

EXPEDITE
 No hearing is set
 Hearing is set

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ATTORNEY GENERAL
OF WASHINGTON

Acknowledged Receipt This
13th day of June 2008
Rob McKenna
Attorney General
By [Signature]
Assistant Attorney General
Matt Kernutt #35202

FILED
JUN 11 2008
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

**SWINOMISH INDIAN TRIBAL
COMMUNITY, Federally Recognized Tribe,**

Petitioner,

vs.

**WASHINGTON STATE DEPARTMENT
OF ECOLOGY,**

Respondent.

No.

08-2 01403 4
SUMMONS

TO THE RESPONDENT: WASHINGTON STATE DEPARTMENT OF ECOLOGY

A lawsuit has been started against you in the above entitled court by the SWINOMISH INDIAN TRIBAL COMMUNITY, Petitioner. Petitioner's claim is stated in the written Petition for Judicial Review, a copy of which is served upon you with this summons.

1 In order to defend against this lawsuit, you must respond to the Petition for Review by stating
2 your defense in writing, and by serving a copy upon the person signing this summons within 20 days
3 after the service of this summons, excluding the day of service, or a default judgment may be entered
4 against you without notice. A default judgment is one where plaintiff is entitled to what he asks for
5 because you have not responded. If you serve a notice of appearance on the undersigned person, you
6 are entitled to notice before a default judgment may be entered.

7
8 You may demand that the plaintiff file this lawsuit with the court. If you do so, the demand
9 must be in writing and must be served upon the person signing this summons. Within 14 days after
10 you serve the demand, the plaintiff must file this lawsuit with the court, or the service on you of this
11 summons and complaint will be void.

12 If you wish to seek the advice of an attorney in this matter, you should do so promptly so that
13 your written response, if any, may be served on time.

14 This summons is issued pursuant to rule 4 of the Superior Court Civil Rules of the State of
15 Washington.

16 DATED this 10th day of June, 2008.

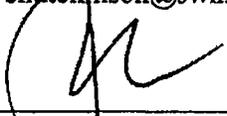
18 SWINOMISH INDIAN TRIBAL COMMUNITY

19 By: John Arum *by DTH for email authorization*

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Judge/Calendar: _____

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COMMUNITY, a Federally Recognized Indian
Tribe,**

Petitioner,

vs.

**WASHINGTON STATE DEPARTMENT
OF ECOLOGY,**

Respondent.

No.

08-2 01403 4

**PETITION FOR
JUDICIAL REVIEW**

I. INTRODUCTION

1. This is a petition for a declaratory judgment brought by the Swinomish Indian Tribal Community ("Tribe") under the Washington Administrative Procedure Act ("APA"), RCW Chapter

1 34.05, and the State Environmental Policy Act ("SEPA"), RCW Chapter 43.21C, seeking judicial
2 review of the validity of certain amendments to the Skagit River Basin Instream Flow Rule, WAC
3 173-503. The amendments were effective June 15, 2006. A copy of WAC 173-503, as amended
4 (hereinafter "2006 Instream Flow Rule Amendments"), is attached as Exhibit 1. The Tribe does not
5 seek judicial review of the validity of the original Skagit River Basin Instream Flow Rule, which
6 was effective April 14, 2001 (hereinafter "2001 Instream Flow Rule").
7

8 II. PARTIES

9 2. Petitioner Swinomish Indian Tribal Community is a federally recognized Indian tribe
10 organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and
11 located on the Swinomish Reservation on Fidalgo Island in Skagit County of the State of
12 Washington. The Tribe's mailing address is Post Office Box 817, La Conner, Washington 98257.

13 3. Since time immemorial the Tribe has lived, hunted, fished and gathered in and around
14 the Skagit River Basin, among other places. Anadromous fish, and particularly salmon, have played
15 a central role in the Tribe's subsistence, economy, culture, spiritual life, and day-to-day existence.
16 The Tribe has been adjudicated to be a successor-in-interest to signators of the Treaty with the
17 Duwamish, Suquamish, Etc., 12 Stat. 927 (hereinafter "Treaty of Point Elliott" or "Treaty"), by
18 which the Tribe reserved various rights, including the right to use and occupy exclusively
19 Reservation lands pursuant to Article 2 and to exercise off-Reservation fishing rights at usual and
20 accustomed fishing areas of the Tribe pursuant to Article 5 of such Treaty. *United States v.*
21 *Washington*, 459 F.Supp. 1020, 1039 (W.D. Wash. 1978). The Skagit River Basin has been
22 determined to be within the usual and accustomed fishing areas of the Tribe. *Id.* at 1049.
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1 4. The 2006 Instream Flow Rule Amendments, or the threatened application of those
2 Amendments, interfere with or impair or immediately threaten to interfere with or impair the legal
3 rights or privileges of the Tribe, and substantially prejudice the Tribe by threatening the Tribe's
4 fishing opportunities and the recreational, commercial, spiritual, aesthetic, scientific, environmental,
5 and cultural benefits derived by the Tribe and its members from the presence of anadromous fish,
6 and particularly salmon, in and around its Reservation and usual and accustomed fishing areas. *See*
7 *Postema v. P.C.H.B.*, 142 Wn.2d 68, 74, 11 P.3d 726 (2000)("The tribes' treaty rights are not
8 directly at issue in these cases, but their treaty rights form the basis for their interest in these case.")
9

10 5. The interests Petitioner seeks to protect are within the zone of interests protected or
11 regulated by SEPA.

12 6. While Petitioner's interest arises from the Treaty of Point Elliott, Petitioner does not
13 assert, but rather explicitly reserves, any and all claims to or arising from Petitioner's Federal rights,
14 including but not limited to claims relating to rights under the Treaty of Point Elliott and Federal
15 reserved rights. *See Postema v. P.C.H.B.*, 142 Wn.2d at 74. Adjudication of the existence or extent
16 of Petitioner's Federal rights is not at issue in this judicial review proceeding, and adjudication of
17 such rights would exceed the permissible scope of this judicial review proceeding under RCW
18 34.05.570.

19 7. Respondent Washington Department of Ecology (hereinafter "Ecology") is an agency
20 of the State of Washington responsible for managing and regulating the water resources of the state.
21 Ecology's authority includes the authority to adopt regulations concerning instream flows pursuant
22 to RCW Chapters 90.03, 90.22 and 90.54. The mailing address of the Department of Ecology is
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1 Post Office Box 47600, Olympia, Washington 98504-7600, and the physical address is 300
2 Desmond Drive SE, Lacey, Washington 98503.

3 III. JURISDICTION AND VENUE

4 8. This Court has jurisdiction over this action, and venue is proper, under RCW
5 34.05.570(2) and RCW 43.21C.075.

6 IV. FACTS

7 9. The Skagit River is the third largest river system in the Western United States. More
8 than 3,000 rivers and streams flow into the Skagit River system, accounting for one-quarter of the
9 fresh water flowing into Puget Sound. It is the only river in the lower 48 states that is home to all
10 five species of Pacific salmon. Over the years, development and other human activity in the Skagit
11 Basin has led to declines in its salmon runs. One of the causes of the declining fish population is the
12 reduction of stream flows necessary for spawning and migration. *See Swinomish Indian Tribal*
13 *Community v. Skagit County*, 138 Wn.App. 771, 773, 158 P.3d 1179 (2007).

14 10. The Skagit River Basin includes the Skagit River and streams that are tributary to the
15 River.
16

17 11. The Skagit River Basin is classified by the State of Washington as consisting of two
18 different Water Resource Inventory Areas (WRIAs): WRIA 3 is the Lower Skagit River Basin and
19 WRIA 4 is the Upper Skagit River Basin.
20

21 12. Groundwater in the Skagit River Basin is in hydraulic continuity with surface water
22 in the Skagit River and its tributaries, such that a withdrawal of groundwater affects the flow in a
23 tributary or in the River with which the groundwater is in hydraulic continuity.
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1 13. Withdrawal of groundwater within the Skagit River Basin may affect surface waters
2 containing threatened or endangered salmonids, including Chinook salmon, bull trout and steelhead.

3 14. Ecology has recognized that fish populations need adequate water to survive and, in
4 particular, has recognized that fish need instream flows that provide habitat for rearing and spawning
5 and provide other essential ecological functions including migration, stream sediment removal and
6 stream channel formation and maintenance. There is a high correlation between stream flows,
7 habitat and fish populations, and Ecology has acknowledged this correlation.

8 15. A reduction of the flow in a stream usually has greater impacts on fish populations as
9 flow levels decrease, such that a reduction of stream flow in smaller streams or during low-flow
10 periods will generally have a greater impact on fish populations than will the same reduction in
11 larger streams or during periods of higher flows.

12 16. Increased out-of-stream uses of water resulting from adoption of the 2006 Instream
13 Flow Rule Amendments will cause direct and indirect environmental effects that adversely impact
14 fish, such as reduced stream flows, increased stream temperature, and increased impervious surfaces
15 and runoff.

