Law Office of Thomas M. Pors

October 13, 2016

VIA FEDERAL EXPRESS

Ms. Carolina Mejia Barahona
Judicial Assistant to Judge Gary R. Tabor
Thurston County Superior Court
2000 Lakeridge Dr SW, Bldg. 2, Courtroom 204
Olympia, WA 98502

Re: Magdalena Bassett, et al. v. Washington State Department of Ecology, Case No. 14-2-02466-2;

Dear Ms. Barahona:

Enclosed please find Judge's copies of the Plaintiffs' Reply Brief and Appendices 7 though 12 and certificate of service, which has been e-filed with the Clerk. This matter is scheduled for trial on Friday October 21st at 1:30 p.m. before Judge Tabor. I previously submitted a binder with Appendices 1 through 6. Please add the new appendices to that binder and inform Judge Tabor, unless he has instructed you differently.

Also please find enclosed Judge's copies of Plaintiffs' Motion to Supplement the Record, Civil Note of Issue for that motion, and certificate of service. This motion has also been e-filed with the Clerk. Respondent CELP has previously noted a similar motion, which I anticipate would be heard by Judge Tabor at the trial on October 21.

Please call me if you have any questions regarding this filing or motion.

Yours very truly,

Thomas Pors

Encl.
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☐ EXPEDITE
☐ No Hearing Set
☒ Hearing is Set:
Date: October 21, 2016
Time: 1:30 p.m.
Judge Gary R. Tabor

SUPERIOR COURT OF STATE OF WASHINGTON
FOR THURSTON COUNTY

MAGDALENA T. BASSETT, DENMAN J. BASSETT, JUDY STIRTON, and OLYMPIC RESOURCE PROTECTION COUNCIL, Plaintiffs, vs. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Defendant.	NO. 14-2-02466-2 CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 13th day of October , 2016, I caused to be served the Plaintiffs' Reply Brief in the above-captioned matter upon the parties herein as indicated below:

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The foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13 day of October , 2016

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I. INTRODUCTION

On October 6, 2016, the Supreme Court issued yet another important decision in a water rights case that changes assumptions made during the Dungeness basin rule-making process and worsens the impacts of the Dungeness Rule (DR) on water availability for domestic purposes. *Whatcom County v. Hirst*,[1] involves the intersection between instream flow protection rules and water availability in the land use context; specifically, a county's compliance with the Growth Management Act (GMA) as it relates to protection of water resources. The Supreme Court reversed in part the Court of Appeals decision and remanded to the Growth Management Hearings Board for further proceedings consistent with its decision that Whatcom County's comprehensive plan violated GMA. The crux of the decision is that counties have an independent obligation to protect minimum instream flows (MIFs) and closed streams when making building permit and subdivision decisions under RCW 19.27.097 and 58.17.110, and cannot rely on an Ecology interpretation that an instream flow rule does not apply to permit-exempt wells proposed as water supplies.

The Bassett case is the flip side of the *Hirst* coin and must be informed by it. Given the result in *Hirst*, it is crystal clear that the consequence of protecting MIFs without adequately protecting water availability for other uses is a durable land use restriction against the use of exempt wells as "adequate water supplies" for purposes of local building and subdivision permits. This "raises the ante" to insure that MIF regulations are adopted properly to begin with, and that they adequately balance MIF protection with water supply needs of the people, because otherwise it will be too late and counties will be stuck with the rule's limitations on water availability. Ecology and CELP are expected to argue that mitigation available through the Dungeness Water Exchange (Exchange) is a more reliable solution for exempt well users in the Dungeness basin than without such mitigation, but this just begs the question: is the mitigation

[1] Wash. Supreme Court Case No. 914475-3, Slip Opinion at Plaintiffs' Appendix No. 7.

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available as a consequence of the DR adequate and certain enough, long term, to justify Ecology's "close the groundwater and mitigate" mechanism in the DR?

A long line of Supreme Court decisions now demonstrates that the effect of minimum instream flow (MIF) rules like the DR on the availability of water for rural development, even from small permit-exempt wells, is potentially catastrophic to rural property owners, builders, and property tax-dependent institutions in rural areas. Under *Hirst*, counties are now independently required by GMA to protect water resources, including MIFs and streams closed by rule, and to insure that water is "legally available" for new buildings and subdivisions. In *Hirst*, an instream flow rule establishing MIFs and closing streams was all the evidence needed that water is no longer "legally available" for other purposes. However, as Chief Justice Madsen wrote in her concurring opinion in *Hirst*, Ecology has a duty in the first instance, when adopting MIF rules, to insure that water is available for future uses, and can't shift that burden to permit applicants to prove that groundwater is available.

> When the counties and Ecology combine their planning and water resources authority, the technical resources and planning solutions offer a wide range of tools to ensure water availability. … Although the legislature has placed a burden on individual applicants to provide evidence of water, RCW 19.27.097(1), there are steps that the State and the counties must take under their statutory duties to protect water resources, ensure water availability, and engage in a comprehensive planning process. <u>The burden on permit applicants under RCW 19.27.097(1) assumes that the State and the counties have already complied with their statutory duties to ensure the availability of water. Thus, the burden to provide evidence of water falls on individual applicants only where the State and the counties have first fulfilled their statutory duties of ensuring that water is available</u>. *Hirst*, slip opinion, Madsen, C.J., concurring at 4-5. (Emphasis added.)

This sounds very much like a directive for Ecology to protect water availability for permit applicants in addition to or even prior to protecting instream flows by rule. This can be done using a maximum net benefits analysis and reservations of water that are not junior in priority to MIFs and closed streams.

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Did Ecology do a proper job of protecting water availability in the Dungeness Basin when it closed groundwater basin-wide and created a mitigation requirement that is incomplete and noncompliant with new Supreme Court mitigation standards? Ecology and CELP say the DR is good enough,but this Reply demonstrates otherwise. CELP also submitted post-rule evidence to demonstrate that the Exchange is working because building permits are being issued based on permit-exempt wells. Their evidence, however, ignored the biggest failure of the DR – the so-called "Yellow Zone" where mitigation is not available for outdoor uses.[2] CELP and Ecology also ignore elements of the Mitigation Plan that no longer comply with current legal standards for year round water-for-water mitigation of impacts to adopted MIFs. Plaintiffs have submitted rebuttal evidence that demonstrates what CELP did not disclose – that mitigation shortcomings for the Yellow Zone have had enormous consequences to properties there, and financial impacts to the Plaintiffs and hundreds of other property owners. These costs were not factored into Ecology's economic analyses of the DR. After considering this rebuttal evidence and new case law, the answer is no, Ecology did not account for the most significant costs of the DR. It created impediments to the use and development of properties in the Yellow Zone, and it has failed to answer Plaintiffs' argument that future mitigation is uncertain or unobtainable year-round to comply with the *Foster v. Ecology* mitigation standard that post-dated the adoption of this rule. Ecology's "close the basin and mitigate" approach does not work as intended, and will continue to cause considerable uncertainty and financial impact to local residents and property owners unless the rule is invalidated and/or remanded to Ecology.

The focus in this case has turned to post-rule events, including new case law (*Swinomish v. Ecology*, then *Foster v. Ecology*, and just recently the *Hirst* decision) and facts concerning the post-rule scorecard for the Exchange. This raises a new consideration in this case – whether a

[2] Rather than oppose CELP's Motion to Supplement the Record, filed on September 28th, Plaintiffs file their own Motion to Supplement the Record, with post-rule evidence demonstrating the limits and failures of the Water Exchange and Ecology's "close and mitigate" approach. CELP opened the door to such evidence, and if it is to be considered, all of the relevant evidence should be considered, not just that favoring CELP and Ecology.

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remand to Ecology is the appropriate remedy under RCW 36.05.562(2). That statute allows the court to remand this rule to Ecology, before a final disposition of the petition for review, with directions based on (1) new evidence that relates to the validity of the rule, and/or (2) that a relevant provision of law changed after the rule was adopted and the Court determines that the new provision may control the outcome. This remedy is discussed further at the end of the Reply and will be addressed in oral argument.

