IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

SWINOMISH INDIAN TRIBAL COMMUNITY, a Federally Recognized Indian Tribe, Appellant, vs. WASHINGTON STATE DEPARMENT OF ECOLOGY, Respondent.	No. 41636-1-II REPLY BRIEF OF APPELLANT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Under the first-in-time, first-in-right principle of Washington water law, a lawful appropriation of water may not be impaired by subsequent appropriations. This fundamental principle protects minimum flow levels established in regulations, which are "appropriations" with priority dates as of the effective dates of their establishment.

The Department of Ecology (DOE) argues it has authority to impair instream flow rights to strike a balance between environmental protection and economic development. It relies on statutes recognizing that both environmental protection and economic development are important goals of Washington water law. However, these statutes do not give DOE discretion to "strike a balance" that disregards the first-in-time, first-in-right principle and impairs *existing water rights*.

DOE also relies on RCW 90.54.020(3)(a), which contains an exception to DOE's statutory obligation to retain base flows necessary to preserve fish and other environmental values, but "only in those situations where it is clear that overriding considerations of the public interest [OCPI] will be served." DOE argues that, under this exception, it can impair instream flow rights for a broad range of uses on a basin-wide basis to provide opportunities for growth in rural areas, as long as impacts on fish populations are (allegedly) small. According to DOE, it may

authorize such uses even if individual uses, or entire categories of use, would not serve overriding considerations of the public interest, and even if such uses could be served without impairing instream flow rights.

This expansive interpretation of the OCPI exception is inconsistent with its plain language, applicable rules of construction and *every* available precedent regarding its meaning. It eviscerates statutory protections for instream flow rights by allowing DOE to impair such rights repeatedly to accommodate rural growth.

DOE's claim that it was necessary to authorize a broad range of uses to allow "limited growth" in rural areas is not supported by the record. DOE found the vast majority of uses it authorized could be served by existing water rights; the only benefit it identified from impairing instream flow rights for such uses was the "avoided cost" of acquiring existing rights. DOE cannot seriously contend it had to authorize half-acre lawns and other similar uses to allow "limited growth" in rural areas.

Finally, DOE did not ensure that actual impacts on fish populations will be small. Its small-impact claim rests on a generic analysis of a one percent reduction in low flows in small tributaries. Here, DOE doubled the allowable flow reductions, ignored pre-existing flow reductions, and in some cases miscalculated the two-percent limit, combined subbasins to evade the limit, and placed the lower reaches of tributaries in mainstem

subbasins, where much larger diversions and withdrawals are allowed. DOE also adopted an accounting system for users of exempt wells that – according to the study on which it relied – underestimates actual summertime withdrawals and thus allows such withdrawals to exceed DOE's own limits. DOE now points to other documents to support its accounting figures, but those documents do not estimate summertime use by exempt-well users, and DOE does not identify a single document in the record to show it actually relied on them.

II. RESPONSE TO DOE COUNTERSTATEMENT OF THE CASE.

A. DOE Overstates the 2001 Rule's Impacts on Rural Development.

In describing the original Skagit River Instream Flow Rule, WAC Ch. 173-503 ("Rule"), DOE notes that new water uses were subject to interruption when the Rule's instream flow levels were not being met, and suggests this would have had a significant adverse impact on rural development. DOE Br. at 5-6. DOE recognizes that "public water suppliers in the Skagit River Basin have [existing] water rights and capacity to serve growth,"[1] but claims that "available public water supplies are concentrated in urban areas of the County." *Id.* at 5. According to DOE, because most

[1] *See also* Tribe's Opening Br. at 43 n.24 (existing water rights could provide for entire out of stream needs for at least the next fifty years) (citing RA040250).

"rural lands in Skagit County do not have existing public water supplies," property owners must often rely on "permit-exempt wells." *Id.* at 5-6. DOE then states that Skagit County and others "asserted that the interruption of new water uses during low flow periods would prevent development of new homes, businesses, farms, and industries that require a year-round water supply in areas of the County where water is not available from a public water supplier." *Id.* at 6.

These statements are misleading in two respects. First, both DOE and the County signed the 1996 Memorandum of Understanding the led to the 2001 Rule. *See* Tribe's Opening Br. at 8-9. A "primary objective" of the MOU was to "reduce the use of exempt wells in those areas of the County experiencing inadequate instream flows that may be occurring as result of groundwater withdrawal." RA004687. In adopting the Rule, DOE explained that there were "environmental benefit[s]" from reducing the use of exempt wells, which can have detrimental effects on "small tributaries that dry up in the summer." RA038159. DOE's current suggestion that it was necessary to amend the Rule to authorize *new* exempt wells disregards a primary environmental objective of the Rule.

Second, DOE fails to note that it considered and, in significant respects, *rejected* the claim that the Rule precluded development of "new homes, businesses, farms, and industries" in large areas of the County.