16 17. It is the strong public policy of the State of Washington to preserve the quality of the
17 natural environment and to maintain sufficient water in streams and other public waters to protect
18 and enhance instream resources and productive fish populations. *See, e.g.*, RCW 43.21C.020; RCW
19 90.54.020. Ecology is authorized or directed to establish by administrative rule minimum instream
20 flow levels for the purpose of protecting and enhancing instream values and resources, including
21 fish, game, bird, and other wildlife populations; recreational, aesthetic, navigational, and other
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1 environmental values; and water quality. See RCW 90.03.005, 90.22.010, 90.54.005, 90.54.010,
2 90.54.020.

3 18. In 1996 a Memorandum of Agreement Regarding Utilization of Skagit River Basin
4 Water Resources for Instream and Out of Stream Purposes with a 50-year term ("1996 MOA" or
5 "MOA") was signed by Ecology, Washington Department of Fish & Wildlife, public water
6 purveyors Skagit County P.U.D. # 1 and the City of Anacortes, Skagit County, the Sauk-Suiattle
7 Indian Tribe, the Upper Skagit Tribe and the Swinomish Indian Tribal Community. The MOA was
8 intended in part to ensure the establishment of instream water flows to protect fisheries resources, to
9 develop a coordinated water delivery system, and to reduce the use of exempt water wells in areas of
10 the county experiencing inadequate instream flows as a result of groundwater withdrawal.

11
12 *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn.App. at 774.

13 19. Skagit County adopted the 1996 MOA by resolution under RCW Chapter 39.34, the
14 Interlocal Cooperation Act, pursuant to which the 1996 MOA took effect once it was recorded by
15 Skagit County with the county auditor.

16 20. The 1996 MOA is incorporated as a part of the Skagit County Coordinated Water
17 System Plan, and both the 1996 MOA and the Skagit County Coordinated Water System Plan are
18 incorporated as parts of the Skagit County Comprehensive Plan.

19 21. The short-term objectives of the 1996 MOA included funding and conducting an
20 Instream Flow Incremental Methodology ("IFIM") study of the Lower Skagit River, and then
21 establishing scientifically based instream flows by rule for the Lower Skagit River Basin (WRIA 3,
22 excluding various islands). An IFIM study uses a series of computer-based models and data
23 collected in the field to accurately predict the amount of fish habitat that occurs with different flow
24

1 levels in a river or stream. An IFIM study is the most widely-used and accepted method for
2 evaluating instream flow needs for fish habitat.

3 22. The IFIM study required by the 1996 MOA was conducted and Ecology subsequently
4 engaged in rulemaking and adopted the Skagit River Basin Instream Flow Rule, WAC 173-503,
5 effective on April 14, 2001. The purpose of the Instream Flow Rule was to retain instream flows in
6 rivers, streams, and lakes in the Skagit River Basin to provide for the protection and preservation of
7 wildlife, fish, scenic, aesthetic, and other environmental and navigational values, as well as
8 recreation and water quality. *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn.App. at
9 775.

10
11 23. As contemplated by the parties to the 1996 MOA, the instream flow levels set in the
12 2001 Instream Flow Rule for the Skagit River and for four tributaries to the Skagit River which
13 originate from Cultus Mountain ("Cultus Mountain tributaries") were consistent with the instream
14 flow levels that were found by the IFIM study to be necessary to protect fish populations dependent
15 upon the Skagit River and its tributaries.

16 24. Once Ecology adopted the 2001 Instream Flow Rule, the flow levels established in
17 that Rule constituted appropriations of Skagit River and Cultus Mountain tributary water under
18 Washington water law with a priority date of appropriation as of the Rule's April 14, 2001 effective
19 date. RCW 90.03.345.

20
21 25. Skagit County filed a Petition for Declaratory and Injunctive Relief in this Court in an
22 action entitled *Skagit County v. Washington State Department of Ecology*, No. 03-02-00668-5,
23 seeking judicial review of the 2001 Instream Flow Rule on procedural grounds. Skagit County
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1 subsequently amended its petition to also seek judicial review of the 2001 Instream Flow Rule on
2 substantive grounds (hereinafter "the judicial review litigation").

3 26. Each of the parties to the 1996 MOA (with the exception of the Department of Fish
4 and Wildlife) subsequently intervened as parties in the judicial review litigation.

5 27. In February 2005, while the judicial review litigation was pending in this Court,
6 Ecology issued a CR 102 proposing to adopt amendments to the 2001 Instream Flow Rule. The
7 proposed amendments were not adopted by Ecology as a final rule and expired by passage of time.

8 28. On October 31, 2005, while the judicial review litigation remained pending in this
9 Court, Ecology issued a second CR 102 proposing to adopt amendments to the 2001 Instream Flow
10 Rule.

11 29. On May 17, 2006, the Tribe learned that a settlement involving Ecology had been
12 reached in the still-pending judicial review litigation. The Tribe immediately requested a copy of
13 settlement documentation from counsel for Ecology, but the Tribe was not provided with a copy of
14 the settlement documentation until May 22.

15 30. On May 19, 2006 – two days after the Tribe had requested a copy of settlement
16 documentation but several days before the Tribe received that documentation – Ecology and Skagit
17 County filed in this Court a "Stipulation and Settlement Agreement and Agreed Order of Dismissal"
18 of the judicial review litigation, and procured a hearing later on May 19 for consideration of the
19 settlement and their proposed Agreed Order of Dismissal.

20 31. None of the other parties to the 1996 MOA or to the pending judicial review litigation
21 were parties to the settlement reached by Ecology and Skagit County.
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1 32. None of the other parties to the pending judicial review litigation were given notice
2 that Ecology and Skagit County had filed their Stipulation or their proposed Agreed Order of
3 Dismissal in this Court, or were given notice that Ecology and Skagit County had procured the May
4 19 hearing for consideration of the settlement and proposed Agreed Order of Dismissal.

5 33. Only Ecology and Skagit County attended the May 19 hearing in this Court.

6 34. Following the May 19, 2006 hearing with Ecology and Skagit County, this Court
7 approved the settlement between Ecology and Skagit County and entered the Agreed Order of
8 Dismissal.

9 35. On May 22, 2006, the Tribe obtained a copy of the Stipulation and Settlement
10 Agreement and first learned that Ecology and Skagit County had filed the Stipulation, had procured
11 the May 19 hearing, and that the Agreed Order of Dismissal had been entered by the Court.

12 36. On May 30, 2006, the Tribe requested either reconsideration and vacation of the May
13 19 Agreed Order of Dismissal under CR 59(a), or in the alternative amendment of the May 19 Order
14 pursuant to CR 59(h).

15 37. On July 14, 2006, this Court vacated the May 19 Agreed Order of Dismissal,
16 dismissed Skagit County's procedural claims with prejudice and substantive claims without
17 prejudice, and dismissed the County's petition for judicial review.

18 38. In Ecology's Settlement Agreement with Skagit County, Ecology agreed to adopt
19 specific amendments to the 2001 Instream Flow Rule that were attached to the Settlement
20 Agreement.
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1 39. As agreed, on May 15, 2006, Ecology adopted the amendments to the 2001 Instream
2 Flow Rule that were attached to the Settlement Agreement. The amendments were effective June
3 15, 2006.

4 40. In the 2006 Instream Flow Rule Amendments, Ecology reserved water for additional
5 future withdrawals for out-of-stream uses for domestic, commercial/industrial and municipal supply,
6 stock watering and agricultural irrigation, despite the fact that the Skagit River instream flow levels
7 that were recommended by the Skagit River IFIM study as necessary to protect fisheries resources
8 and that were adopted by Ecology in the 2001 Instream Flow Rule had frequently not been met since
9 adoption of the 2001 Rule. *See* WAC 173-503-052, 173-503-060, 173-503-073.

10 41. Ecology's reservation of water for additional future withdrawals for out-of-stream
11 uses was based upon a finding by Ecology "that the public interest advanced by these limited
12 reservations clearly overrides the potential for negative impacts on instream resources," citing RCW
13 90.54.020(3)(a).

14 42. RCW 90.54.020(3)(a) states:

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

17 (a) Perennial rivers and streams of the state shall be retained with base flows
18 necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other
19 environmental values, and navigational values. Lakes and ponds shall be retained
20 substantially in their natural condition. Withdrawals of water which would conflict
21 therewith shall be authorized only in those situations where it is clear that
22 overriding considerations of the public interest will be served.
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- 1 d. Ecology did not coordinate the 2006 Instream Flow Rule Amendments with
2 other applicable law, including but not limited to the 1996 MOA, to the
3 maximum extent practicable, in violation of RCW 34.05.328(1)(i); and
4 e. Ecology's application of a return flow recharge credit or septic system credit
5 to water imported into the basin or subbasin at issue, when accounting for
6 water reserved by the 2006 Instream Flow Rule Amendments, constitutes a
7 substantive rule that was adopted without compliance with rulemaking
8 procedures required by RCW Chapter 34.05.

