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THURSTON COUNTY, WA  
SUPERIOR COURT  
May 8, 2017  
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Thurston County Clerk

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X Hearing is set: Date: June 9, 2017 Time: 1:30 pm Judge: Hon. James Dixon

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

CENTER FOR ENVIRONMENTAL  
LAW & POLICY, AMERICAN  
WHITEWATER, AND SIERRA  
CLUB,

Petitioners,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY and  
JAY INSLEE,

Respondents

No. 16-2-02161-34

PETITIONERS' AMENDED  
OPENING BRIEF

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10 *Guidance Manual*, Ecology Publication No. 04-10-022 (March 2005) . . . . . 20

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1 **I. INTRODUCTION**

2 Petitioners Center for Environmental Law and Policy, American Whitewater and Sierra  
3 Club (collectively, “CELP”) appeal two final agency actions undertaken by the Respondent  
4 Washington Department of Ecology (“Ecology”): (1) the Spokane River Instream Flow Rule,  
5 WAC 173-557 (the “Rule”); and (2) Ecology’s decision denying CELP’s Petition to Amend the  
6 Rule (“Petition to Amend”).<sup>1</sup> By adopting a very low 850 cfs summer instream flow, Ecology’s  
7 Rule fails in its purpose to ensure that there is, or will be, sufficient water in the River to protect  
8 all instream values for present and future generations.<sup>2</sup> To be clear, neither the Petition to  
9 Amend nor this lawsuit seek additional water “added to” the River or that natural flows be  
10 artificially “enhanced.” Rather, Ecology has a legal obligation to fulfill all of its statutory  
11 mandates and have a reasoned basis for its adoption of the Rule. Unless and until that occurs,  
12 many navigational, aesthetic and recreational uses of the River, as well as its fish, could be lost.  
13  
14

15 **II. STATEMENT OF THE CASE**

16 The Spokane River is a treasured natural wonder uniquely located in the backyard of the  
17 city of Spokane. Many residents and visitors use the river for whitewater rafting, float trips,  
18 fishing, swimming, birdwatching, and for enjoyment of its aesthetic beauty.<sup>3</sup> Much of the  
19 shoreline has frequently-used parks, hiking/biking trails, picnic areas, and campgrounds.<sup>4</sup>  
20

21 <sup>1</sup> AR10598-609.

22 <sup>2</sup> In this appeal, CELP only challenges that portion of the Rule that establishes summer instream flows of 850 cfs  
from June 15-September 30. WAC 173-557-050(2).

23 <sup>3</sup> AR011576-011578, AR003460 (“The Spokane River provides excellent whitewater boating opportunities with  
both river runs and park-and-play areas”); AR000250, 266, 287, 352, 386, 399, 431; AR008025-27.

24 <sup>4</sup> *Id.*; AR002515; AR001238; AR001245; AR001250; AR001252 (noting importance of maintaining views of Falls);  
AR001255-6; AR001262; AR001267; AR001272-3; *see also* AR001324 (cataloging over 700,000 recreational visits  
annually).  
25

1 Like most Western rivers, flow in the River is highly variable through the year and  
2 between different years.<sup>5</sup> The River’s natural flow regime, including both high and low flows, is  
3 important to the overall health of the River.<sup>6</sup> Summer flows show large year-to-year variation,<sup>7</sup>  
4 and have been declining with the average summertime seven-day low flow dropping from 1800  
5 cfs to 1141 cfs in the 118 years that data has been collected.<sup>8</sup> Very recently, seven-day low flows  
6 range between 679 and 1268 cfs for the years 2008-2015.<sup>9</sup> The River’s “low flow trend”<sup>10</sup> is  
7 attributable to a number of factors, including climate change, water use pattern changes,  
8 municipal pumping increases in both Washington and Idaho, and reservoir operations (Post Falls  
9 Dam).<sup>11</sup> Low flows in the River affect both water quality and river ecology.<sup>12</sup> Low flows during  
10 the summer can also lead to increased temperature in the River, which “can exceed lethal levels  
11 for trout.”<sup>13</sup>