When DOE adopted the Rule, it found that the Rule would *not* have "excessively severe" effects on domestic supply, since "[l]arger scale developments are likely to be . . . located in areas where water service from a municipal source or other central supplier is available," and interruptible groundwater supplies, public supply and "(perhaps to a limited extent) acquisition and conversion of existing rights provide feasible (and likely preferred) alternatives" for smaller developments. RA013588. In amending the Rule in 2006, DOE again recognized that at least some rural lot owners (perhaps up to *50 percent* of them) could acquire existing water rights to develop their lots. *See* RA002865; *see also* Tribe's Opening Br. at 16-17.

In 2001, DOE found that agriculture did "not appear to be significantly hampered by the proposed rule in that it appears that most agricultural irrigation concludes by mid-summer," *before* the minimum flow requirements would cause significant interruptions in supply. RA013587. It also found that the PUD could supply new farms, a source "often preferred by agricultural irrigators." RA013588 & n.6. In 2006, DOE found that future agricultural demand "may be able to be met by *a variety of tools* such as transfers or changes to existing water rights, interruptible water rights, purchasing water from water utilities, or short term seasonal leases." RA002998 (emphasis added). In its cost-benefit analysis, DOE did not find there would be *any* loss of agricultural production in the absence

of the Rule amendments; instead, it calculated the benefits of the agricultural reservation on the basis of the "avoided cost" of acquiring existing water rights to support new farmlands. *See* RA002869-71.

In 2001, DOE found "[c]ommercial and industrial development is most likely to occur in areas zoned for these activities and in proximity to population or market centers," areas "likely to be served by existing water suppliers." RA013588. There is nothing in the 2006 cost-benefit analysis to suggest there would be *any* loss of commercial or industrial development in the absence of the Rule amendments. *See* RA002863-73.

In short, while the County and others *claimed* the 2001 Rule prevented the "development of new homes, businesses, farms, and industries" in large areas of the County, DOE's analyses largely refute that claim.

B. DOE Departed from Its Own Policies to Accommodate the County's Demands for More Water.

DOE asserts that, in the absence of stakeholder consensus, it developed an agency proposal to amend the Rule and only made changes to that proposal that "were consistent with law and agency policy." DOE Br. at 7. The record strongly suggests, however, that the County's demands led DOE to enlarge dramatically the amount of water being reserved and the uses to which it could be put. *See* Tribe's Opening Br. at 11-12. As DOE's exasperated instream flow biologist wrote:

> The county has previously said they only want a certain amount of new water and they will stop suing, but I notice they are still suing us and still asking for more after previously saying they wouldn't ask for more. I'm not sure there is an end to their desire for more water. [RA032638.[2]]

In acquiescing in the County's demands, DOE did *not* adhere to agency policy. For example, in November 2004 DOE stated that the "proposed rule amendment is anticipated to generally follow the policy framework" in DOE's September 2004 Guidance. RA002772. That policy authorized reservations of water that would not be subject to instream flows, but *only* for domestic uses and with limits on any outdoor use. RA006964. DOE's initial proposal to amend the Rule may have been consistent with this policy, *see* Tribe's Opening Br. at 10-11, but the final amendments were not; they were not restricted to domestic use and placed no limits on outdoor use. *See id.* at 11-14.

C. DOE's Attempt to Minimize the Size and Impact of the Reservations Is Misleading.

DOE seeks to minimize the size of the reservations and their impact on fish populations.[3] It claims it limited the reservations "to just two

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[2]These comments were triggered by the County's demands for more water for the Fisher Creek subbasin, either by increasing the reservation to 5% of 7Q10 or combining the Carpenter and Fisher subbasins (allowing the combined reservation to be used in the Fisher subbasin). *See* RA036167. DOE opted to combine the subbasins, effectively authorizing withdrawals from the Fisher subbasin of about ***4.5*** times DOE's estimate of 2% of the 7Q10 flow in Fisher Creek. *See* Tribe's Opening Brief at 13 n.7.

[3]DOE states the total volume of the reservations, about 25 cubic feet per second (cfs), is less than 0.5 percent of low flows in the mainstem Skagit River. DOE Br. at 9. 25 cfs is

percent of the historic summertime low flow," and that DOE and Washington Department of Fish and Wildlife (WDFW) biologists "determined that a reduction in stream flows of 2 percent or less during the historic summer low flow period would not impact the long-term sustainability of the fish populations and is protective of fish." DOE Br. at 11 & n.5.