9
10 45. The allegations of paragraphs 1-44 are incorporated by reference as if fully set forth
11 in this paragraph.

12 46. The 2006 Instream Flow Rule Amendments are also invalid because substantive
13 provisions of the Amendments are contrary to law and/or are arbitrary and capricious, specifically
14 including but not limited to the following:

- 15 a. Ecology did not determine that water was available for withdrawal in the
16 Skagit River Basin or tributary subbasins (specifically including the four
17 Cultus Mountain tributary subbasins) as required by RCW 90.03.290, and any
18 determination of availability that may have been implicit in the 2006 Instream
19 Flow Rule Amendments is not supported by substantial evidence and is
20 arbitrary and capricious;
21
22 b. Ecology's determination that the reservations of water as established are
23 necessary as required under RCW 90.54.050 is unsupported by substantial
24 evidence, is arbitrary and capricious, and is contrary to law;

- 1 c. The sizes of the reservations of water created by the 2006 Instream Flow Rule
2 Amendments are arbitrary and capricious, are unsupported by substantial
3 evidence, are contrary to the recommendations and opinions of the State's
4 own fisheries biologists, and are contrary to Ecology's own 2004 *Guidance:*
5 *Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses;*
6
7 d. Ecology acted arbitrarily and capriciously and unlawfully in relying upon a
8 wholesale application of the doctrine of Overriding Considerations of the
9 Public Interest under RCW 90.54.020(3)(a) to globally justify all of the
10 reservations of water for a multitude of out-of-stream uses throughout the
11 entire Skagit River Basin, rather than weighing the public benefit derived
12 from instream values in the Skagit River mainstem subbasins or in particular
13 tributary subbasins against (i) the interests to be served by specific out-of-
14 stream uses proposed for each such basin and (ii) the purported benefits
15 derived from the extent of the reservation made for each such proposed out-
16 of-stream use;
17
18 e. Even if Ecology's global application of Overriding Considerations of the
19 Public Interest under RCW 90.54.020(3)(a) was lawful, Ecology's reliance
20 upon the doctrine to justify the creation of the reservations of water for
21 agricultural and stockwatering uses, for domestic use in the Upper Skagit
22 Subbasin and in specified tributary subbasins, and for commercial and
23 industrial uses and municipal supply is unsupported by substantial credible
24 evidence, is arbitrary and capricious and is contrary to law and to Ecology's
25

own 2004 *Guidance: Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses*;

- f. Ecology's failure to require mitigation by users of reserved water, and failure to restrict the use of reserved water to indoor domestic uses and limited outdoor uses, are contrary to Ecology's own policy as set forth in its 2004 *Guidance: Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses*, and are arbitrary and capricious;
- g. Ecology's refusal to require measurement of groundwater withdrawals serving a single residence is arbitrary and capricious and contrary to law, including WAC 173-173-040;
- h. Because water consumption is typically highest during the period when stream flows are the lowest and therefore when additional withdrawals for out-of-stream uses are more likely to result in adverse impacts to fish populations, Ecology's assumption, for purposes of calculating the extent to which reserved water is utilized, that a single residence uses an annual average of 350 gallons of water per day is arbitrary and capricious and is inconsistent with Ecology's own recognition elsewhere in the 2006 Instream Flow Amendments that (for users other than a single residence) the proper measure of daily water use is the average use only during the period of maximum use;
- i. Ecology's adoption of a return flow recharge credit or septic system credit for all locations served by a septic system is contrary to law;

- 1 j. Ecology's adoption of a 50% return flow recharge credit or septic system
2 credit that does not reflect differences in groundwater recharge based on
3 place, type and period of use and that is available for further appropriation is
4 unsupported by substantial evidence, arbitrary and capricious, and is contrary
5 to law; and
6
7 k. Ecology's application of a return flow recharge credit or septic system credit
8 to water imported into the basin or subbasin at issue, when accounting for
9 water reserved by the 2006 Instream Flow Rule Amendments, is inconsistent
10 with Ecology's stated position during notice and comment rulemaking and is
11 unsupported by substantial evidence, arbitrary and capricious and contrary to
12 law.

13 VI. REQUEST FOR RELIEF

14 WHEREFORE, Petitioner respectfully requests that this Court:

- 15 1. Issue a declaratory judgment that the 2006 amendments to the Skagit River Basin
16 Instream Flow Rule, WAC 173-503, are invalid to the extent that the Court
17 determines that the amendments were adopted without compliance with statutory
18 procedural requirements, and to the extent that the provisions of the amendments
19 are contrary to law or arbitrary and capricious (Petitioner does not request a
20 determination that any provision of the original 2001 Skagit River Basin Instream
21 Flow Rule is invalid);
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other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial. (RCW 90.54.020(1))

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

Perennial rivers and streams of the state shall be retained with base flows necessary to provide for the protection and 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. (RCW 90.54.020 (3)(a))

Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. (RCW 90.54.020 (3)(b))

In furtherance of these statutory objectives, this chapter creates a reservation of a limited amount of water for specific future uses. It establishes closures for tributaries, and sets forth conditions for future water right permitting.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-020, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC 01-07-027 (Order 99-05), § 173-503-020, filed 3/14/01, effective 4/14/01.]

173-503-025
Definitions.

For the purposes of this chapter, the following definitions shall be used:

"Agricultural irrigation" means the application of water to crops grown for commercial agricultural purposes.

"Allocation" means the designation of specific amounts of water for specific beneficial uses.

"Appropriation" means the process of legally acquiring the right to use specific amounts of water for beneficial uses, as consistent with the ground and surface water codes and other applicable water resource statutes. This term refers to both surface and ground water right permits and to ground water withdrawals otherwise exempted from permit requirements under RCW 90.44.050.

"Commercial/industrial use" means use of water for the purpose of business activities, including human domestic needs within the business property, manufacturing or production activities and maintenance of vegetated areas on the business property. For permit exempt commercial/industrial water ground water uses, it also means irrigation of agricultural products.

"Consumptive use" means a use of water whereby there is a diminishment of the water source.

"Department" means the Washington state department of ecology.

"Domestic water use" means, for the purposes of administering WAC 173-503-073 and 173-503-074 only, potable water to satisfy the human domestic needs of a household, including water used for drinking, bathing, sanitary purposes, cooking, laundering, maintenance of vegetation, care of household pets and incidental livestock, and other incidental uses. For permit-exempt domestic water use of ground water sources, total outdoor watering for multiple residences shall be consistent with the ground water permit exemption provisions in RCW 90.44.050.

"Incidental stock water use" means, for the purposes of administering WAC 173-503-073 and 173-503-074 only, sufficient water to care for small scale domestic livestock operations.

"Instream flow" means a stream flow level set in rule that is needed to protect and preserve fish, wildlife, scenic, aesthetic, recreational, water quality, and other environmental values, and navigational values. The term "instream flow" means a base flow under chapter 90.54 RCW, a minimum flow under chapter 90.03 or 90.22 RCW, or a minimum instream flow under chapter 90.82 RCW.

"Maximum average consumptive daily use" means 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.

"Mitigation plan" means a scientifically sound plan voluntarily submitted by a proponent to offset the impacts of a proposed water use and must be approved by the department.

"Municipal water supplier" means an entity that supplies water for municipal water supply purposes. (RCW 90.03.015)

"Municipal water supply purposes" means a beneficial use of water as defined in RCW 90.03.015, including:

(a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year;

(b) For governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or

(c) Indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use.

"Nonconsumptive use" means a type of water use where either there is no diversion from a source body, or where there is no diminishment of the source.

"Permit-exempt withdrawals" or "permit exemption" means a ground water withdrawal exempted from permit requirements under RCW 90.44.050, but which is otherwise subject to the ground water code.

"Public water system" means any system defined in RCW 70.119.020(8) which provides water for human consumption through pipes or other constructed conveyances, excluding a system serving only one single-family residence and excluding a system with four or fewer connections all of which serve residences on the same farm. This term includes group domestic systems.

"Reservation" means an allocation of water for future beneficial uses. The priority date of a given allocation from the reservation is the same as the effective date of rulemaking that established the reservation.

"Retail service area" means the area where a municipal water supplier currently provides direct water service and has documented plans to provide new water service.

"Scientifically sound" means adhering to the requirements of best available science as defined in WAC 365-195-905 (5)(a) and (b).

"Stream management unit" means a stream segment, reach, or tributary used to describe the part of the relevant stream to which a particular instream flow level applies. Most of these units contain a control station.

"Stock water" means drinking water supply for the raising of livestock animals and associated uses of water related to care of stock animals.

"Subbasin management unit" means a stream segment, reach, or tributary basin, used to describe where a particular instream flow level, water reservation budget, or water diversion or withdrawal limit applies.

"Timely and reasonable manner" means the way in which potable water service can be provided by a public water system to a property as defined in local coordinated water system plans, or by public water systems, or by local legislative authorities.

