070(2)	Single domestic (including up to ½ acre lawn and garden irrigation and associated noncommercial stockwatering) exempt, but when cumulative impact of single domestic diversions begins to significantly affect quantity of water available for instream uses, water rights shall be issued for in-house use only, if no alternative source is available.