Substantively, Ecology and CELP defend the DR primarily by explaining the long technical history of the instream flow setting process and the status of fish and low flows in the basin. However, this case is not about the technical methodology used by Ecology or the WRIA 18 Planning Unit for setting instream flow levels, or about biology and the habitat needs for salmon. It is not even about the Dungeness River, per se, because Plaintiffs don't contest the need to protect surface waters in the basin. Ecology had a single-goal focus to protect instream flows, and did not pay enough attention to water availability for people and rural properties. They did only half a job, ignoring legislative mandates to allocate the waters of the basin according to the "maximum net benefits for the people" (MNB).

Ecology falsely claims it was "required" to adopt the DR as developed by the WRIA 18 watershed planning process, but this is smoke and mirrors. The final DR includes substantive changes and additional regulations that differ from the Elwha-Dungeness Watershed Plan (the "2005 Plan").[3] In any event, Ecology was still required to comply with statutory mandates before appropriating water for instream flows, closing groundwater to new uses of exempt wells, and making up their own laws, without authority, that ignore the property rights of rural property owners in the basin. Ecology knows that it did not follow the statutory requirements for protecting instream flows, but it uses smoke and mirrors and bait and switch tactics to convince the Court otherwise. Ecology's single-minded flow-protection focus included mistaken analyses

[3] *ECY069771*. Documents included in Ecology's binders will not be duplicated in Plaintiffs' Appendix.

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about impacts to development of rural property and led to the significantly flawed and uncertain mitigation requirements that Ecology mistakenly determined would eliminate uncertainty and provide a benefit to rural property owners. Thus Ecology failed in its "independent statutory dut[y] to ensure water availability."

CELP, in its defense of the DR, uses straw man arguments, mischaracterizing in many material respects the Plaintiffs' briefing and evidence in order to attack a different argument instead of responding to the real issues and evidence in the case. This demonstrates CELP's bias against those seeking to hold Ecology accountable for following the law when it adopts instream flow rules, especially a rule that allocates all remaining water in the basin for fish and closes an entire groundwater basin to future domestic uses. They mischaracterized this Court's ruling on summary judgment in January 2016,[4] and accuse Plaintiffs of seeking to "eviscerate" instream flow protection throughout the state, which is a diversionary smear tactic worthy of the unfortunate U.S. presidential campaign this year.

CELP, like Ecology, makes elaborate citations to the record regarding fish populations and low flows due to irrigation diversions, although they fail to acknowledge that much of the flow of the Dungeness River was already restored through agreement with the irrigators before the rule was adopted. Plaintiffs don't dispute that Ecology has authority to protect instream flows and they have no dispute with the flow setting methodology per se. Regardless of the state of fisheries in the basin, Ecology is still required to follow the law, and must comply with all conditions on the Legislature's limited delegations of authority to adopt rules like these. That is the issue in this case.

II. REBUTTAL FACTS

[4] Both Ecology and CELP misread this Court's January 8, 2016 ruling on summary judgment, contending that the court fully disposed of the 4-part test issue in denying the Plaintiff's motion for summary judgment. They omitted the Court's statement, "that does not necessarily imply that a four-part test might not be appropriate in this case. … There are issues that are still out there but I want to consider those issues in the context of the administrative record." *Appendix B to CELP's Response Brief.*

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A. The DR exceeds the scope of the 2005 Watershed Plan, thus procedural compliance with the APA was not "voluntary."

As compelling as the need for protecting instream flows and fisheries may be, it does not excuse Ecology from complying with the law, within the limits of its delegated authority. Ecology's smoke and mirrors legal arguments (e.g., "the legal requirements of the Watershed Planning Act are entirely dispositive of Petitioners' claims")[5] are addressed below, but the inconsistencies between the DR Ecology adopted and the rule recommended by the WRIA 18 Planning Unit are exposed here.

The 1994 DQ Plan (*ECY068233-68821*) did not recommend closing the groundwater in the Dungeness Basin to permit-exempt wells. *See* DQ Plan Recommendations at ECY068487-68535. The 2005 Elwha-Dungeness Watershed Plan (2005 Plan) also failed to recommend closure of the groundwater in the basin or a requirement that new users of permit-exempt wells prove or obtain mitigation as a condition of obtaining building permits. Instead, the 2005 Plan provided a series of water management recommendations for development of intergovernmental agreements between Ecology, Clallam County, and the Jamestown S'Klallam Tribe. In particular, the 2005 Plan's water quantity recommendations address protecting instream flows and limiting exempt wells where public water service can be feasibly provided. *ECY070401*. The recommendations include a strategy for making water available for future appropriation, including a "potential groundwater reserve for East WRIA 18 subbasins," but this strategy recommendation refers to those future appropriations requiring applications to Ecology for a new water right, not to permit-exempt wells. *ECY070402, footnote 2*. Further details about these recommendations in the 2005 Plan include discussion of exempt well regulation, but the plan for such regulations was limited to allowing drilling only where public water service was not feasibility available, requiring conservation as part of the building permit review process, and recommending to the Legislature that the groundwater exemption "should be reduced to a more

[5] Ecology's Response Brief at p. 19, ls. 19-20.

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realistic withdrawal volume." *ECY070409-10*. There was a plan to develop an intergovernmental agreement to manage groundwater, that was not subsequently implemented due to the Jamestown S'Klallam Tribe's abstention. *ECY070410-11; ECY069780-82*. Nowhere in the 2005 Plan does it require the closure of groundwater in the basin to new permit-exempt wells or the denial of building permits based on exempt wells unless public water supply is feasibly available as an alternative.

The challenged DR adopted by Ecology differed from the 2005 Rule in many respects, including the requirement that all new permit-exempt appropriations are subject the stream closures and minimum flows and must be mitigated as provided in the rule (WAC 173-518-070(3)); the failure to recognize inchoate permit exempt water rights, crafted as an exclusion of only those permit-exempt groundwater rights "where regular beneficial use began before the effective date of this chapter" (WAC 173-518-010(3)(b)); the adoption of very limited groundwater reservations that must be replenished with mitigation (WAC 173-518-080); and the adoption of maximum depletion amounts that trigger denial of new water uses, including permit-exempt wells (WAC 173-518-085). Because of these significant differences between the 2005 Plan and the DR, Ecology cannot claim that its adoption of this particular DR was "required" by RCW 90.82.080, or that it allows Ecology to avoid the "significant legislative rule" requirements of the APA. Again, it is not the instream flow levels that are the subject of this challenge, it is Ecology's failure to comply with statutory requirements to balance the public's need for water with the need for protection of flows in the basin's surface streams. Ecology cannot point to the DQ Plan or the 2005 Plan as requiring it to adopt a rule that fails to follow statutorily mandated procedures and water allocation policies.

B. <u>Even if a CBA and LBA were not required, Ecology chose to include them in the APA rulemaking process, and used them to "sell" the DR.</u>

Ecology is trying to have it both ways – justifying the DR cost benefit analysis (CBA), but then arguing that it was "voluntary" and not required by the APA. If it was not required,

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why did they do it? Why incur significant suspicion from local leaders after they reassigned Tryg Hoff and used a fudged economic analysis to justify the rule? Having chosen to prepare a CBA and LBA for the DR, Ecology obligated itself to do so consistently with the APA (see Argument IV.H, below). If Ecology could have adopted the rule without a CBA why didn't they? The answer is that the DR was not fully consistent with the local watershed plan adopted under Chapter 90.82 RCW, therefore the exemption at RCW 90.82.080(1)(b) from procedural compliance for "significant legislative rules" did not apply. Another reason is that these analyses were important for the people and institutions of the Dungeness basin, and for Ecology.

Even if the CBA and LBA were voluntary, having decided to include them in this important rule-making process, Ecology must now be held to the same APA standard of review for preparing them properly. In other words, Ecology can't "volunteer" a cost-benefit analysis and least burdensome alternative analysis in a formal rule-making and then argue that it can escape the consequences for failing to prepare them properly.

C. Ecology failed to conduct a maximum net benefits analysis, and the DR fails the statutory requirement to consider the public interest before closing a watershed to domestic uses.

Whether MNB is a fundamental legislative policy or a procedure (or both), neither Ecology nor CELP contend that Ecology conducted a maximum net benefits analysis or made findings consistent with the MNB language in RCW 90.54.020(2) and 90.03.005. Neither Ecology nor CELP contend that the DR satisfies the requirements of RCW 90.03.290 (four-part test) to determine whether the minimum instream flows and reservations in the DR are detrimental to the public welfare. In short, the DR adoption falls short of what the Legislature intended as a required balancing of the multiple competing fundamental water policies enumerated in the WRA. Quite simply, it failed to consider the public interest before allocating all available water in the basin to minimum instream flows and none (beyond the strict

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mitigation requirement[6]) to meet the public's need for safe and adequate supplies of drinking water.