"Withdrawal" means the extraction and use of ground water, or the diversion and use of surface water.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-025, filed 5/15/06, effective 6/15/06.]

173-503-030
Findings.

Ecology finds that:

(1) The magnitude or variability of flows are important in maintaining the aquatic ecosystem that sustains both fish and other valuable resources. Criteria to limit total withdrawals of water from the Lower Skagit River were developed to protect the aquatic ecosystem in the region covered by this rule.

(2) To protect the estuary area below river mile 8.1 the duration of flow inundation of at least one foot of depth, in selected estuary habitat, can be reduced no more than ten percent from existing conditions from the date of enactment of this regulation. This criterion applies to the period of February through August to withdrawals from the Skagit River. Total withdrawals greater than eight hundred thirty-six cubic feet per second during that period will result in a greater than ten percent deviation from existing conditions and therefore would result in harm to the fisheries resources and aquatic ecosystem in the region covered by this rule.

(3) Protection of the aquatic ecosystem of the estuary in the months of September through January requires that the total withdrawals of water from the Skagit River not exceed 1/10 of the fifty percent exceedance flow for each month, based on the period of record (1/1/41 - 12/31/95) for the U.S. Geological Survey (USGS) stream gage on the Skagit River near Mt. Vernon, WA (Sta. #12-2005-00) in order to maintain channel morphology and other estuarine and riverine functions. This equates to a low point of eight hundred thirty cubic feet per second during the month of September. Total withdrawals greater than eight hundred thirty cubic feet per second during the month of September will not protect and preserve fish, wildlife and other environmental values and therefore would be harmful to fisheries resources and the aquatic ecosystem in the region covered by this rule in violation of chapter 90.54 RCW.

(4) The rules setting minimum flows in the Lower and Upper Skagit River (WRIA 3 and 4) (WAC 173-503-040) and finding certain waters available (WAC 173-503-050) are necessary to protect and preserve wildlife, fish, scenic, aesthetic and other environmental values.

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC 01-07-027 (Order 99-05), § 173-503-030, filed 3/14/01, effective 4/14/01.]

173-503-040
Establishment of instream flows.

(1) Stream management units and associated control stations are established as follows:

Stream Management Unit Information

Stream Management Unit Name	Control Station by River Mile and Section, Township and Range; Latitude and Longitude	Stream Management Reach
Skagit Mainstem: Skagit River near Mt. Vernon, WA		From mouth of Skagit River

USGS Sta. #12-2005-00	River Mile (RM) 15.7	including tidal fluctuation to headwaters.*
Cultus Mountain Tributaries:		
Mundt Creek	Stream gage will be installed at RM 3.4 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Turner Creek	Stream gage will be installed at RM 4.2 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Gilligan Creek	Stream gage will be installed at RM 3.2 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Salmon Creek	Staff gage periodically recorded will be installed at RM 4.3 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.

*Other additional control stations and instream flows may be established in WRIAs 3 & 4 to improve water management.

(2) Instream flows are established for the stream management units in WAC 173-503-040(1) as follows (See Figures 1 through 3):

Instream Flows as measured at USGS Sta. #12-2005-00 (Instantaneous cubic feet per second)

USGS Sta. #12-2005-00		
Month	Day	Skagit River
Jan.	1-31	10,000
Feb.	1-29	10,000
Mar.	1-31	10,000
Apr.	1-30	12,000
May	1-31	12,000
Jun.	1-30	12,000
Jul.	1-31	10,000
Aug.	1-31	10,000
Sep.	1-30	10,000
Oct.	1-31	13,000
Nov.	1-15	13,000
	16-30	11,000
Dec.	1-15	11,000
	16-31	10,000

Instream Flows for Cultus Mountain Tributaries, WRIA 3 (Instantaneous cubic feet per second)

		RM 3.4	RM 4.2	RM 3.2	RM 4.3
Month	Day	Mundt Creek	Turner Creek	Gilligan Creek	Salmon Creek
Jan.	1-31	6.4	7.9	19.8	4.0
Feb.	1-29	6.4	5.4	19.8	4.0
Mar.	1-15	6.4	5.4	19.8	4.0
	16-31	9.4	5.4	27.7	4.0
Apr.	1-30	9.4	7.9	31.7	4.0
May	1-31	9.4	7.9	31.7	1.4
Jun.	1-30	9.4	4.9	31.7	1.4
Jul.	1-31	7.6	4.9	39.6	1.4
Aug.	1-31	7.6	4.9	39.6	1.4
Sep.	1-30	7.6	4.9	39.6	4.0
Oct.	1-31	7.6	7.9	23.8	4.0
Nov.	1-30	9.4	7.9	27.7	4.0
Dec.	1-31	9.4	7.9	27.7	4.0

(3) Instream flow hydrograph.