There are several problems with these claims. First, the biologists' conclusion that small reductions would have "little impact on the long term sustainability of the fish population" was developed to support one percent reductions in tributary flows in the Quilcene basin. *See* RA036712-13. DOE provided exactly the same rationale for the Skagit basin, *see* RA002992-93, even though it doubled the size of the flow reductions.[4] Moreover, the biologists' assertion that one- or two-percent reductions will have "little impact on the long term sustainability of the fish populations" does not mean there will be no decline in actual numbers of fish. To the contrary, the biologists stated there would be an adverse

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equivalent to about 16,158,000 gallons per day (gpd). According to DOE, the 10 cfs agricultural reservation is sufficient to irrigate *2,260 acres of land.* RA002869. At DOE's standard consumptive use rate of 175 gpd (*see* Tribe's Opening Br. at 20), the 14.5 cfs DMCI reservation is sufficient to provide water for *53,550 new homes.* The two largest water-right purveyors in the Skagit basin, the PUD and the City of Anacortes, hold total non-interruptible water rights of 127.6 cfs. RA002912. 25 cfs thus represents almost 20% of their existing, non-interruptible rights. It represents over 6% of *all* documented water rights in the Skagit basin and over 4% of all documented and claimed rights in the basin. *See* RA013550. By any of these measures, 25 cfs is a significant amount of water.

[4] As DOE's instream flow biologist pointed out, this created a precedent for repeatedly eroding instream flow protections: "[s]omeone would make the argument that taking 1% more is insignificant and if you agree, where do you stop as they repeat that 100 times and take 100% of the river." RA032638.

impact on fish numbers, and cited numerous studies demonstrating that even a one percent reduction in low flows would reduce the number of fish returning to the basin. *See* RA003006-09; RA038068. DOE itself estimated the 20-year cost of reductions in four populations (including two threatened populations) at $5.3 million, with a potential range of up to $19 million, and acknowledged there might be additional costs associated with reductions in other populations and recreational activities. RA002988-89.

Second, the 2006 amendments do not in any event limit the reservations to DOE's estimates of two percent of low flows. DOE does not dispute that the reservation for the combined Carpenter-Fisher subbasin exceeded its own estimate of two percent of the 7Q10 flow by 28 percent, or that the effect of combining these subbasins was to permit withdrawals in the Fisher subbasin that are about ***4.5*** times DOE's estimate of two percent of the 7Q10 flow in Fisher Creek. *See* Tribe's Opening Br. at 13 n.7.

Third, DOE's generic analysis relating small flow reductions to small fish impacts did not account for existing conditions where fish populations have *already* been adversely affected by reduced flows. Sixty years ago Washington's fisheries department concluded that Nookachamps Creek was over-appropriated, and it has consistently recommended that *no* further impairment of low flows be permitted there or in other Skagit tributaries to preserve fish populations. *See* Tribe's Open-

ing Br. at 6-7. In 1992, the department found that "[o]ne of the main problems [for salmon production] in the Nookachamps basin is low summer flow," and that this was "particularly true through the lower 3-4 miles":

> It has gotten so bad that it is likely that all early season adult salmon spawners which could potentially use Nookachamps Creek are blocked at its mouth by this polluted reach. The fall rains must clear this out and drop the temperature before substantial numbers of spawners will enter.

RA003815. DOE provided no analysis to show that *additional* flow reductions, even small ones, will not significantly impact fish populations under these circumstances.

Finally, DOE's reliance on the two-percent limit is misleading because DOE placed the lower reaches of many tributaries in mainstem subbasins. For example, the lower reach of Nookachamps Creek is in the Skagit-Lower subbasin, not the Nookachamps Creek-Upper subbasin. *See* WAC 173-503-120 & Exh. A hereto. This means this reach of Nookachamps Creek is not protected by the 12,279 gpd limit for the Nookachamps Creek-Upper reservation, but instead is subject to both the 6,463,170 gpd agricultural reservation[5] and the 5,254,103 DMCI reservation for the Skagit-Lower subbasin. *See* WAC 173-503-073(2) & (3), 074. DOE does not explain how permitting large new appropriations from the

[5] The agricultural reservation of 3,564 acre feet per year is based on the continuous diversion of 10 cfs throughout the irrigation season. RA002997. This allows for diversions of about 6,463,170 gpd during the irrigation season.

lower reach of Nookachamps and other tributaries is "protective of fish." *Cf.* DOE Br. at 11 n.5.

III. ARGUMENT.

A. DOE Has No Authority to Impair Instream Flow Rights to Strike a Balance Between Environmental Protection and Community Development.

DOE claims authority to impair instream flow rights "to strike a balance between environmental protection and community and economic development." *See, e.g.,* DOE Br. at 1. In support, it argues Washington's statutes do not elevate "the protection of stream and river flows to support fish populations above all other public values and objectives," but "also were enacted to advance other important values and objectives, including the supply of water for people and farms." DOE Br. at 19.

This argument disregards the first-in-time, first-in-right principle. It is true that Washington water laws were enacted to advance multiple objectives. *See* Tribe's Opening Br. at 27-28 & nn. 14, 16. However, whatever authority DOE has to strike a balance among these objectives ends when water is lawfully appropriated and put to a beneficial use. *See* RCW 90.03.290(3); 90.44.030 (prohibiting new appropriations that impair existing rights). Under the first-in-time, first-in-right principle, DOE has *no* authority to impair existing rights to accommodate competing interests.