D. New evidence demonstrates that the Water Exchange has a hole, with continued impacts to property sales and development of rural properties.

CELP argues that the DR does not bar development using permit-exempt wells and uses post-rule evidence about the Exchange to demonstrate that building permits can be obtained in the basin with permit-exempt wells.[7] However, the Exchange does not provide mitigation everywhere and Ecology was aware of this before it adopted the DR. ECY020818 is map entitled "Likely Mitigation Availability in Dungeness Watershed," and is dated March 22, 2012, while the rule was still in draft form. It demonstrates that Ecology knew mitigation would not be available uniformly in the Yellow Zone, comprising thousands of rural properties.

Ecology decided to allow in-house domestic use of water in the Yellow Zone, but not outdoor uses, yet even this restriction has caused significant impacts in what is predominantly a rural agricultural area. Who wants to build a home in a low density (one home per 2.5 or 5 acres or more) rural agricultural zone when they can't have horses, goats, or other farm animals or a garden to grow their own food? Farming without outdoor water? That is not consistent with the needs of the people or the land use plan and zoning for this area of Clallam County, and it had destroyed people's dreams, lifestyles and property values unnecessarily. *See* Appendix 8, October 11, 2016 letter from Patrick and Virginia Cates. Plaintiff Judy Stirton owns a property in Happy Valley within the Yellow Zone but could not find a buyer after the DR's "no outdoor water" mitigation restriction went into effect, even at $40,000 under the assessed value. She was successful in a tax valuation appeal and her property value was reduced by forty percent as a

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[6] As demonstrated by Plaintiffs' rebuttal evidence, Ecology's "close and mitigate" mechanism in the DR does not currently meet the needs of the public in the Yellow Area for adequate water supply. As demonstrated in Section IV.C, *infra*, the Mitigation Plan is not fully compliant with current legal standards for preventing impairment to MIFs and closed streams.

[7] Rather than objecting to CELP's Motion to Supplement the Record and post-rule evidence, Plaintiffs submit their own rebuttal evidence on the theory that it is better to consider all the facts than to decide this case in a vacuum. Post-rule events both legal and factual have become very relevant to the validity of the DR.

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result of the DR. She did a survey of Clallam County building permitsissued over the last four years and her declaration demonstrates that of 173 building permits issued by the county, only five, in four years, were for buildings in the Yellow Zone using permit-exempt wells and indoor-only water. *Declaration of Judy Stirton, Plaintiffs' Appendix 9.* This markedly contrasts with the email offered by CELP relating to the total number of mitigation certificates issued basin-wide in the first three years after the DR. CELP's evidence avoided disclosing the distinction between the Green Zone, which allows outdoor water, and the Yellow Zone, which does not. Based on Judy Stirton's declaration, there is an obvious difference and a major problem providing mitigation in the Yellow Zone, none of which was analyzed in the CBA or LBA for the DR.

Greg McCarry, a director of Plaintiff Olympic Resource Protection Council and a professional builder and former Realtor, researched property sales in the DR area for this year, using the local multiple listing service, and his declaration demonstrates a clear preference of buyers for property in the Green Zone, where water is available for both indoor and outdoor use, over property in the Yellow Zone. Only seven of sixty-eight buyers were willing to buy properties in the Yellow Zone this year, three of which were bank foreclosures and only two of which require a permit-exempt well for water supply. *Declaration of Greg McCarry, Plaintiffs' Appendix 10.*

Plaintiffs Magdalena and Denman Bassett own a 2.5-acre property in Happy Valley, also in the Yellow Zone, with a small lavender farm and shed but no home. It is surrounded by similar properties, several of them with grandfathered water usage for grazing and watering sheep, horses, or llamas. They listed their property for sale but two contracts were rescinded after the buyers discovered the "no outdoor water" rule. Dropping their price did not help. They cannot sell it because nobody wants to buy a rural agricultural property that has no water available for outdoor usage. *Declaration of Magdalena Basset, Plaintiffs' Appendix 11.* The no outdoor water rule makes the DR inconsistent with Clallam County zoning for this property,

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which is NC, allowing multiple land uses and other activities that require outdoor water usage, including agriculture and commercial horse facility. *Id*.

A far more sensible approach to mitigating impacts from future groundwater uses would have been what the 2005 Plan recommended -- develop groundwater resource management plans in concert with local government that could mitigate basin-wide for the future impacts of these sparse and manageable permit-exempt rural groundwater uses, instead of putting the burden on individual permit applicants. Ecology's own analysis found less than 1 cfs of impact basin-wide from all future permit-exempt groundwater withdrawals in the basin, perhaps as low as 0.3 cfs. *ECY018885, ECY048408, ECY023346*. Instead, Ecology placed a near-impossible burden on rural property owners like Magdalena and Denman Bassett and Judy Stirton, to demonstrate that such limited groundwater uses would have "no effect", not even a de minimus effect, on minimum flows and closed streams adopted in the DR.[8] To add insult to injury, Ecology's CBA gave no value to the loss of water availability for rural lands and avoided meaningful public interest evaluation of those impacts on people and property.

After *Hirst* and *Foster*, the question remains whether mitigation is adequate to make groundwater "legally available" in the Yellow Zone, a significant legal uncertainty now that the County has an independent duty to determine legal availability of water and to protect water resources including minimum flows. It must be noted that the Supreme Court in *Hirst* disregarded Ecology's amicus brief interpreting the Nooksack River instream flow rule as not applying to permit-exempt wells. Who can guarantee to future building permit applicants in the Yellow Zone that county-issued building permits won't be challenged for violating the County's duty to independently determine legal adequacy of mitigation provided by the Exchange? If the mitigation isn't adequate for outdoor uses, how can one prove that the Mitigation Plan is legally

[8] For a discussion of the enormous burden of proving a negative, that even tiny groundwater withdrawals would not impair instream flows, see *Hirst*, slip opinion dissent by Justice Stephens at 18-21.

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adequate for indoor uses of groundwater? Certainly Ecology cannot provide this guarantee after *Hirst*, which is a material change to the assumptions made by Ecology when it adopted the DR.

E. <u>The Dungeness Rule is arbitrary and capricious.</u>

Ecology offered no evidence, only argument, as to whether the DR is arbitrary and capricious. CELP argues that the Plaintiffs' reference to the Skagit County Assessor's devaluation of properties due to lack of water availability is irrelevant, but the issues in the Skagit were brought to Ecology's attention during the DR rule-making process, as evidence of problems to come if Ecology closed the groundwater to permit-exempt wells.[9] Appendix 12 is an official announcement by the Skagit County Assessor to devalue rural properties that could not obtain building permits based on exempt wells due to the operation of the Skagit Rule.[10] The Skagit Assessors' decision to devalue 785 parcels by as much as 90% of their previously assessed value was based on the lack of legal water availability due to the operation of the 2001 Skagit Basin Instream Flow Rule, which was reinstated in 2013 after the Supreme rejected the 2006 amended Skagit Rule in the *Swinomish v. Ecology* decision. Similar devaluations are now happening in the Dungeness Basin, as evidenced by Judy Stirton's declaration testimony, which represents just the tip of the iceberg.

CELP's post-rule evidence regarding the issuance of mitigation certificates from the Exchange is presumably offered in response to Plaintiffs' arbitrary and capricious claim, but Plaintiffs' rebuttal testimony shows that the REALTORs' prediction has come true. The current water availability hole in the Yellow Zone, and the lack of certainty regarding future mitigation availability after *Foster v. Ecology* and *Hirst*, demonstrate, in addition to other evidence offered in Plaintiffs' Opening Brief, that the DR is arbitrary and capricious.

III. STANDARD OF REVIEW

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[9] REALTORs comment letter, *ECY062221, at 622227-30. See* Opening Brief at pp. 14-16.

[10] Plaintiffs intended to include this document in Appendix 2 to their Opening Brief, but it was unintentionally omitted. It is now offered as rebuttal evidence in Plaintiffs' Motion to Supplement the Record.