Figure 1

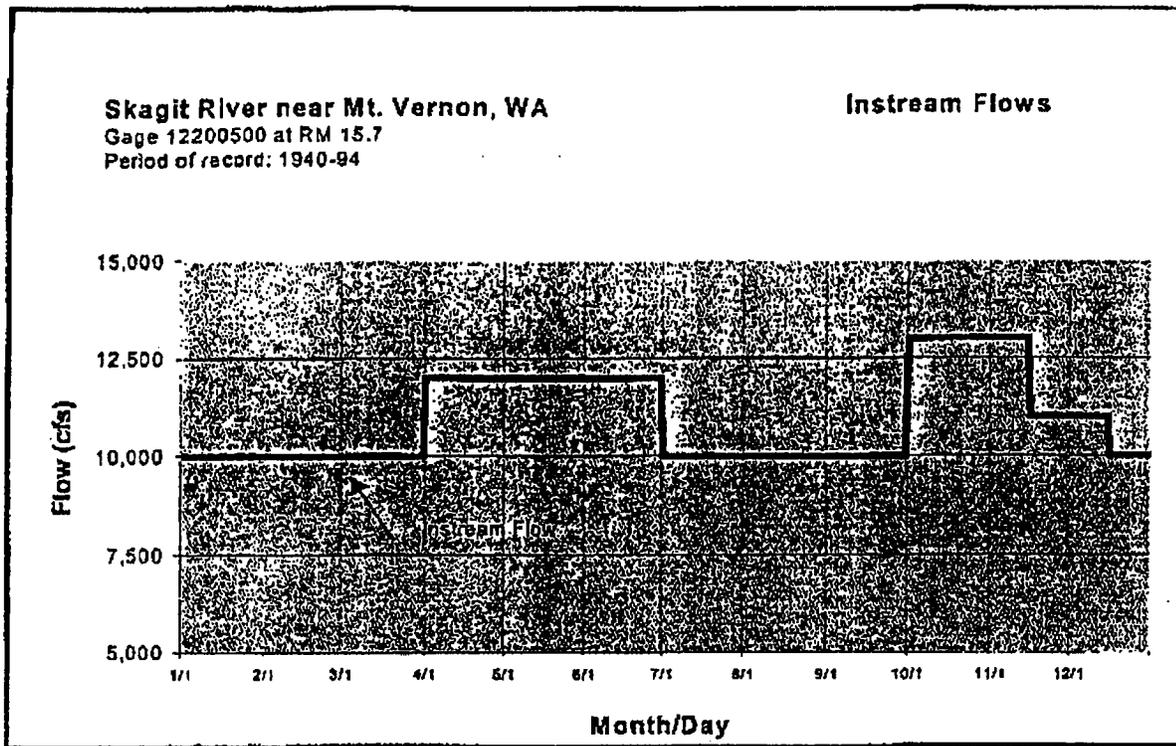


Figure 2

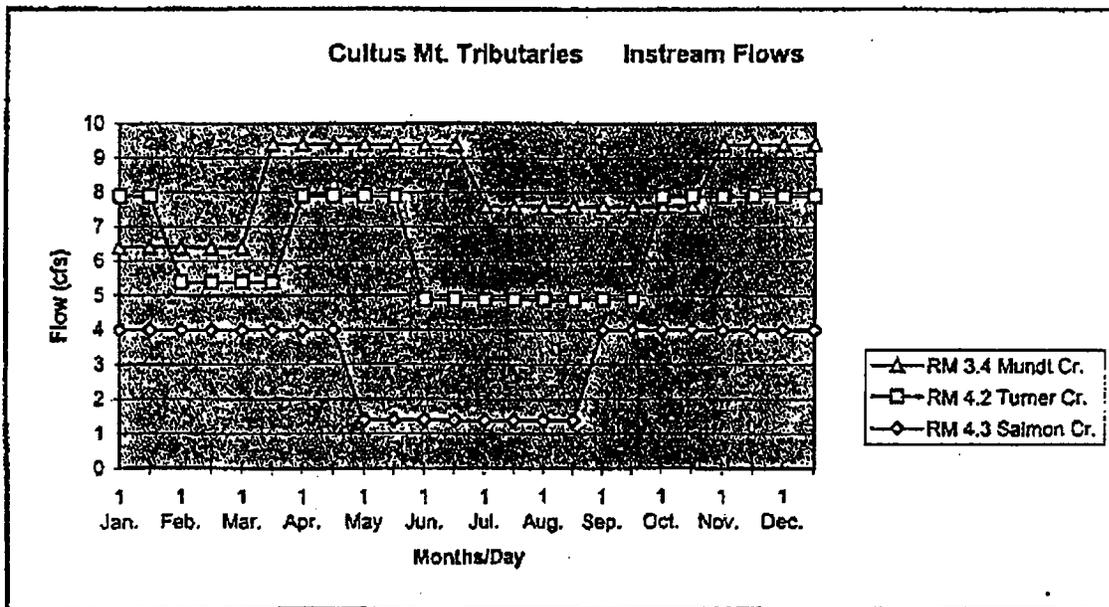
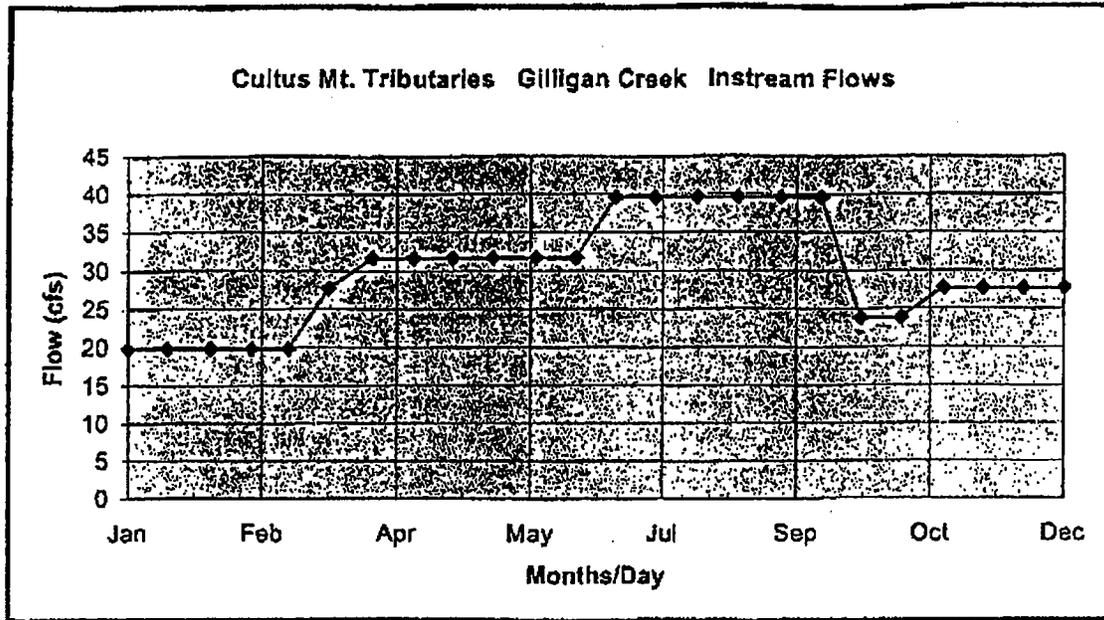


Figure 3



(4) The instream flow hydrographs, as represented in Figures 1 through 3 in WAC 173-503-040(3) shall be used for identification of instream flows.

(5) Future consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) 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 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.

(6) Future consumptive water rights issued to applications pending at the effective date of the regulation are superior in priority date but shall be conditioned on the instream flows established in WAC 173-503-040 (1) through (3). (RCW 90.03.247)

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC, 01-07-027 (Order 99-05), § 173-503-040, filed 3/14/01, effective 4/14/01.]

173-503-050
Water availability determination.

(1) The department has made a determination that two hundred cubic feet per second is available to be appropriated through ground water withdrawal or surface water diversion for further instantaneous consumptive appropriation in the Lower and Upper Skagit watershed (WRIA 3 and 4). These waters are available for appropriation, subject to existing rights, exemptions in WAC 173-503-070, and instream flows in WAC 173-503-040(2). This determination was based upon review of existing water right records and existing water use, and is consistent with the findings section (WAC 173-503-030) of this regulation.

(2) The department advises that water rights issued to appropriate these waters determined to be available by this rule will be interruptible rights.

(3) After these instantaneous diversion or withdrawal of the 200 cfs quantities identified in subsection (1) of this section have been allocated by ecology, the Lower and Upper Skagit Watershed (WRIA 3 and 4) shall be withdrawn from further consumptive appropriations. This rule may be reopened to further consumptive appropriation only if further information demonstrates that such appropriations can be made consistent with the finding section (WAC 173-503-030) and the instream flow section (WAC 173-503-040). If further information demonstrates that the amount in the availability determination set forth in subsection (1) of this section should have been less than two hundred cubic feet per second, ecology will not be bound by the two hundred cubic feet per second number when processing individual water right applications.

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC, 01-07-027 (Order 99-05), § 173-503-050, filed 3/14/01, effective 4/14/01.]

173-503-051
Future stream closures.

(1) The department determines that, based on historical and current low flows and existing water uses, water is not available for year-round consumptive

appropriation in the Skagit River basin. However, in order to provide for some limited future out-of-stream uses, the department has set aside a limited amount of water for future out-of-stream uses in the subbasin management units of the Skagit River identified in WAC 173-503-074 that can be used under certain criteria described in WAC 173-503-073. When and if the full amount of the reserved quantities are allocated and used by permitted or exempt use, those subbasins identified as subject to closure in WAC 173-503-074 shall thereby be closed without further action of the department, except for the Upper Skagit, Middle Skagit, and Lower Skagit subbasin management units, which will remain open to out-of-stream uses subject to instream flows. If subsequent water use information indicates that the basin can be reopened, the department shall notify the public and local governments of the change in the status of the basin as provided for below.

(2) The department will notify the public of effective subbasin closures and reopening of subbasins through publication of a notice in a newspaper of general circulation in each affected county in WRIA 3 and 4.

(3) Exceptions to the closures and instream flow requirements are provided in WAC 173-503-060, 173-503-073, 173-503-074 and 173-503-075.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-051, filed 5/15/06, effective 6/15/06.]

173-503-052

Future out-of-stream uses in the Upper Skagit River subbasin management unit.

In order to allow for some limited future out-of-stream uses while protecting instream resources in the Upper Skagit River subbasin management unit, the department has set aside a limited amount of water for future out-of-stream uses in the Upper Skagit subbasin management unit and important tributaries in this subbasin management unit identified in Figure 5 of WAC 173-503-120.

All appropriations in each Upper Skagit tributary subbasin identified in Figure 5 of WAC 173-503-120 are to be from ground water sources only and are cumulatively limited to a maximum average consumptive daily use of 25,851 gallons per day in each tributary basin identified in Figure 5 of WAC 173-503-120. These uses must comply with the criteria described in WAC 173-503-073 and will be debited against the Upper Skagit subbasin reservation quantity.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-052, filed 5/15/06, effective 6/15/06.]

173-503-060

Future water rights.

(1) Surface and ground water rights, including permit exempt uses under RCW 90.44.050, may be obtained that are not subject to the instream flows established in WAC 173-503-040 and closures established in WAC 173-503-051 if all statutory requirements are met and if any of the following situations apply:

(a) The proposed use is nonconsumptive, and compatible with the intent of this chapter.

(b) The water use qualifies for the reservations established in this chapter. The proposed use from the reservation must be consistent with all the conditions outlined in WAC 173-503-073, 173-503-074 and 173-503-075. The department shall deduct the water use from its record of water available from the reservations as described in WAC 173-503-073 and 173-503-075.

(c) The applicant or governmental agency elects to submit a scientifically sound mitigation plan and it is approved by the department. A mitigation plan can be submitted to mitigate for an individual withdrawal or to mitigate for multiple withdrawals in a subbasin. A mitigation plan may be approved if the proponent can demonstrate to the department's satisfaction that when the mitigation is implemented the proposed withdrawal(s) will not impair senior water rights, including instream flow rights, adversely impact instream resources, or diminish water quality. An approved mitigation plan shall include a monitoring and reporting plan, including a quality assurance/quality control plan. It shall also include conditions that the plan be implemented as long as the associated water right is used and that any water provided for mitigation purposes be prohibited from being applied to any other purpose. Except for closed basins, if monitoring of a mitigation plan shows the mitigation is not effective, departmental approval of the mitigation plan shall be suspended and the use of water under the water right shall then be subject to the instream flows until the department finds the mitigation plan is effective. In the case of a closed basin, if monitoring of a mitigation plan shows the mitigation is not effective, departmental approval of the mitigation plan shall be suspended and the water use shall cease until the department approves a new or revised mitigation plan.