The central teaching of *Postema v. PCHB*, 142 Wn.2d 68, 81-83,

11 P.3d 726 (2000), is that this principle applies to and protects minimum flow levels established by regulation. This is the inescapable conclusion of RCW 90.03.345, which declares that the establishment of "minimum flows . . . shall constitute appropriations . . . with priority dates as of the effective dates of their establishment." Contrary to DOE's argument, this does not elevate instream flows *above* all other objectives of Washington water law, it merely affords to regulatory instream flow rights the *same* protection as is afforded to all other water rights.

B. DOE's Expansive Interpretation of the OCPI Exception Conflicts with Its Plain Meaning, Applicable Rules of Construction, and *Every* Available Precedent.

DOE offers an expansive view of the OCPI exception that conflicts with its plain language, applicable rules of construction, and *every* available precedent. DOE asserts that, as long as impacts on fish populations are "small," the exception authorizes diversions of surface water and withdrawals of groundwater that impair instream flow rights to: (1) advance the economic well-being of the community at large; (2) provide the public a choice to build homes and businesses in rural areas; and (3) authorize any beneficial use of water, including private golf courses and half-acre lawns. *See* DOE Br. at 32-35. DOE asserts it may use the OCPI exception for these purposes even if: (1) individual uses, or entire categories of use, do not serve overriding considerations of the public interest;

(2) the economic benefits of proposed uses do not outweigh the costs of impairing instream flow rights; and (3) the proposed uses could be served without impairing instream flow rights. *See id.* at 36-37, 40-41.

Although DOE claims the "plain language" of the OCPI exception supports its position, *see, e.g.,* DOE Br. at 19, it largely ignores the actual statutory language. First, as the PCHB has explained, the term "withdrawals" limits the OCPI exception to *withdrawals* of groundwater and excludes *diversions* of surface water (which have more immediate and direct impacts on stream flows):

> A careful analysis of the water code reveals that the Legislature consistently utilizes the term diversion in connection with surface water appropriations, and withdrawal in connection with ground water appropriations. . . . Limitation of the exemption to withdrawals clearly implies that the Legislature intended that future surface water diversions may not interfere with base flows, and that future ground water withdrawals may only interfere with base flows where there are overriding considerations of public interest.[6]

DOE claims the statute authorizes "appropriations" (including both withdrawals and diversions) that conflict with base flows, *see* DOE Br. at 28, but never discusses the statutory term "withdrawals" and provides no analysis to support DOE's interpretation of it.

Second, the Legislature authorized only withdrawals that conflict with "base flows." DOE substitutes the term "instream flows" for "base

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[6] *In the Matter of Appeals from Water Rights Decisions of the Dep't of Ecology*, 1996 WL 514630 at *6 (PCHB July 17, 1996).

flows," *see* DOE Br. at 32, but, again, it provides no analysis of the statutory term to support its interpretation. As discussed in our opening brief (at 27-29), in the three statutes specifically addressing regulatory minimum flows (RCW 90.22.010-030; RCW 90.03.247: RCW 90.03.345), the Legislature did not authorize *any* subsequent withdrawals or diversions that impair such flows. In the intervening OCPI enactment, the Legislature imposed a duty on DOE to retain "base flows" in *all* perennial rivers and streams of the State – whether or not DOE had adopted regulatory minimum flows for such streams – and carved out a narrow exception for certain withdrawals that conflict with such "base flows." *See* RCW 90.54.020(3). DOE's assumption that this provision created a broad exception to the *separate statutory protections* for regulatory minimum flows (two of which had not yet been enacted), and that it did so without even mentioning them, is untenable.

Third, DOE's assertion that nothing in the statute requires the exception to be applied on a case-by-case basis ignores the statutory language – "only in those situations where it is clear" – and the PCHB's interpretation of it.[7] Similarly, DOE's claim that "no language in the statute" limits the exception to uses of the highest priority, *see* DOE Br. at 34,

[7] *See Black Diamond Assocs. v. Dep't of Ecology*, 1996 WL 755426 at *9 (PCHB Dec. 13, 1996) ("only in those situations" phrase "calls for individualized determinations").

disregards the dictionary definition of the term "overriding" as "[f]irst in priority; more important than all others,"[8] and DOE's own prior interpretation of the exception.[9]

Fourth, DOE's claim that it may impair instream flows whenever it determines the public benefits of impairment "'clearly override' the benefits of protecting the flows," DOE Br. at 22, cannot be reconciled with the statutory language as a whole, which authorizes withdrawals that conflict with base flows "only in those situations in which it is clear that overriding considerations of the public interest will be served." This unusual provision was clearly intended to *limit* DOE's discretion; it cannot fairly be read to authorize DOE to permit withdrawals that conflict with base flows whenever DOE determines the benefits outweigh the costs. Had Legislature intended to vest such discretionary authority in DOE, it could have done so using language resembling the maximum-net-benefits provision in RCW 90.54.020(2) or the other statutory provisions on which DOE now relies. *See* DOE Br. at 32-33 n.10. That it chose to use far more re-

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[8] *See* Tribe's Opening Br. at 38; *see also HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (courts may look to dictionary to determine plain meaning of undefined term).