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A. Review of Administrative Rules under APA

The standard of review for administrative rules is established at RCW 34.05.570(2)(c) as detailed in Plaintiffs' Opening Brief at 16-17. RCW 34.05.570(2)(c) provides that "the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

Ecology's Response Brief attempts to alter the standard of review of the Plaintiffs' rule-making procedural claim relating to the CBA, from a simple burden of demonstrating "failure to comply with statutory rule-making procedures" to the "willful and unreasoning" standard that applies only to arbitrary and capricious claims. *See* Ecology Response Brief at 35:4-6. It doesn't work that way. Ecology cited to *Wash. Indep. Tel. Ass'n v. Wash. Util. & Trans. Comm.*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003), but they misread that case. It did not determine that the arbitrary and capricious standard applies to rule-making procedural requirements like a CBA, it merely defined the standard for determining whether a rule itself (substantively) is arbitrary and capricious. In fact, other claims in the case based on WUTC's statutory authority were decided by a different standard, whether the WUTC exceeded its statutory authority.

IV. ARGUMENT AND AUTHORITY

A. The Watershed Planning Act (ch. 90.82 RCW) does not require or allow Ecology to ignore other statutory requirements for adopting minimum instream flows or for closing streams and groundwater.

Ecology argues that is was "required" to adopt the DR by RCW 90.82.080, because the instream flow levels were adopted in a watershed plan. As set forth in the introduction to this Reply, this dispute is not about the particular flow levels established in the DR or the methodology for determining them. Plaintiffs' challenge the APA rule-making procedures used by Ecology, and its failure to follow statutory mandates for adopting minimum flows as water rights, including the MNB mandate and four-part test. These were not responsibilities of the

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WRIA 18 planning unit when it recommended flows in the 2005 Plan, and it is absurd for Ecology to argue that its own statutory responsibilities are excused by an entity that lacks authority to adopt rules and did not carry out the same tasks in any event. Nothing in chapter 90.82 RCW authorizes Ecology to ignore any requirements in the Water Resources Act (WRA) or Water Code, and in any event, the DR adopted by Ecology included elements not present in the 2005 Plan.

The Court should also note that property owners and associations of farmers, realtors, and builders do not have one of the statutory vetoes to adoption of minimum instream flows by watershed planning units – those are limited to governmental entities and participating tribes.[11] Therefore, Ecology's subsequent compliance with the MNB, four-part test, and APA procedural requirements are particularly important to Plaintiffs.

B. <u>Ecology's and CELP's arguments against MNB and the four-part test fail.</u>

1. Ecology's core argument, that it can't protect flows if it has to do MNB or four-part test, is circular logic and assumes the result.

Ecology's core argument against both the four-part test and MNB is hopelessly circular and presumes the result they are looking for. On page 21 of Ecology's Response Brief, they argue:

> "Under [90.22 and 90.54.020(3)(a)], when Ecology establishes flows by rule it does not rely on a "four-part-test analysis" because, as explained below, application of that analysis, would not and could not satisfy the statutory purposes of RCW 90.22 and RCW 90.54. Ecology also does not engage in a maximum net benefits analysis when it sets flows as it would simply result in frustrating the very purpose of the Rule to protect and preserve aquatic values. Instead, when Ecology sets flows for rivers, it relies on the well-established IFIM/PHABSIM methodologies, supra, to answer the scientific question of what flows are minimally required to preserve and protect the listed statutory purposes in RCW 90.22 and RCW 90.54."

[11] "Approval is achieved if all government members and tribes that have been invited and accepted on the planning unit present for a recorded vote unanimously vote to support the proposed minimum instream flows, and all nongovernmental members of the planning unit present for the recorded vote, by a majority, vote to support the proposed minimum instream flows." RCW 90.82.080(1)(a)(ii).

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In other words, "we don't follow the law because it gets in the way of what we want to do – protect instream flows."

Ecology has failed to demonstrate that completing a MNB analysis for the DR would necessarily result in less protection of minimum flows, although its avoidance of the procedure suggests this is its belief. The MNB mandate doesn't limit Ecology's ability to protect instream flows, it simply requires Ecology to balance the peoples' interests in water for both instream and out-of-stream uses. It is extraordinarily presumptive for Ecology to assume that determining the peoples' interest in the peoples' water resources would frustrate the government's purposes. The government serves the people, not the other way around. Ecology needs to engage in a meaningful and reviewable process to determine MNB, instead of rejecting a statutory mandate simply because they assume it would result in less protection of instream flows. This is precisely the purpose of MNB, to serve as a check on Ecology's actions that might undermine part of the public interest by erring too much in the other direction, such as by failing to adequately consider the availability of water when allocating all the peoples' water to instream flow protection. In terms of authority, Ecology is simply the designated manager of the people's water, subject to the Legislature's directive to create a balance among the fundamental water allocation policies of RCW 90.54.020. Allowing Ecology to avoid these directives renders whole sections of the WRA and Water Code superfluous, and leaves the public vulnerable to water availability problems they cannot resolve on their own.

In *Hirst*, the Supreme Court reaffirmed several canons of statutory interpretation that are applicable to the MNB mandate and 4-part test in this case.

> "Statutes must be interpreted and construed so that all the language is given effect, with no portion rendered meaningless of superfluous." *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010); *see also Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) ('To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.").

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Hirst, slip opinion, at 29. The majority opinion then stated, "The GMA provisions would be superfluous if the County's only obligation was to defer to Ecology's water regulations." Id. Applying the same canons and logic, the MNB provisions in RCW 90.54.020(3) and 90.03.005 and the fundamental policy protecting adequate water supplies at RCW 90.54.020(5) would be superfluous if Ecology's only obligation is to allocate water to instream flows.

Similarly, Ecology states that it is a "certainty" that they can't satisfy the legislative intent to protect instream flows if they have to apply the four-part test. *Ecology Response Brief at p. 24, ls 4-6*. Have they tried? There is no evidence that they have done so, but it is ironic that they object so strongly to having to go through the same process that they administer statewide to all other applicants for a water right permit.

Ecology has essentially admitted that they cherry pick the statutes for authority to do what they want, then disregard other statutes that are inconsistent with the result they want. It's that kind of statutory interpretation by Ecology that the Supreme Court rejected in *Swinomish* and *Foster*. Ecology wants to protect flows for environmental reasons, but it is beyond Ecology's authority to repeal sections of the WRA or the Water Code, because they are not a legislature. Similarly, they cannot decide to implement or prefer only one of the Legislature's directives if that results in an inability to accomplish the others, such as protection of adequate water supplies. The logical answer to the dilemma of implementing competing fundamental policy directives is to use the one fundamental legislative policy that is designed to balance the public's interest among all the other fundamentals, MNB.

Consider the end result of Ecology's result-oriented interpretation allowing it to protect instream flows first without a MNB finding or reviewable decision relating to the adequacy of domestic water availability. Add to that Ecology's paying lip service to water availability by patching together a limited OCPI-based reservation of water and a mitigation program to appease most of the people in the short term. The result is what happened in the Skagit basin after the Supreme Court's rejection of Ecology's OCPI-based reservations: building moratoria, property

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devaluations, and no feasible mitigation answer for rural landowners after three years of study.[12] It's quite possible none of this would have happened if Ecology performed a MNB analysis before adopting the Skagit rule. Because it didn't, the lack of water avaialability in the Skagit has resulted in building moratoria and cases like *Fox v. Skagit County*, This is preventable in the Dungeness Basin, but only if the Court invalidates the DR and remands to Ecology to do it over with a proper MNB analysis that considers current law relating to reservations for future domestic uses, mitigation standards for impacts to MIFs and closed streams, the existence of inchoate permit-exempt groundwater rights and relation-back priority dates, and a correct economic analysis of the costs and benefits of the rule.

By analogy, an applicant for a water right doesn't get a permit under the four-part test merely by demonstrating the <u>need</u> for water. He has to demonstrate that other rights won't be impaired, that water is available, and that it won't be detrimental to the public interest. Ecology wants to create new MIFs water rights, and to close the groundwater of the basin, solely based on the biological <u>need</u> for water in the streams. It doesn't want to consider the public interest or whether these MIFs would foreclose future domestic uses of the public's groundwater. But Ecology is not only establishing a flow target for the Dungeness River and managing water resources to attempt to achieve that target. Under WAC 173-518-040(3) it is establishing minimum flows as water rights with priority dates that "will be protected from impairment by any new water rights commenced after the effective date of this chapter and by future water right changes and transfers." It is because Ecology wants to protect flows by creating senior water rights, instead of using less draconian methods like cooperative agreements and water right purchases, that the four-part test is be required. It is self-serving and illogical for Ecology to argue that neither MNB nor a four-part are required when Ecology creates water rights that

[12] Appendix 12. *Fox v. Skagit County*, 193 Wn.App. 254, 372 P.2d 784 (2016), is a testament to this foreseeable disaster. Its facts and conclusions demonstrate the inability of a rural property owner to obtain a building permit in the Skagit basin after *Swinomish v. Ecology* wiped out the reservations for domestic uses from exempt wells.