(d) A proposed ground water use will not impair senior water rights or withdraw water from a legally closed basin. Based on the hydrogeology of the basin, and the location and depth where ground water withdrawals generally occur, future ground water withdrawals may capture water that would result in impacts to surface water flows and levels in the Skagit River basin. A ground water right that is not subject to the instream flows or closures may only be approved if an applicant can demonstrate, through scientifically sound studies and technical analysis, and to the satisfaction of the department, that the proposed use will not cause impairment to existing water rights, including the instream flows set in this chapter or withdraw water from a legally closed source. The department acknowledges that additional scientific investigations may identify areas where water may be used without impairing the instream flows set in this chapter. If future scientifically sound investigations sufficiently identify such areas, the department will notify the public of these findings through publication of a *Skagit River Water Supply Bulletin*, and will account for uses under the reservations in WAC 173-503-073, 173-503-074 and 173-503-075 in accordance with these findings.

(2) Before the department can approve a water right application for a new public water system under subsection (1)(b), (c), or (d) of this section, the applicant must also demonstrate that there are no other public water systems in the same proposed retail service area that can provide timely and reasonable water service as defined in WAC 173-503-025. If domestic potable water can be provided by another public water system, the department shall reject the water right application.

(3) Surface and ground water appropriations may be issued in subbasins identified in WAC 173-503-074 that are subject to the instream flows and subject to the maximum water availability determination of two hundred cubic feet per second pursuant to WAC 173-503-050. The applicant must adequately demonstrate to the satisfaction of the department that the proposed withdrawal can be managed to avoid impairment of the instream flows established in WAC 173-503-040. The project proponent must also describe how its water needs will be met when water use is curtailed. If the water

source is located in a closed subbasin, a water right can only be obtained under conditions in subsection (1)(a), (c) or (d) of this section.

(4) No appropriation to withdraw, divert or store the public surface or ground waters of the Skagit River basin that conflicts with the provisions of this chapter will hereafter be commenced, except in cases where such rights will clearly meet the standards set forth in RCW 90.54.020 (3)(a).

(5) All future surface and ground water appropriations shall be measured through installation and maintenance of appropriate measuring device(s) (water source meters), except for permit exempt uses serving a single residence. Water users required to measure water use must provide a reasonable right of inspection, allow access for the meter to be read, and report the data to the department or a local entity the department designates. The department may require additional users to measure water use, if the department determines that water supplies warrant further monitoring.

(6) Any authorization for new beneficial uses must require development on a timeline that shows reasonable progress and due diligence.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-060, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC, 01-07-027 (Order 99-05), § 173-503-060, filed 3/14/01, effective 4/14/01.]

173-503-061

Baker River project settlement agreement flows.

The department acknowledges that the project releases submitted to the Federal Energy Regulatory Commission for relicense of Puget Sound Energy's Baker River project are a necessary component to adequately mitigate for the ongoing impacts of Baker River project operations. Therefore, in order to prevent detriment to the public interest, new permits for withdrawals or diversions that would impact the portion of the Skagit River basin between Sedro Woolley up to and including the Baker River, will only be issued if the applicant can demonstrate that there will be no measurable reduction in the mitigation benefits associated with the flow release provisions associated with the Baker River relicense. However, this provision shall not apply to new appropriations that are obtained under a reservation provided for in WAC 173-503-073, 173-503-074 and 173-503-075.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-061, filed 5/15/06, effective 6/15/06.]

173-503-070

Exemptions.

(1) Nothing in this chapter shall affect existing water rights, including perfected riparian rights, federal Indian and non-Indian reserved rights, or other appropriative rights existing on the effective date of this chapter, nor shall it affect existing rights relating to the operation of any hydroelectric or water storage reservoir or related facilities.

(2) Nonconsumptive uses which are compatible with the intent of this chapter may be approved.

[Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC, 01-07-027 (Order 99-05), § 173-503-070, filed 3/14/01, effective 4/14/01.]

173-503-071

Lakes and ponds.

RCW 90.54.020 (3)(a) requires, in part, that the quality of the natural environment shall be protected, and where possible, enhanced, and lakes and ponds shall be retained substantially in their natural condition. Future withdrawals that would not be consistent with this requirement shall be denied.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-071, filed 5/15/06, effective 6/15/06.]

173-503-072

Administrative requirements.

In administering and enforcing this regulation, the department's actions shall be consistent with the provisions of chapter 90.54 RCW. Additionally, all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter (RCW 90.54.090).

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-072, filed 5/15/06, effective 6/15/06.]

173-503-073

Water reservations.

(1) The department has weighed the public interest supported by providing a limited amount of water for domestic supply, commercial/industrial supply, municipal supply, stock watering and agricultural irrigation with the potential for negative impact to instream resources. The department finds that the public interest advanced by these limited reservations clearly overrides the potential for negative impacts on instream resources. (RCW 90.54.020 (3)(a).) Critical to the department's finding that the public interest overrides the negative impacts is the limited nature of the reservations. The department does not anticipate the ability to make additional future reservations given the volume of water previously allocated in the basin for out-of-stream uses and the distressed condition of the fishery resource. Further reservations would be expected to exceed "potential" negative impacts and create actual negative impacts.

Based on this finding, the department hereby reserves specific quantities of an amount of surface and ground water, which can be allocated for specific future beneficial uses. These reservations of water are not subject to the instream flows established in WAC 173-503-040 or closures established in WAC 173-503-051. Uses of the water under the reservation are available only if all the conditions set forth in this section are fully complied with. The department reserves its authority to review an application for new water use under the reservation in light of new information that may reflect upon or alter its current findings of availability, beneficial use, impairment, and/or public interest.

(a) Agricultural irrigation reservation. A reservation of 3,564 acre-feet of water annually, is available for agricultural irrigation purposes not subject to the instream flows.

(b) Domestic, municipal, and commercial/industrial water supply reservation. A reservation of a maximum average consumptive daily use of 9,370,208 gallons per day of water is available for domestic, municipal, or commercial/industrial water supply not subject to the instream flows.

(2) Conditions for use of the reserved agricultural irrigation water are as follows:

(a) The reservation is available for both ground and surface water and is only available from the Lower, Middle or Upper Skagit River subbasin management units.

(b) The reservation shall be only for the purpose of agricultural irrigation, as defined in WAC 173-503-025.

(c) A water right for use from the reservation must be obtained from the department. The department will condition uses under the reservation to minimize the instantaneous impact of withdrawals on instream flows. Such conditions may include requiring efficient conveyance and irrigation methods or irrigation scheduling.

(d) Water use will be authorized for only the irrigation season, unless the applicant can demonstrate to the department's satisfaction a need for a continuous, year-round, irrigation demand.

(e) A water user must install and maintain a water measuring device (water source meters) in accordance with specifications provided by the department. The user or other designated local entity must report the data to the department in accordance with the permit requirements.

(f) The department will maintain an estimate of the amount of water used from the reservation based on water rights issued by the department and actual measured water use.

(g) Agricultural irrigation water rights obtained under this reservation are limited to irrigation purposes only. The purpose of use of a water right obtained under the agricultural irrigation reservation cannot be changed. In the event that the water use authorized under a water right from the reservation is no longer desired, has been abandoned, or has been relinquished, the department will credit the quantity of water previously used back to the reservation for that purpose, once the department is notified of the discontinuation.

(3) Conditions for use of the reserved domestic, municipal, and commercial/industrial water reservation are as follows:

(a) The reservation shall be only for the purpose of domestic, municipal, or commercial/industrial water use as defined in WAC 173-503-025. It is available to users exempt from the permitting process and to users requiring a water right, as outlined in WAC 173-503-060.

(b) This reserve of water shall be allocated and used consistent with WAC 173-503-074. The water source must be a ground water well if the source is located in a subbasin management unit tributary to the Skagit River. Such use of the reservation is subject to availability of water in the reservation and the conditions of use of the reservation. For water sources located in identified tributaries in the Upper Skagit subbasin management unit in Figure 5 of WAC 173-503-120, water withdrawals must meet the restrictions described in WAC 173-503-052. A surface water source can be used only if the following conditions are met:

(i) The source is located in the Upper, Middle or Lower Skagit subbasin management units, or the applicant demonstrates to the department that surface water is the only physically available source of water that can be obtained in the tributary subbasin;

(ii) The appropriation complies with the conditions of the reservation; and

(iii) The appropriation is approved by the department through a water right permit.

(c) Water use shall meet the water use efficiency standards of the uniform plumbing code as well as any applicable local or state requirements for conservation standards.

(d) All users of this reservation, except for permit exempt appropriations serving a single residence, shall install and maintain a measuring device (water source meter), in accordance with specifications provided by the department. Water users required to measure their water use must provide a reasonable right of inspection, allow the meter to be read, and report the data to the department or a designated local entity. The department may require additional users to measure their water use, if the department determines that water supplies require further monitoring.

(e) This reservation shall be administered and accounted for by the department and local governmental authorities.

(f) A new withdrawal for potable water supply under this reservation is not allowed in areas where a public water system has been established and a connection can be provided in a timely and reasonable manner. If an applicant for a building permit or subdivision approval cannot obtain water through a public water system, the applicant must present written evidence to the department that water service cannot be provided in a timely and reasonable manner by a public water supplier prior to drilling a well. This determination shall be consistent with the criteria listed in RCW 43.20.260.