[9] *See* Tribe's Opening Br. at 31-32, 34-35 (citing DOE rules and policy statements limiting OCPI exception to in-house domestic use and normal stockwatering, where no other source of water was available).

strictive language belies DOE's broad interpretation of the exception.[10]

Nor can DOE's position be reconciled with the rule that, generally, "exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions." *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999). DOE's interpretation of the OCPI exception conflicts with the mandate to retain base flows in RCW 90.54.020(3)(a) and with the separate statutory protections for regulatory minimum flows in RCW 90.22.030, 90.03.247, and 90.03.345. In *Postema*, 142 Wn.2d at 89, the Court held that the "obvious legislative intent" underlying these provisions was to *prevent the piecemeal impairment of instream flow rights*. Rather than construing the OCPI exception narrowly to give effect to this intent, DOE seizes on the absence of a statutory definition of "public interest" or "considerations" to argue that virtually *any* conceivable interest (such as the "public" interest in private golf courses and half-acre lawns) can be invoked to *justify the piecemeal impairment of instream flow rights*. *See* DOE Br. at 32, 38-39.

DOE's position also conflicts with *every* available precedent regarding the OCPI provision, including its own rules and policy statements, PCHB decisions, and Supreme Court guidance. *See* Tribe's Opening Br.

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[10] *See Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976) (where "different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word").

at 31-35. DOE argues these precedents involved individual water right applications, not a basin-wide water management rule. *See* DOE Br. at 23-26.[11] However, there is only one OCPI exception, and nothing in the statutory language suggests it applies narrowly in the context of individual applications and broadly in the context of watershed planning rules. It may be that, on a watershed basis, the public interests served by a class of uses will be greater than those served by an individual application (although the impairment of instream flow rights will also likely be greater), but that does not relieve DOE of the statutory obligation to demonstrate that *overriding* considerations of the public interest will be served, and to refrain from authorizing the impairment of instream flow rights for uses that will *not* clearly serve such interests.[12]

DOE argues that the Tribe "seeks to severely limit the OCPI ex-

[11] DOE's treatment of its own prior watershed rules is particularly noteworthy – and dishonest. In claiming its current interpretation of the OCPI exception is entitled to deference, DOE asserts the Skagit Rule amendment "involves the first time that [DOE] applied OCPI in the context of watershed rule-making." DOE Br. at 42. However, in the Superior Court, DOE asserted it had "enacted numerous instream flow rules that create class-based OCPI exceptions to instream flow rules for domestic uses and/or stockwatering." DOE's Br. in Resp. to Tribe's Opening Br. at 10-11 n.6 (Feb. 19, 2010) (CP 228-29). Similarly, in *Postema*, 142 Wn.2d at 90, DOE argued that a provision in the 1979 instream flow rule for the Cedar-Sammamish basin was based on the OCPI exception. DOE's conflicting representations to this Court, the Superior Court and the Supreme Court about whether and when it has invoked the OCPI exception provide no basis for according deference to DOE's new and expansive interpretation of the exception. *See Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001) (agency view not entitled to deference where it "is entirely inconsistent with the agency's prior administrative practice").

[12] Similarly, DOE's assertion (Br. at 39-40) that it is *possible* for private uses to serve the public interest is misplaced, since this cannot relieve DOE of the burden to establish that particular private uses *will* serve *overriding* considerations of the public interest.

ception to the point where it could virtually never be applied . . . ." DOE Br. at 19. However, the Tribe's interpretation is consistent with the manner in which the exception was interpreted and applied for over thirty years after its enactment. As discussed in our opening brief (at 31-35), from 1971 until development of the Skagit Rule amendments, DOE, the PCHB and the Supreme Court consistently interpreted the OCPI exception as a "narrow exception," *Postema*, 142 Wn.2d at 81, that had to be applied on an individualized, case-by-case basis, and which could not be used to authorize uses of water that could be served without impairing instream flow rights. Notably, in rejecting the Tribe's "narrow" interpretation of the exception, DOE never once mentions the Supreme Court's *identical* characterization of it.

C. DOE's Argument Is Not Supported by the Record.

The Tribe's Opening Brief (at 36-44) shows DOE's application of the OCPI exception exceeded its statutory authority in multiple respects. For example, the overwhelming majority of the benefits DOE attributed to the reservations were based on the use of only 0.81 to 1.50 cfs of water (out of total reservations of about 25 cfs of water), and DOE's own analysis showed the remaining reservations would have only minimal benefits. *See* Tribe's Opening Br. at 41.

In response, DOE asserts it was necessary to authorize a broad

range of uses in order to allow "some limited growth in rural areas." *See* DOE Br. at 33. However, as discussed above (*see* § II.A), despite the claims of the County and others, DOE itself found that there were a variety of mechanisms to provide water for new homes, farms and businesses in rural areas *without* impairing instream flow rights.[13] And, it cannot seriously be contended that it is necessary to permit the use of water for feedlots (an activity expressly excluded from the policy of preserving water for stockwatering in RCW 90.22.040), private golf courses and half-acre lawns, and other similar uses to allow such "limited growth."