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exclude future domestic uses, and with greater impacts than they have disclosed. *See Argument Section IV.C, infra,* regarding post-rule legal changes that increase the impact of MIFs in the DR and undermine Ecology's half-hearted mitigation plan.

2. It matters how instream flows are established.

It matters how minimum instream flows are established because, like reservations, they become permanent water rights that impact subsequent uses of water in the basin, including permit-exempt uses of groundwater. Contrary to Ecology's briefing, the Supreme Court in *Swinomish* did care about how reservations are established in an instream flow rule, and held that the four-part test, not OCPI, applied. Plaintiffs provided a simple statutory interpretation argument that the same requirement applies to minimum flows adopted by rule. *See* Plaintiffs' Opening Brief at pp. 30-31. Ecology can't have it both ways. It could avoid MNB and four-part test by protecting instream flows in a manner that does not amount to creating permanent water rights, or it can create MIF water rights by following the statutory requirements, including MNB and the four-part test. If Ecology doesn't want to balance the conflicting interests involved, it must choose to protect flows in another manner, such as it did in years past in the Dungeness basin when it brokered agreements with irrigators and restored flows to the river by investing money rather than regulating property rights. *See ECY062224-26*.

3. MIFs are, by definition, an "allocation" of water.

In order to avoid the MNB directive, Ecology bizarrely contends that establishing minimum flow water rights with priority dates and closing a basin to new appropriations of water is not an "allocation of water." *Ecology Response Brief at 25, ls, 9-12 and 26, ls. 15-24.*[13] This simply defies common sense.

[13] Ecology yet again denies the true nature of minimum flow water rights by claiming that an MIF is just a scientifically recommended number needed to satisfy other statutory obligations.

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The plain meaning of the MNB directive is a requirement for a balancing test between instream and out-of-stream uses when Ecology chooses between competing uses of water. The legislative intent is clear that this balancing test be used when waters of the state are "allocated." This is demonstrated by the legislature's inclusion of the MNB directive in both the WRA and the Water Code at RCW 90.54.020(2) and 90.03.005, respectively. Merriam-Webster defines "allocate" and "allocation" as "to apportion for a specific purpose or to particular persons or things" and "appropriate" as "to set apart for or assign to a particular purpose or use."[14] The plain meanings of "allocation" and "appropriation" are roughly equivalent for purposes of determining the legislature's intent in this regard. If anything, the common usage of "appropriation" is more limited than the common usage of "allocation," so that if Ecology "appropriated" water for a MIF, which it admits, it has also "allocated" water for instream purposes. Therefore, Ecology is required to perform a MNB analysis whenever it adopts a MIF by rule. However, that is not what Ecology did when adopting the DR.

Next, Ecology claims it would lead to an absurd result if MNB was required every time Ecology allocates water, because every water right it has issued under RCW 90.03.290 without a MNB analysis would be invalid. That is a smoke screen of considerable dubiousness, because this case does not challenge the validity of any other water right, nor would this be the forum to do so, and the 30-day statute of limitations would bar such actions in any case.[15] Ecology is just deflecting in defense of its own failure to follow statutory procedures.

4. Is MNB a policy, a procedure, or both? Does it make a difference?

Ecology next argues that it can ignore the Legislature's fundamental water policies, including MNB, simply because they aren't "procedural." Ecology's Response Brief at 25-27. This is patently absurd and disrespectful to the Legislature's conditional delegation of authorities

[14] http://www.merriam-webster.com/dictionary/allocate and http://www.merriam-webster.com/dictionary/appropriate. Copies attached as Appendix 13

[15] Exclusive jurisdiction for water right permit appeals is before the Pollution Control Hearings Board. RCW 43.21B.110. Actions brought more than 30 days following the decision are barred. RCW 43.21B.230.

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to Ecology. It is like saying that they don't need to do what the Legislature mandated because the Legislature didn't specify how it was to be done, which frankly is juvenile. It is not, however, a stretch of the imagination to find a process for making MNB determinations. Ecology's own administrative procedures specify how they can be done, they simply "don't do them" when adopting minimum instream flow rules. *See* POL-2025, "Interpretive Statement on When to Perform a Maximum Net Benefits Analysis," *ECY002959*. POL-2025 clearly regards MNB as an "analysis" or procedure that will be performed during rule-making processes, just not during instream flow rule-makings. This completely contradicts Ecology's arguments that MNB is not a procedure and that it can't be implemented while adopting a rule that allocates water.

5. Chapter 90.22 is not dispositive of Plaintiffs' legal issues.

Ecology complains that Petitioners' "scarcely discuss RCW 90.22," and claim 90.22 as their source of authority to adopt instream flows, but Ecology never explains how chapter 90.22 overrides the MNB requirement or 4-part test. Chapter 90.22 is also the older and more general statute in the statutory scheme, whereas the MNB directives in the WRA and Water Code are more detailed and newer, which gives them preference when interpreting statutes. Where two statutes dealing with the same subject matter are in apparent conflict, established rules of statutory construction require us to give preference to the more specific statute and to the later adopted statute. *Etco, Inc. v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 306, 831 P.2d 1133 (Wash. Ct. App. 1992).

6. CELP's arguments about MNB don't support Ecology's decision not do a MNB analysis.

CELP argues that enough water has already been appropriated in the Dungeness basin, but nothing in RCW 90.54.020(3) or 90.03.005 suggest that would excuse Ecology from the duty to determine MNB before appropriating all remaining water in the basin for instream flow purposes. If the result achieved by the DR were truly the maximum benefit for the people in light of existing appropriations in the basin, then a MNB analysis would show that. There is no

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reason Ecology shouldn't consider existing appropriations in an MNB analysis, but there is every reason to require the analysis as a check on Ecology's authority and its predisposition to protect MIFs first and consider the consequences later.

C. **Post-Rule Legal Changes Impact the Validity of the Dungeness Rule**

As shown by the *Hirst* case, *Postema*, and *Foster*, once MIFs are established, all groundwater in the basin becomes subservient to meeting those flows and water is no longer available for uninterruptible requirements like domestic supply. In *Fox v. Skagit County*, the Court of Appeals concluded that permit-exempt water rights established after the effective date of a MIF rule were subject to, or junior in priority date, to the minimum flow. 193 Wn. App. at 265 ("*The statutory scheme dictates that the Foxes' right to withdraw water from their permit-exempt well is subject to the superior water rights protected by the instream flow rule*.") This leads to the conclusion that junior permit-exempt withdrawals are interruptible, and the court held that interruptible water rights were not adequate sources of water supply for building permits under RCW 19.27.097. 193 Wn. App. at 270.

Hirst removes any doubt whether counties are obligated to protect MIFs when considering building permit applications or subdivisions. While nominally a decision based on GMA, it interprets several of the same statutes at issue in this case and addresses the subject of "legal water availability" from permit-exempt wells following adoption of a MIF rule. The pertinent ruling for purposes of this case is the Supreme Court's affirming of the Growth Management Hearings Board's decision that Whatcom County violated GMA by allowing building permits to issue based on permit-exempt wells without determining whether water was "legally available," in relation to an adopted MIF for the Nooksack River that was not consistently met. *Hirst*, Slip Opinion, *passim.* The analysis in *Hirst* assumes, without deciding, that a new permit-exempt use of water would be junior to the Nooksack Rule adopted in 1985.

The *Hirst* case describes the Court's "minimum flow jurisprudence" including *Postema*, *Swinomish*, and *Fox*.