(g) For appropriations under this reservation utilizing a permit-exempt ground water source, water use shall be consistent with the provisions in RCW 90.44.050.

(h) All users of this reservation, including permit exempt users, which would like to obtain the septic recharge credit must state, at the time of the appropriation of water, the type of wastewater disposal system for the property or properties that the appropriation serves. If the initial wastewater disposal system is a septic system, and the property or properties subsequently connect(s) to a sewer system, the users of the appropriation must report to the department the change in the wastewater disposal system in a timely manner.

(4) It shall be the responsibility of an applicant for a building permit or subdivision approval seeking water, or a subsequent owner using water under the reservation to comply with the conditions in WAC 173-503-073(3) and all other conditions of this chapter.

(5) The reservations are a one-time, finite resource. Once the reservations are fully allocated, they are no longer available and the subbasin management units identified as subject to closure in WAC 173-503-074 are closed, except for the Upper, Middle and Lower Skagit subbasin management units. Upon closure, new appropriations, including permit exempt wells, may be available only under the provisions in WAC 173-503-060, 173-503-081, 173-503-100 and 173-503-110. If subsequent water use information indicates that the basin can be reopened, the department shall notify the public and local governments of the change in the status of the basin as described below.

The department shall notify the appropriate county, in writing, when it determines that fifty percent, seventy-five percent, and one hundred percent of the reservation for each subbasin management unit has been allocated. The department shall also issue a public notice annually in a newspaper of general circulation for the region that shows the amount of reserved water for each subbasin management unit that has been allocated, remains unallocated, any subbasin management units that have been fully allocated and from which water is no longer available under these reservations, and any subbasin management units that are reopened.

(6) If an appropriation from a reservation is not in compliance with any condition of these reservations, the department may take action consistent with WAC 173-503-090.

(7)(a) A record of all withdrawals from the domestic, municipal, and commercial/industrial reservation shall be maintained by the department. The record will readily show both the allocated and unallocated quantities of water that are in reserved status.

(b) All uses of this reservation shall be debited against the reservation. The department will account for water use under the reservation based on actual measured water use or a standard quantity. If actual measuring data are not available, the department will deduct the authorized quantities under water right permits or certificates from the reservation. For permit exempt appropriations, the department will deduct a standard amount of 350 gallons per day for each domestic or residential service connection in a group domestic water system. The standard amount will be adjusted periodically based on reported water use to reflect the maximum average daily use before any recharge credit for those users that are required to measure and report water use. The department will deduct 5,000 gallons per day for each commercial/industrial use, unless actual measured use is available. Additionally, the department reserves the right to account for water use based on the best available information contained in well logs, water approvals issued by local jurisdictions, water rights issued by the department, public water system approvals or other documents.

(c) For water users using individual and community on-site septic systems, fifty percent of the water used will be credited to the reservations for recharge from on-site septic systems provided that the water user's point of withdrawal is not located in the service area of a sewer provider's adopted general sewer plan as defined in WAC 173-240-050(3). The septic system credit will be removed for water users of the reservation that are subsequently converted to sewer systems whose discharge is located outside of the basin of origin. If water users are subsequently converted to sewer from septic systems, total water uses under the reservation in the applicable subbasin shall remain below the maximum average consumptive daily use limits in the applicable subbasin. Actions to remain in compliance with maximum average consumptive daily use limits could include: Reducing the number of withdrawals under the appropriate subbasin reservation, reducing actual water use, providing an equal quantity of imported water to the subbasin as has been provided through septic recharge return flow allowance, implementing a department approved mitigation plan, or by connecting to water sources from outside of the subbasin.

(d) If a water user under the reservation subsequently abandons or relinquishes the withdrawal, the department will credit back to the reservation the actual amount of water used and/or debited from the reservation, upon demonstration to the department that the well or surface water source has been decommissioned through written certification.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-073, filed 5/15/06, effective 6/15/06.]

173-503-074

Establishment of subbasin management units and reservation quantities by subbasin management unit.

The department hereby establishes the following subbasin management units. The boundaries of the management units are shown on the maps in WAC 173-503-120. Table 1 shows the approximate location and maximum average consumptive daily use of reserved water that can be withdrawn for each management unit. Appropriations established after April 14, 2001, will be debited from the reserved quantities in accordance with the provisions contained in WAC 173-503-060, 173-503-073 and 173-503-150.

Subbasin Management Unit	Table 1 Location	Reservation Quantity
*Denotes basins subject to future closure under WAC 173-503-051	Approximate point where the stream meets a connecting water body	Maximum average consumptive daily use in gallons per day
Alder Creek*	NE 1/4, SW 1/4, Sec. 18, T35N, R7E (RM 41.7)	81,430
Anderson/Parker/	Sec. 26, T35N, R5E (flows into slough on south side of Skagit River)	20,034
Sorenson creeks*		
Careys Creek*	NE 1/4, SW 1/4, Sec. 14,	11,633

	T35N, R6E	
Carpenter/Fisher Creek*	NE 1/4, Sec. 30, T33N, R4E	11,633
Childs/Tank creeks*	Sec. 13, T35N, R5E (flows into Minkler Lake)	18,096
Coal Creek*	NW 1/4, SE 1/4, Sec. 21, T35N, R5E (flows into Skiyou Slough)	18,742
Cumberland Creek*	SW 1/4, SE 1/4, Sec. 14, T35N, R6E (RM 39.9)	25,851
Day Creek*	NE 1/4, Sec. 20, T35N, R6E	131,839
Gilligan Creek*	SE 1/4, SE 1/4, Sec. 27, T35N, R5E (RM 28.4)	25,851
Grandy Creek*	NE 1/4, SE 1/4, Sec. 15, T35N, R7E (RM 45.6)	147,350
Hansen Creek*	SE 1/4, Sec. 30, T35N, R5E (RM 24.2)	38,130
Jones Creek*	SE 1/4, NE 1/4, Sec. 17, T35N, R6E (RM 35.1)	67,212
Loretta Creek*	SW 1/4, Sec. 22, T35N, R6E	11,633
Mannser Creek*	SE 1/4, NE 1/4, Sec. 17, T35N, R6E	15,511
Morgan Creek*	NE 1/4, NE 1/4, Sec. 25, T35N, R5E (flows into slough on south side of Skagit River)	13,572
Muddy Creek*	SW 1/4, NW 1/4, Sec. 14, T35N, R6E (flows into Davis Slough)	28,436
Nookachamps Creek - East Fork*	Sec. 10, T34N, R4E	14,218
Nookachamps Creek - Upper*	Sec. 10, T34N, R4E	12,279
O'Toole Creek*	NW 1/4, NW 1/4, Sec. 21, T35N, R7E (RM 43.6)	23,266
Red Cabin Creek*	NW 1/4, NW 1/4, Sec. 15, T35N, R6E (flows into Jims Slough)	42,653
Salmon/Stevens creeks*	SE 1/4, SE 1/4, Sec. 28, T35N, R5E	5,170
Skagit - Lower	From the Skagit River at the east edge of Sec. 30, T35N, R5E downstream to the mouth	5,254,103
Skagit - Middle	From the Skagit River at the west edge of Sec. 29, T35N, R5E to the Skagit River at the east edge of Sec. 21, T35N, R7E	1,394,655
Skagit - Upper*	Water Resource Inventory Area 4 (Upper Skagit) excluding Grandy Creek subbasin management unit	1,938,816
Wiseman Creek*	NW 1/4, SW 1/4, Sec. 23, T35N, R5E	18,095
Total Reservation		9,370,208

*All uses in each Upper Skagit tributary subbasin identified in Figure 5 of WAC 173-503-120 are limited to a maximum average consumptive daily use of 25,851 gallons per day. These uses will be debited against the Upper Skagit tributary subbasin reservation quantity.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-074, filed 5/15/06, effective 6/15/06.]

173-503-075
Future stock watering.

(1) Consistent with RCW 90.22.240, the department retains sufficient minimum flows or levels in streams, lakes, or other public waters to provide adequate waters in such water sources to satisfy stock watering requirements for stock on riparian grazing lands. Future permit exempt stock water uses and future stock water uses requiring a water right can be obtained as outlined below.

A reservation of 324,000 gallons per day of water is reserved for new stock water uses not subject to instream flows. It is available to users exempt

from the permitting process and to users requiring a water right. Users of this reservation would be limited to a source within the Lower, Middle and Upper Skagit subbasins and must use the source only for stock watering purposes. Future permit exempt stock water users would not have to measure and report their water use, although the department encourages water withdrawal measuring. The department would measure and account for permit exempt stock water appropriations using stock inventory reports or actual measuring data, if such data exist. New stock water sources using surface water can be authorized under this reservation if authorized under an approved water right from the department. Measurement requirements for these appropriations would be outlined in the water right permit.