DOE also asserts it determined that the benefits of allowing water for a range of purposes, "in amounts that would not cause *any* harm to fish and other instream values," would clearly serve overriding considerations of the public interest. DOE Br. at 35 (emphasis added). However, as discussed in § II.C above, DOE and WDFW biologists expressly found the reservations would reduce the size of fish populations, DOE itself estimated the economic cost of reductions in just four populations (including two

[13] DOE argues that the Tribe "oversimplifies [DOE's] assessment of whether alternative sources of water are actually available to serve some uses that are allowed under the reservations" because those sources are not available to users in rural areas who would benefit from the reservations. DOE Br. at 40-41. However, as discussed in § II.A above, DOE's findings regarding the availability of alternative sources of water for rural lot owners, agricultural users and large water purveyors specifically addressed the anticipated users of the reservations. DOE itself found that only 0.81 to 1.50 cfs of the reservations would be used by users of exempt wells or rural public water systems over the next 20 years. *See* RA002867-68. This finding cannot be reconciled with DOE's current claim that it was necessary to reserve ***25*** cfs for "users in rural areas."

threatened populations) at $5.3 million over a 20-year period, with a potential range of up to $19 million, and DOE acknowledged there may be reductions in the size of other fish populations and instream values. DOE cannot credibly claim there will be *no* harm to fish and other instream values on this record, while simultaneously claiming that benefits of only $41,000 to $73,000 for rural lot owners who could purchase and transfer uninterruptible rights, $104,000 for large water purveyors, or even $3.7 million for agricultural uses serve "overriding considerations of the public interest." *See* Tribe's Opening Br. at 16-18, 41.

DOE also claims there will be additional benefits to large public water purveyors *after* the 20-year horizon of its cost-benefit analysis. DOE Br. at 37-38. However, in its cost-benefit analysis, DOE assumed that large water purveyors would use 5.5 cfs of the 14.5 cfs DMCI reservation *during* that 20-year horizon, and estimated the economic benefits of such use would be only $104,000. RA002868-69. DOE's speculative claim of possible additional benefits[14] does not make it *clear* that overriding considerations of the public interest *will* be served, since there is no basis for concluding that those benefits will be significantly greater than the $104,000 estimate for the first 20 years, or that they will outweigh the

[14] DOE limited its cost-benefit analysis to a 20-year time horizon because a longer horizon "would significantly increase the uncertainty" in its estimates. RA002862.

future costs of impairing instream flows.

Finally, conceding that "the monetary value of water for agriculture and stock water is less than the value for domestic and commercial uses," DOE asserts (Br. at 38) that "agriculture is a large component of the economy and an important part of the culture and lifestyle of the Skagit River Basin, and there was strong support from the community to provide additional agricultural water supply for farmers and stock growers." These points might be persuasive if DOE were free to disregard the first-in-time, first-in-right principle to satisfy junior, but more politically powerful, water users. However, they do not support a finding that overriding considerations of the public interest would be served under any reasonable interpretation of the narrow OCPI exception.

D. DOE Failed to Ensure New Appropriations Will Remain within the Two Percent Limit.

Although DOE found it was critical to limit maximum average consumptive use under the reservations to two percent of 7Q10 flow, the Rule amendments do not ensure actual use will remain within this limit. This is because the amendments: (1) miscalculated the two percent limit in some sub-basins; (2) combined the Carpenter and Fisher subbasins to evade the limit; (3) placed the lower reach of some tributaries in mainstem subbasins; and (4) adopted standard accounting figures that underestimate

actual withdrawals from new exempt wells. *See* Tribe's Opening Br. at 12-13 n.7, 20-22, 45-47; § II.C above.

DOE agrees that the two-percent limit was "pivotal" to its OCPI finding, DOE Br. at 43, but does not address the first three problems and does not dispute that its standard accounting figures were well below the Economic and Engineering Services (EES) estimates on which it relied. *See id.* at 42-49.[15] Although DOE stated it also relied on a 2004 USGS study, it cites nothing in that study to support its standard accounting figures or question the EES estimates. *See* DOE Br. at 45.[16]

DOE asserts it "considered, in addition to [the EES and USGS] studies, information from a variety of water system and watershed planning documents, as well as actual water use metering records." DOE Br. at 45. However, DOE does not cite a single record document that shows it considered these documents when it adopted the Rule amendments, or that

[15] DOE now asserts that half-acre lawns are "typical uses in rural areas." *Id.* at 39. The EES estimate of summertime consumptive use for residences with 20,000 square foot lawns (slightly under one-half acre), was 1,603 to 1666 gpd, more than *nine times* DOE's standard accounting figure of 175 gpd. *See* Tribe's Opening Br. at 20-22.