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> In *Postema*, we held that a minimum flow, once established by Ecology, is an existing water right that may not be impaired by subsequent groundwater withdrawals. 142 Wn.2d at 81. …
> [T]he rule in Washington is that groundwater appropriations cannot impede minimum flows. *Swinomish Indian Tribal Cmty*., 178 Wn.2d at 598. It would be incongruous to limit Postema to the holding that Ecology must consider the effect of groundwater appropriations on minimum flows when issuing permits but that the County does not need to consider these same impacts when issuing building permits. The County emphasizes that Ecology expressly does not engage in the usual review of a permit application when considering permit-exempt wells and exempt-use applications are not reviewed for impairment of existing rights. This argument misses the mark-the GMA explicitly assigns that task to local governments. *See* RCW 19.29.097(1); RCW 58.17.110. *Slip Opinion at 31-32.* Because the right to use a permit-exempt well is subject to the prior appropriation doctrine, [Fox v. Skagit County] held that a determination of water availability for purposes of issuing a building permit requires that the county consider whether the development would impair senior water rights, including rights established by an instream flow rule. Slip Opinion at 33, citing *Fox*, 193 Wn. App. at 269-70.

Hirst and *Fox* boil down to this in the context of Plaintiffs' challenge to the DR: water was legally available for new permit exempt uses until Ecology adopted MIFs and stream closures in the Dungeness Basin, and applied the DR to new permit exempt wells. WAC 173-518-010(3). Neither Ecology nor CELP dispute that Clallam County was issuing building permits based on exempt wells before the effective date of the DR. Since adoption of the DR, the County must require evidence of "legal water availability" before issuing a building permit, which can include a recorded mitigation certificate from the Exchange that will allow a permit-exempt well for uses and within limits specified in the certificate. *Appendix A to CELP's Response Brief; ECY071273-4*. Thus, the ability to develop land in the Dungeness Basin, outside the service area of a public water system with adequate water rights, hinges on obtaining a legally adequate mitigation certificate for the planned use. As described above and Plaintiffs' rebuttal evidence, Appendices 8-12, mitigation certificates that are currently available do not allow outdoor uses of water in the Yellow Zone, a restriction that significantly affects the

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marketability of property and renders it unusable for agricultural purposes consistent with zoning.

The effect of *Foster v. Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015) must also be considered regarding the future availability of mitigation for the Exchange; because there is no certainty that mitigation approved by Ecology for the Exchange before *Foster* (the current source of mitigation certificates) is legally adequate, will last indefinitely, or that it could again be approved under the extraordinarily strict *Foster* standard for mitigation. In *Foster*, the Supreme Court rejected a "gold-plated" regional mitigation plan approved by Ecology and the PCHB for the City of Yelm's new groundwater permit, on two bases: (1) that the mitigation was adopted using OCPI as authority, which could only be used to authorize temporary or seasonal uses of water, and (2) that it included some "out-of-kind" habitat mitigation designed to offset small effects to closed streams during the non-irrigation season, for which there was no available water-for-water mitigation. 184 Wn.2d at 477 ("nor can a mitigation plan "mitigate" by way of ecological benefit the legal injury to a senior water right.") This precedent now applies to the mitigation of potential effects on adopted MIFs and closed streams throughout the state, including MIFs and closed streams adopted by Ecology in the DR. What this means is that the mitigation will be held to a standard of 100% water for water replacement, year round, in all locations where new uses of groundwater could potentially impair, in any way, stream flows protected by the DR. It is likely that no year-round mitigation exists in the form of water rights because that would mean municipal or domestic water rights and, to be used as mitigation, other homes or businesses would be cut off from water.

The Dungeness Mitigation Plan ("Mitigation Plan") approved by Ecology pursuant to WAC 173-518-075 (*ECY 071278-91*) does not include any certainty of acquiring "year-round water for water everywhere" mitigation because the *Foster* standard did not exist when the DR was adopted and Ecology did not anticipate the *Foster* decision or the need for "year-round water for water everywhere" mitigation when it adopted the DR. In fact, the Mitigation Plan was

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approved a mere sixteen days after its submittal, with no specific water rights identified as having been acquired as mitigation for impacts to streamflow. Thus, it relies on prospectively-acquired mitigation.

The Mitigation Strategy document cited by Ecology, ECY002785-2829, which is the basis for the Mitigation Plan, demonstrates some disconnect with the later *Foster* decision. *"The Dungeness Rule also provides for the possibility of out-of-kind mitigation- i.e. mitigation actions that address potential water right/instream flow impairment through means other than mitigation water."* ECY002793. *"[I]n-kind mitigation will be used to offset impacts during the critical period for new withdrawals. However, during the non-critical period, mitigation will be achieved partially through out-of-kind habitat mitigation in the small streams."* ECY071289 (emphasis added). Thus, the Mitigation Plan is focused on partial year mitigation during a fish-critical period, rather than the year-round avoidance of "legal injury" to stream flow that is, for better or worse, the law of the land after *Foster*.[16] This is a significant concern of Plaintiffs, that future permit applicants and Clallam County won't be able to rely on the Exchange as a source of "legal water availability" for permit-exempt wells because it doesn't meet the legal standards for mitigation that came into effect after the DR was adopted and the Mitigation Plan approved by Ecology. As C.J. Madsen wrote in her concurring opinion in *Hirst*:

> The burden on permit applicants under RCW 19.27.097(1) assumes that the State and the counties have already complied with their statutory duties to ensure the availability of water. … [I]t is the burden of the State and local governments, independently and in cooperation, to determine water availability in the first instance. This is not a burden to be shifted onto individual permit applicants. *Hirst*, Slip Opinion of Madsen, C.J., at 5-6.

D. Mitigation Holes Affecting Groundwater Availability Also Affect the Validity of the DR

[16] The Mitigation Plan admits that impacts from some wells may be attenuated and distributed across the full year, but nevertheless categorized impacts into a "Critical Period" and "Non-Critical Period" for purposes of determining mitigation demand. *ECY071286-87*. This may be smart from a biological resource management perspective, but it is not consistent with *Foster*.

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Rather than object to CELP's post-record evidence relating to the Exchange, Plaintiffs accept CELP's open door and submit their own post-record evidence regarding the Yellow Zone, a giant hole in the Exchange. This evidence, described *supra*, demonstrates that mitigation availability is incomplete and remains uncertain for current and future users of the groundwater exemption. It is odd that CELP's response argued that the operation of the Exchange is outside the scope of this rule challenge, because it submitted its own evidence regarding operation of the Exchange to support its argument that the DR didn't really close groundwater to permit-exempt wells. The real issue is whether the legal and factual landscape changed so that Ecology's assumptions in adopting the DR are no longer valid. If so, the proper remedy is remand, as discussed further below.

The DR and the Mitigation Plan assumed that rural property owners would be able to obtain building permits after adoption of the MIFs and closed streams, because of Ecology's OCPI reservations (WAC 173-518-080), maximum depletion amounts (WAC 173-518-085) and mitigation plan (173-518-075), which CELP described as "overdraft protection" for future permit-exempt wells. Ecology's assumptions proved to be legally wrong, after *Swinomish*, *Foster*, *Fox*, and *Hirst*, and factually wrong in regard to the Yellow Zone. The DR doesn't work as intended because changes in the law since it was adopted make the Exchange unreliable and incomplete for rural property owners. In turn, this points to mistakes in the calculation of costs and benefits of the rule and to the rule's invalidity, procedurally and substantively.

E. Ecology and CELP Get the Relation-Back Doctrine Wrong – Which Skewed the CBA, the LBA, and Unfairly Impacts Exempt-Well Users

Another separate legal failure of the DR is its failure to recognize relation-back priority dates for exempt-wells, which exceeds Ecology's statutory authority, leads to critical mistakes in CBA and LBA, and is a primary factor in the analysis that the rule is arbitrary and capricious. Ecology's CBA considered that these rights held no value until water was actually put to beneficial use, that they were "mere expectations" rather than inchoate rights under the prior

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appropriation doctrine. However, the DR's purported application to inchoate exempt-well water rights (WAC 173-518-010(3)) destroys the reasonable investment-backed expectations of people who subdivided land, drilled wells, even planned or built houses but had not yet turned on the tap by the effective date of the rule.

The subject of the relation-back doctrine is set forth in detail in Plaintiffs' Opening Brief at pp. 18-20. In *Hirst*, the Supreme Court reaffirmed that permit-exempt withdrawals are appropriations, subject to senior water rights, including minimum flows established by Ecology. Slip Opinion at 14. This means that <u>it is critically important for the owners of permit-exempt water rights that their priority date is not mistakenly altered by an Ecology rule</u>, and made subject to a minimum flow that it would otherwise be senior to. Changing the priority date of a water right in relation to the DR affects the determination of legal water availability. If it is senior to the DR, no mitigation is required to offset impacts to minimum flows. This is an issue of enormous consequence to rural property owners, who would not otherwise be able to access water for home building or outdoor watering of gardens and farm animals.