(2) Chapter 173-503 WAC shall be implemented consistent with RCW 90.22.040 and the department's policy that encourages direct stock water uses from streams to remove livestock from streams for the purpose of protecting water quality and stream habitat. This applies to both existing and new stock water rights.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-075, filed 5/15/06, effective 6/15/06.]

173-503-081
Future changes and transfers.

No changes or transfers to existing surface or ground water rights in the Skagit River basin shall hereafter be granted that conflict with the purposes or provisions of this chapter. Any change or transfer proposals can be approved only if there is a finding that existing rights, including instream flows hereby established, will not be injured or impaired under the provisions of RCW 90.03.380 or 90.44.100.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-081, filed 5/15/06, effective 6/15/06.]

173-503-090
Compliance and enforcement.

(1) In accordance with RCW 90.03.605, in order to obtain compliance with this chapter, the department shall prepare and make available to the public, technical and educational information regarding the scope and requirements of this chapter. This is intended to assist the public in complying with the requirements of their water rights and applicable water laws.

(2) When the department determines that a violation has occurred, it shall:

(a) First attempt to achieve voluntary compliance, except in egregious cases involving potential harm to other water rights or to the environment. An approach to achieving this is to offer information and technical assistance to the person, in writing, identifying one or more means to accomplish the person's purposes within the framework of the law.

(b) If education and technical assistance do not achieve compliance, the department shall issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess penalties under RCW 43.83B.336, 90.03.400, 90.03.410, 90.03.600, 90.44.120 and 90.44.130.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-090, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC. 01-07-027 (Order 99-05), § 173-503-090, filed 3/14/01, effective 4/14/01.]

173-503-100
Alternative sources of water.

(1) The legislature has long acknowledged that water supply and availability around the state are becoming increasingly limited, particularly during summer and fall months and dry years when demand is greatest. Growth and prosperity have significantly increased the competition for this limited resource (RCW 90.54.090 (1)(a)). This chapter provides limited exceptions for new uses in the Skagit River basin.

(2) However, there is a continuing need for ongoing and reliable sources for new water uses. The need dictates the continued development and use of alternative sources of water. Alternative sources of water of equal or better quality than the proposed source have the potential to be used, where appropriate to improve stream flows for fish, to offset impacts of withdrawals on stream flows and provide sources of water for future out-of-stream uses. Alternative sources include, but are not limited to:

- Reuse of reclaimed water;
- Artificial recharge and recovery;
- Multipurpose water storage facilities;
- Conservation and efficiency measures applied to existing uses and the transfer of saved water;
- Acquisition of existing water rights; and
- Establishment of a trust water rights program.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-100, filed 5/15/06, effective 6/15/06. Statutory Authority: Chapters 90.54 and 90.22 RCW, and chapter 173-500 WAC, 01-07-027 (Order 99-05), § 173-503-100, filed 3/14/01, effective 4/14/01.]

173-503-110

Establishment of trust water rights program.

(1) The department may establish a trust water rights program to facilitate the acquisition of existing water rights through purchases, long-term leases, donations and conserved water saved through state and federally funded conservation projects.

(2) The determination of how much water should be allocated between future out-of-stream uses and the restoration and enhancement of instream flows will be made at the time the water is acquired and deposited into the trust water rights program.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-110, filed 5/15/06, effective 6/15/06.]

173-503-116

Incorporating new hydrologic investigations and information in rule.

The Skagit River basin and estuary is a complex river system. Consequently, the department acknowledges that additional hydrologic investigations, ground and surface water modeling, and fisheries studies may enhance scientific understanding of the hydrology and ecology of the Skagit River system. If further scientific investigations produce results that indicate the findings and conditions of this chapter should be updated, the department will publish, after consultation with local and tribal governments, the scientific findings in a *Skagit River Water Resources Supply Bulletin* and will account for uses under the reservations in WAC [173-503-073](#), [173-503-074](#) and [173-503-075](#) in accordance with these findings. If necessary, the department will outline a process for updating maps described in WAC [173-503-120](#).

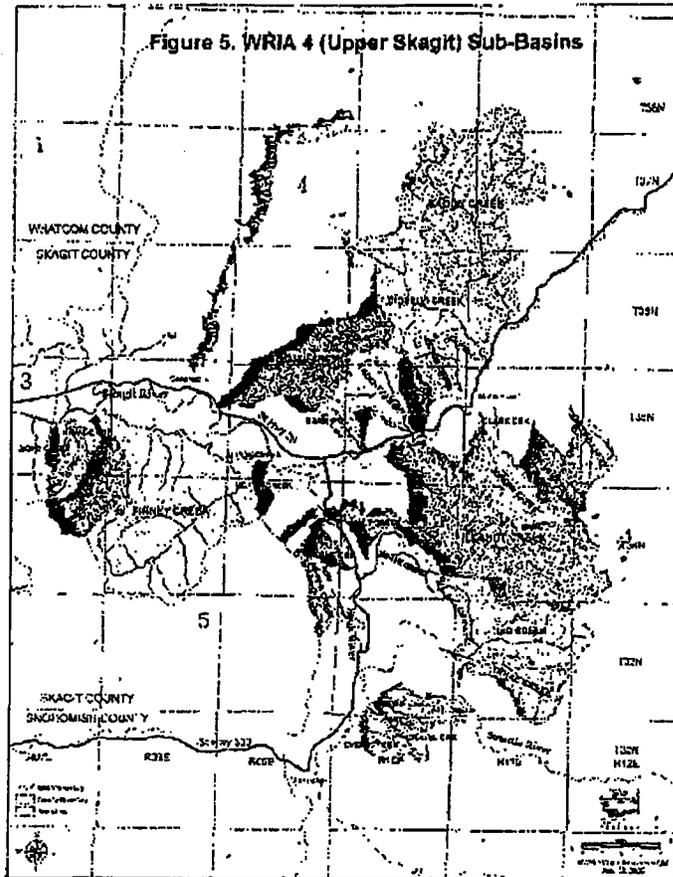
[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-116, filed 5/15/06, effective 6/15/06.]

173-503-120

Maps.

For the purposes of administering this chapter, the boundaries of the Skagit River basin and subbasin management units contained in Figures 4 and 5 are presumed to accurately reflect the basin hydrology and will be updated as information becomes available as provided under WAC [173-503-116](#).

Figure 4



[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-120, filed 5/15/06, effective 6/15/06.]

173-503-130
Appeals.

All final written decisions of the department pertaining to water right permits, regulatory orders, and related water right decisions made pursuant to this chapter can be subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-130, filed 5/15/06, effective 6/15/06.]

173-503-140
Regulation review.

Review of the rules in this chapter may be initiated by the department whenever new information is available, a change in conditions occurs, or statutory modifications are enacted that are determined by the department to require review.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW, 06-11-070 (Order 05-15), § 173-503-140, filed 5/15/06, effective 6/15/06.]

173-503-150

Water rights subject to instream flows predating the reservations.

All water rights established after this amendment shall be subject to the provisions of this chapter as now amended. Water rights that were established after April 14, 2001, the original effective date of this chapter, but that were established prior to the effective date of the reservations contained in WAC 173-503-073, and 173-503-074, may participate in the appropriate reservation provided they agree to change their priority date to that of the reservations. The department assumes that these water rights established during this period will participate under the reservation, unless the water user notifies the department otherwise in writing. For accounting purposes, these water rights, including permit exempt commercial/industrial irrigation users, will be debited against the subbasin reservations at an amount equal to the maximum average consumptive daily water use of 350 gpd, and an amount of 5,000 gpd for commercial/industrial uses, unless the department determines that other information demonstrates an alternative water use quantity should be deducted. Mitigation credits, including, but not limited to, the recharge credit described in WAC 173-503-073(7), apply to these water uses, if appropriate.

[Statutory Authority: Chapters 43.27A, 90.54, 90.22, and 90.82 RCW. 06-11-070 (Order 05-15), § 173-503-150, filed 5/15/06, effective 6/15/06.]

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ATTORNEY GENERAL
OF WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY	
	Plaintiff/Petitioner,
vs.	
	Defendant/Respondent

NO. 08-2-01403-4

NOTICE OF ASSIGNMENT/ (NTAS)
NOTICE OF STATUS CONFERENCE (NTC)

TO: THURSTON COUNTY CLERK
ATTORNEYS/LITIGANTS

PLEASE TAKE NOTICE:

1. That the above-noted case is assigned to:

The Honorable Christine A. Pomeroy

2. That the Status Conference is scheduled for 9:00 a.m. September 12, 2008.

Dated this 11th day of June, 2008.

All parties should be familiar with Local Civil Rule 16(d) which requires in part that parties or lead counsel attend and that the parties or counsel shall communicate with each other concerning the case schedule order before the status conference.

THURSTON COUNTY SUPERIOR COURT
2000 LAKERIDGE DRIVE SW
OLYMPIA WA 98502
(360) 786 - 5560

NOTICE OF ASSIGNMENT/
NOTICE OF STATUS CONFERENCE