[16] DOE discussed the USGS estimate in a February 2005 draft of its Rule-Making Criteria document, in which it asserted that 350 gpd was "an estimate of *annual average use* by an average household, including a *small amount* of outdoor irrigation." RA000790 (emphasis added). DOE does not explain how 350 gpd can *also* represent maximum average use, especially after DOE eliminated the outdoor watering limits in its February 2005 proposal. *See* Tribe's Opening Br. at 11.

purports to explain how it reconciled them with the EES estimates.[17] Notably, *none* of these documents purports to estimate summertime use by rural exempt-well users. This is critical, because exempt-well users use more water in the summertime than most other water users in the County. *See* Tribe's Opening Br. at 48-49.[18] The closest these documents come to such an estimate is in the Skagit County Coordinated Water System Plan Regional Supplement, which estimates rural average-day water use of 100 gpd per capita with a rural peak-day factor of 2.6. RA006394. Assuming household size of 2.6 persons per household, this yields rural peak-day household use of 676 gpd, well above DOE's standard accounting figure of 350 gpd. Although DOE argues it "appropriately arrived at an estimate of maximum average daily consumptive use that falls between the average day demand and the maximum daily demand," DOE Br. at 47, it provides no explanation of how it determined the maximum average use was only 52% ($350 \div 676 \approx .52$) of this estimate of maximum daily demand.

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[17] *See Wash. Ind. Telephone Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003) (validity of rule must be determined "as of the time the agency" adopted it).

[18] DOE argues there is no factual basis for this claim, but it ignores the demand study on which it based the reservations. *See* RA002995 (citing demand study to justify reservations). That study reports maximum day demand by exempt well users of 801 gpd per household, compared to 406 gpd for PUD customers and 338 gpd for City of Anacortes customers. *See* Tribe's Opening Br. at 48-49; RA002909-10; *see also* RA005219 (County letter asserting rural water users "will need much more" than 350 gpd). DOE cannot have it both ways: it cannot rely on higher use by exempt-well users to justify the reservations, and then use lower estimates when it comes time to account for such uses.

DOE also asserts (Br. at 47) its 50 percent recharge credit "is a conservative figure, as reflected by a study that estimated such recharge at 51 to 72 percent," and that "[t]his conservative credit figure further ensures that use of the 350 gpd debit figure will not cause reservation water quantities to be exceeded." This argument is unavailing because the study that estimated recharge at 51 to 72 percent was the EES study, *see* RA002999; RA0022748, and DOE's standard accounting figures are less than the EES estimates *after accounting for recharge*. *See* Tribe's Opening Br. at 20-22.[19]

"[W]hen a rule is challenged as arbitrary and capricious, the reviewing court must consider the relevant portions of the rule-making file *and the agency's explanation for adopting the rule* as part of its review in order to determine whether the agency's action was willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Ind. Telephone Ass'n*, 148 Wn.2d at 906) (emphasis added). Here, DOE stated it based its standard accounting figures on the EES study.

[19]The 51 to 72 percent estimate was an estimate of *annual* recharge under EES's "medium" water use scenario, the second lowest of EES's four scenarios. *See* RA022747-48; Tribe's Opening Br. at 20-21. For the next highest water use scenario, involving outdoor watering of 20,000 square feet of lawn and garden (a scenario DOE now claims is "typical" in rural areas, DOE Br. at 39), EES estimated *annual* recharge of only 23 to 30 percent. *Id.* In rejecting proposals to adopt a higher recharge rate, DOE explained that "50% is an appropriate approximation for all scenarios." RA003182. More importantly, as both EES and DOE explained, recharge rates *decline* in the summertime. *See* RA022746; RA003158. DOE's use of an *annual* recharge estimate thus *overestimated* recharge during the summer months, *i.e.*, during the period of maximum average use.

Now, confronted with the fact that its figures are well below those in the EES study, DOE's counsel has scoured the record looking for other evidence to support DOE's figures. However, there is nothing in the record to suggest DOE considered or relied on that evidence, which, in any event, does not address the critical issue – maximum average consumptive use by rural exempt-well users. Under well-established principles of administrative law, the Court should not accept counsel's post hoc rationalization for agency action or supply a reasoned basis for agency action that the agency itself did not provide. *E.g., Hernandez-Cruz v. Holder,* ___ F.3d ___, 2011 WL 2652461 at *11 (9th Cir. 2011).

IV. CONCLUSION.

For the reasons given here and in our opening brief, the Court should hold the 2006 Rule amendments invalid.