Ecology has pointed to no authority that allows it to alter the priority date of water rights, and no such authority exists. Only superior courts have the authority to adjudicate water rights, which includes determining priority dates. *Rettkowski v. Ecology*, 122 Wn.2d 219, 225, 858 P.2d 232 (1993). WAC 173-518-010(3) is written as an exemption for pre-existing exempt well uses, but in fact uses the wrong triggering date for purposes of regulating exempt well water rights that had not yet ripened into perfected water rights. It provides:

> This chapter applies to the use and appropriation of surface and groundwater in the Dungeness River watershed begun after the effective date of this chapter. Unless otherwise provided for in the conditions of the water right in question, this chapter shall not affect: …
> (b) Existing groundwater rights established under the groundwater permit-exemption <u>where regular beneficial use began before the effective date of this chapter</u>. (Emphasis added.)

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Contrary to how relation back works in the prior appropriation doctrine, both at common law and in the Water Code and Groundwater Code, Ecology used "beneficial use," the last act required before an inchoate water right is perfected, as the priority date for an exempt well water right instead of the "notice" date, which is the trigger for priority dates under the relation back doctrine, the Water Code and the Groundwater Code. For purposes of a permit-exempt withdrawal, which has no associated application requirement, the appropriate "notice" event could be when a lot is subdivided with the intention of building a home on an exempt well, or the date a well is drilled or a start card for a well is filed with Ecology. It is not Ecology's decision to make in any event, because it cannot adjudicate water rights. This decision is best left to the county in the course of determining "legal water availability" under RCW 19.27.097 and, if contested, to the superior court which has authority to determine the priority date of water rights. There is simply no credible argument that Ecology has the authority to do this by adoption of a rule, and its attempt to do so, WAC 173-518-010(3)(b), exceeds Ecology's statutory authority.

Ecology incorrectly claims that rural property owners possess only a speculative "expectation" of future use of groundwater. By comparison, someone possessing a water right permit issued under the Water Code also has only an "expectation" of putting that water to beneficial use until water is actually used, but when the right is perfected the priority date is the date of application for the permit, not the date of beneficial use. Ecology also cites a portion of the exemption out of context. RCW 90.44.050 includes the phrase, "to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit." This is no more than equal recognition of the requirement for water right permits to be put to beneficial use, continuously, to <u>maintain</u> a valid water right. Beneficial use is the measure of a water right, and is required for the perfection of a water right, but it has nothing to do with the priority date for permits or permit-exempt withdrawals. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-90, 957 P.2d 1241 (1998). An inchoate right is "an incomplete appropriative right in good standing. It comes into being as the first step provided by law for

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acquiring an appropriative right is taken. It remains in good standing so long as the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last step provided by law." *Theodoratus* at 596, *citing* 1 Wells A. Hutchins, Water Rights Laws in the Nineteen Western States 226 (1971).

CELP falsely claims that Plaintiffs are seeking a "super-priority" but it is no more and no less than any other inchoate water right under the prior appropriation doctrine. This is not "at odds" with prior appropriation. The fact that there is not an application-based notice that initiates the inchoate right is a function of legislative-creation, because RCW 90.44.050 requires no "notice" document to initiate the permit-exempt inchoate water right. CELP and Ecology are simply insisting on something that isn't required. Nothing in *Swinomish*, *Hirst* or *Fox* is inconsistent with this, or justifies Ecology's mistaken analysis that inchoate permit-exempt withdrawals are "mere expectations" rather than inchoate rights. Again, Ecology is not a legislature that can make or amend law regarding this. These are inchoate rights that Ecology has no authority to extinguish or subordinate to an instream flow with a junior priority date.

CELP is way off in its citation to RCW 90.44.090, which is a vested rights provision applying to groundwater rights claimed to exist prior to 1944. It has no relationship to permit-exempt wells authorized by RCW 90.44.050.

Ecology and CELP know the difference between relation back and beneficial use but they are playing dumb and using smoke screens to hide it, probably because they want maximum effect of the DR, in terms of its protection of instream flows, but have no control over senior inchoate permit-exempt water rights. Control over the impact of such inchoate rights could be obtained through cooperation with Clallam County on conservation standards, and through regional mitigation efforts that are not tied to illegal restrictions on these inchoate rights. This is yet another example of how Ecology failed to balance both the public interests and the costs and benefits of the DR. If it had done so properly, then one can easily presume that it would not have attempted to eliminate the inchoate rights of rural property owners to perfect their permit-exempt

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water rights after the effective date of the rule. Instead, they attempted to make a blanket rule altering the priority date of these inchoate rights without any statutory authority to do so, and thus to terminate those rights and disregard any value associated with them.

F. Ecology Exceeded its Statutory Authority by Adopting Surface Water Closures in the DR

Postema did not provide that Ecology could evade rule-making requirements when closing streams. The arguments presented in Sect. IV.F of Plaintiffs' Opening Brief were not presented in the *Postema* case or discussed in that decision. Rather than restate those arguments in this Reply, Plaintiffs respond that the stream closures in the DR are part of the overall regulatory scheme for the basin, along with MIFs, reservations, maximum depletion amounts, etc. The effect of the stream closures on the overall allocation of water within the basin must be considered as part of the MNB analysis and the CBA and LBA analyses required by the APA.

G. Ecology and CELP Overstate the Limited Effect of ESSB 6513 – the Dungeness Reservations Are Not Validated by a Simple Intent Statement.

In yet another case of bait and switch, Ecology claims that the validity of ESSB 6513 is not before the Court. Yes, but the validity of the reservations in the DR are very much before the Court. ESSB is a vague statement of intent, not a validation of Ecology's use of OCPI in a manner completely contrary to the Supreme Court's interpretation of that statute. The gap between the reservations at WAC 173-518-080 and the Supreme Court's interpretation of OCPI is huge. ESSB 6513 does not indicate any intention to reverse Supreme Court precedent and the Court should be wary of this political hot potato with separation of powers implications.

H. The CBA for the DR Must Conform to APA Requirements

Ecology is using the 2005 Plan and Chapter 90.82 RCW as a shield to avoid

responsibility for errors in the rule-making process, including economic analysis of the DR's impacts on people, small businesses, and property in the basin. Essentially, Ecology

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claims that the rule isn't "significant" after years of effort and millions of tax dollars spent on the process.

Ecology points to RCW 90.82.080(1)(b) as "requiring" it to adopt the DR and thus excusing it from the procedural requirements for "significant legislative rules" at RCW 34.05.328. There are two problems with this argument. First, it is Ecology's rule that has legal and economic consequences and is challenged in this case, and Ecology's rule that closed the groundwater and created a MIF water rights with impacts on people and property, not the 2005 Plan. Under the APA, it is Ecology that must comply with the APA procedural requirements including the CBA and LBA, not the planning unit or the county. There are inconsistencies described above between Ecology's DR and the 2005 Plan that require a complete CBA and LBA that are reviewable under the APA.[17] Second, having completed a CBA and an LBA during the rule-making process, Ecology cannot withdraw them now claiming that they were "voluntary."

Ecology defended the economics of the DR on the basis of its CBA and LBA, but now it doesn't want to defend these analyses. Ecology can't have it both ways. Essentially, Ecology is saying it's okay to lie to themselves and the people of the Dungeness Basin about the economic effects of the DR, but it isn't okay to hold Ecology responsible for it. They should be ashamed of making this argument, and they should be held accountable for their CBA and LBA rather than wriggle out from it because maybe it was "voluntary." Ecology erred when concluding in the CBA and LBA that inchoate permit-exempt rights had no value, and by assigning a benefit to the rule for replacing those rights to free water with limited and conditional rights to pay for water. Ecology's CBA concluded that requiring inchoate permit-exempt water uses to pay for something that was free before the rule, and which entitled them to a building permit before the rule, is a benefit stemming from the DR to those water users worth $46 million. It is insulting to

[17] See Argument section IV.A, *supra*, for Plaintiffs' argument that nothing in ch. 90.82 excuses Ecology from complying with other statutory directives in the WRA and Water Code.