Respectfully submitted August 5, 2011,

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SWINOMISH INDIAN TRIBAL COMMUNITY
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Emily Hutchinson by MDS

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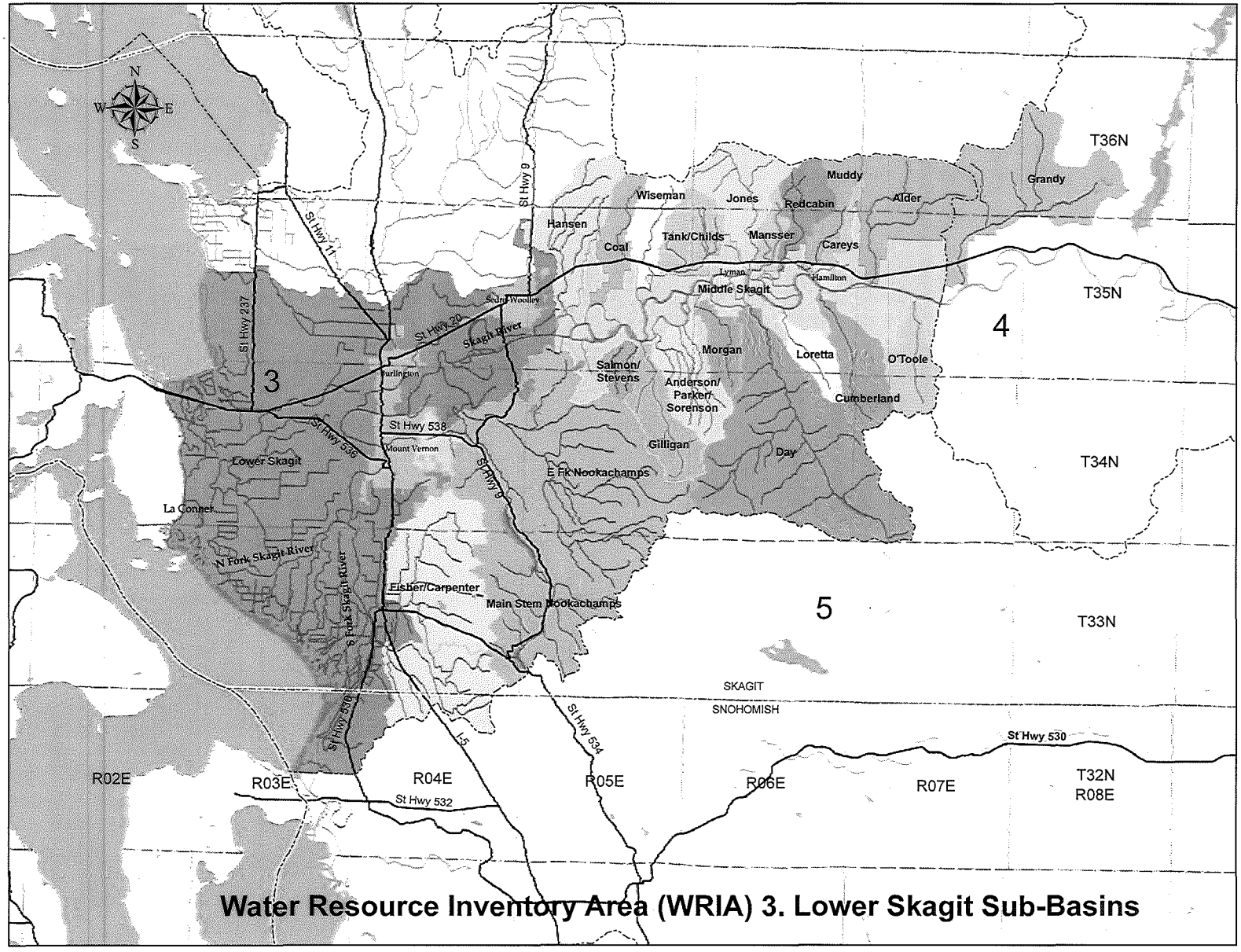
Exhibit A

Map of Lower Skagit Subbasins from
Department of Ecology website.

http://www.ecy.wa.gov/programs/wr/instream-flows/images/pdfs/skagit/Subbasins_WRIA3_51706.pdf

Subbasin Management Unit	Reservation Quantity
*Denotes basins subject to future closure under WAC 173-503-051	Maximum average consumptive daily use in gallons per day
Alder *	81,430
Anderson/Parker/Sorenson *	20,034
Careys *	11,633
Carpenter/Fisher *	11,633
Childs/Tank *	18,096
Coal *	18,742
Cumberland *	25,851
Day *	131,839
Gilligan *	25,851
Grandy *	147,350
Hansen *	38,130
Jones *	67,212
Loretta *	11,633
Mannser *	15,511
Morgan *	13,572
Muddy *	28,436
Nookachamps - East Fork*	14,218
Nookachamps - Upper*	12,279
O'Toole *	23,266
Red Cabin *	42,653
Salmon/Stevens *	5,170
Skagit - Lower	5,254,103
Skagit - Middle	1,394,655
Skagit - Upper †	1,938,816
Wiseman *	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.



WRIA Boundary
County Boundary
Township

ECOLOGY

Miles
0 1.5 3 6

NWRO Water Resources GIS
May 17, 2006 (Rev.)

Water Resource Inventory Area (WRIA) 3. Lower Skagit Sub-Basins