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the extreme that Ecology would claim to benefit people by taking away their inchoate rights to a valuable resource, forcing them to pay for something that was formerly free, and restricting even that to certain areas for indoor usage only, contrary to land use designations and the common usage of such properties for small farms. It is like charging people for the air they breathe and expecting to be applauded for it.

I. ***Swinomish* does not affirm Ecology's economic analysis in this case**

Ecology's Response Brief states that, under Swinomish, "the economic value quantified for future uses of water can never override the intrinsic or qualitative value of an instream flow use." Ecology Response Brief at 42, ls. 16-17, *citing Swinomish*, 178 Wn. 2d at 599. They failed to explain the context of these statements in *Swinomish*, where the instream flow water rights already existed before Ecology used the OCPI exception to adopt reservations for future out-of-stream uses in a later amendment to the Skagit Rule. The Supreme Court invalidated the reservations because of Ecology's faulty economic analysis, its use of OCPI, and its failure to conduct a four-part test. Ecology's argument actually cuts the other way, demonstrating that once an instream flow is adopted and has the status of a water right with a priority date, it is too late to adopt a reservation of water or to grant a new water right that conflicts in any way with the minimum flow.

J. **The LBA used the wrong objective**

Ecology uses a one-sided objective-based defense to the LBA analysis, instead of trying to achieve the "maximum net benefits for the people of the state." Its defense is based on achieving only one of three stated objectives for the rule – to protect instream flows. Ecology Brief at 38, ls. 20-23. The Final CBA and LBA, however, list two other objectives for the rule, including the fundamental water policies "preserving and protecting adequate and safe water supplies to satisfy human domestic needs," and "giving full recognition in the administration of

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water allocation and use programs to the natural interrelationships of surface and groundwaters." ECY 2403

Ecology's Response Brief states, "It does not matter that the Petitioners would prefer Ecology to 'reserve enough water for future domestic uses without requiring mitigation.' … Their preference directly conflicts with the very purpose of the Rule." This argument directly contradicts the stated multiple objectives of the rule, and diminishes the Plaintiffs' right to adequate and safe water supplies to the status of a "preference." It is shocking for a state agency to suggest that the right to adequate and safe drinking water is only a "preference," especially after appropriating all the available water in the basin for instream flows and making rural landowners pay for mitigation, causing a substantial loss of their property values, and changing the agricultural way of life in the Dungeness valley.

Ecology's citations to *Swinomish* and *Postema* to defend the LBA are off the mark, because the proscription against "de minimus" impacts to instream flows in those cases did not exist before instream flows were adopted and given the status of water rights with priority dates. It exists only after instream flows are adopted, under the impairment standard of the four-part test. With this argument, Ecology exposes its bias toward instream flow protection at the expense of other water requirements and fundamentals, because Ecology assumed, incorrectly, that MIFs it created in the DR already existed, and any other use of water was already unavailable and a potential impairment to those instream flows. This may also be the source of Ecology's animosity toward their economist, Tryg Hoff, who disagreed strongly with Ecology's economic arguments. Hoff, for instance, requested a formal AGO opinion to clarify three legal questions affecting the economic analysis, including whether Ecology could ignore the MNB requirement. *ECY 072252*. Ecology's Response Brief characterizes Mr. Hoff differently, stating that, "Mr. Hoff demanded he be allowed to conduct his own "legal analysis." The only legal analysis conducted was an informal one by Assistant AGO Stephen North. *ECY 056692-96, and ECY*

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072196-201, but these are more akin to flawed economic analyses than to legal opinions. The problem was not Mr. Hoff playing a lawyer, it was Mr. North playing an economist.

Ecology's defense of the LBA for the DR is to disavow one of the primary objectives of the rule and to diminish the Plaintiffs, who suffered from the rule, and its own employee who disagreed with them. This is unacceptable.

K. <u>What is the Appropriate Remedy?</u>

Plaintiffs seek invalidation of the DR on numerous grounds, primarily because Ecology failed to adequately protect water availability for properties in the basin that are not served by public water systems. Under *Swinomish*, it is too late to redo the reservations for future uses including permit-exempt wells or the Mitigation Plan <u>unless</u> the MIFs are also redone; otherwise, the priority date of the instream flows would make allocation of water to reservations impossible, as in the *Swinomish* case. The groundwater closure was also linked to the reservations and should be rescinded and reconsidered in light of new facts and changes in the law, including the end of OCPI as a tool for adopting reservations, the end of out-kind mitigation to prevent impairment of MIFs and closed streams, and the County's new independent obligation to protect MIFs from any impairment. These are changes in the law that occurred after the DR was adopted. In addition, Ecology would not have been aware of the significant economic effects of the "no outdoor water" rule in the Yellow Zone, at the time it adopted the DR.

RCW 34.05.562(2) provides:

> (2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:
> (a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;
> (b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have

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reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;
(c) The agency improperly excluded or omitted evidence from the record; or
(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

Plaintiffs request that Ecology, CELP and the Court consider the appropriateness of this remand remedy given the post-rule facts and legal changes that have affected the implementation and outcomes from the DR.

V. CONCLUSION

After *Hirst*, it is clear that Ecology has a dual obligation to protect not only instream flows but also the availability of water, which must be done in the rule if not prior to it. There is no other way to do it. As demonstrated in this Reply Brief and in Plaintiffs' rebuttal evidence regarding holes in the Mitigation Plan and Exchange, Ecology failed to meet this dual obligation in its adoption of the DR. The time is now to invalidate the rule and remand it to Ecology to properly protect water availability for future domestic uses as part of the task of protecting water resources in the basin generally, including the protection of instream flows, according to the maximum net benefits for the people. If not now, it will be too late to fix these issues and prevent the Dungeness basin from experiencing hardships similar to the Skagit basin, due to the status of MIFs as water rights with priority dates that cannot be impaired, even de minimum impairment, by subsequent groundwater withdrawals.

VI. RELIEF REQUESTED

Plaintiffs request a declaratory judgment from the Court that the Dungeness Rule is invalid on one or more of the following bases:

1. Ecology's Cost Benefit Analysis for the Dungeness Rule is incorrect and/or inadequate;
2. Ecology failed to consider less burdensome alternatives to the Dungeness Rule;

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3. Ecology failed to coordinate the Dungeness Rule with Clallam County's GMA plan and development regulations and/or with the WRIA 18 Watershed Management Plan;
4. The Dungeness Rule exceeds Ecology's statutory authority; and
5. The Dungeness Rule is arbitrary and capricious.
6. Alternatively, the Court should repeal and remand the Dungeness Rule to Ecology for further rule-making proceedings, including:
    a. Recognition and protection of inchoate permit-exempt groundwater rights;
    b. Conduct a maximum net benefits analysis consistent with RCW 90.54.020 and 90.03.005;
    c. Make four-part test findings for any minimum flow water rights;
    d. Adopt reservations consistent with the maximum net benefits analysis and the need to protect water availability for domestic uses;
    e. Consider new evidence relating to the Yellow Zone and impacts of the "no outdoor water" rule;
    f. Conduct a new cost benefit analysis and least burdensome alternative analysis consistent with the changes described above; and
    g. Revise the Mitigation Plan consistent with current legal standards.
7. Plaintiffs further request an award of such costs and fees as the Court may grant under the Uniform Declaratory Judgment Act, RCW 4.84.350, RCW 34.05.566, and state and local court rules.

DATED this 13th day of October, 2016.

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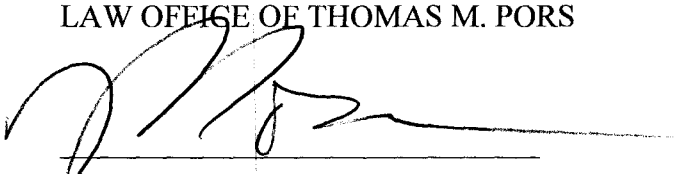

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APPENDICES

7. Slip Opinion, *Whatcom County v. Hirst*, Supreme Court Case No. 91475-3 (October 6, 2016).

8. October 11, 2016 letter from Patrick and Virginia Cates.

9. Declaration of Judy Dtirton.

10. Declaration of Greg McCarry

11. Declaration of Magdalena Bassett.

12. Skagit County Assessor – Well Restriction Assessment Devaluation Report.

13. Copies of Miriam-Webster definitions of "allocate" and "appropriate."

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