12  
13  
14 The River, along with the Spokane Valley-Rathdrum Prairie Aquifer (“SVRPA”)  
15 underlying it, is also a critical water source for the region. Hundreds of water rights in the  
16 Middle Spokane watershed, totaling about 294,000 acre-feet/year for permits and certificates,  
17 and 319,000 acre-feet per year for claims, pre-date the Rule, and thus their future use will not be  
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20 <sup>5</sup> The hydrology of the Spokane River is set forth in detail in the Petition to Amend. AR010498-010504.  
21 <sup>6</sup> AR003831. (“the natural timing and range of variation in hydrology is needed to sustain ecological functions and  
22 processes in a river.”).  
23 <sup>7</sup> AR001908.  
24 <sup>8</sup> AR002224.  
25 <sup>9</sup> AR011377; AR001908.  
26 <sup>10</sup> AR001095; AR001487.  
<sup>11</sup> AR010501-2; AR011189.  
<sup>12</sup> AR10504; AR011521 (“Extremely low flows in developed areas lead to algal blooms and fish kills.”).  
<sup>13</sup> AR013611; AR001083 (water temperature expected to increase due to climate change).

1 restricted by its operation.<sup>14</sup> Approximately 18 municipal water suppliers hold water rights, about  
2 half of which (152,223 acre-feet) have not yet been put to beneficial use.<sup>15</sup> It is expected that  
3 these inchoate rights will be put to use as population grows and demand increases in both  
4 Washington and Idaho.

5  
6 The Little Spokane-Middle Spokane (WRIA 55-57) Watershed Planning Unit (WPU) was  
7 convened in 1999 and attempted to develop and recommend instream flows for the Spokane  
8 River by establishing a Joint Instream Flow Work Group.<sup>16</sup> The Group and the WPU were  
9 unable to reach consensus on instream flows for the lower river at the Spokane gage, so the  
10 decision to set instream flows defaulted to Ecology and the Washington Department of Fish and  
11 Wildlife (“WDFW”).<sup>17</sup> Despite previous recommendations for higher summer flows,<sup>18</sup> WDFW  
12 ultimately recommended a value of 850 cfs for the summer flow.<sup>19</sup> WDFW made it very clear,  
13 however, that 850 cfs was a minimum instream flow that would be tolerated by redband trout and  
14 Mountain whitefish, and that higher flows would not be detrimental to fish. Senior WDFW  
15 biologist Hal Beecher stated, “I would oppose lower flows, but not higher summer flows,” and  
16 that “the proposed flows are not seen by me as an enhancement, rather as a floor.”<sup>20</sup>  
17

18 Ecology began formal rulemaking for the Spokane River instream flow in 2014.<sup>21</sup> During  
19 the rulemaking process, Ecology received thousands of comments critical of the summer  
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21 <sup>14</sup> AR010538.

22 <sup>15</sup> *Id.*

23 <sup>16</sup> AR003429-31; AR007892.

24 <sup>17</sup> RCW 90.82.080(5).

25 <sup>18</sup> *See* AR003842-3882; AR003883-3980.

26 <sup>19</sup> WAC 173-557-050.

<sup>20</sup> AR013609; AR014232, AR018528, AR002985.

<sup>21</sup> AR000071.



1 proposed flow of 850 cfs, many of which stated that such low flows would impair instream uses  
2 such as navigation, recreation and aesthetics.<sup>22</sup> Petitioner American Whitewater conducted a  
3 recreational use survey and provided the data to Ecology during the rulemaking process.<sup>23</sup> The  
4 American Whitewater survey found that 1000 cfs was the minimum flow to allow navigation,  
5 with recreational boaters having a preferred minimum flow of 1500 cfs.<sup>24</sup> These results were in  
6 line with a 2004 Whitewater Paddling Instream Flow Assessment Study Report that was  
7 prepared for the Spokane River Hydroelectric licensing process that found that a flow of 1350 cfs  
8 was preferred and that 1000 cfs was an absolute minimum.<sup>25</sup> In November 2015, CELP provided  
9 Ecology with an expert report by aesthetic and recreation flow researchers Bo Shelby and Doug  
10 Whittaker that was also highly critical of Ecology's lack of analysis of aesthetic and recreation  
11 flows as well as the 850 cfs summer flow.<sup>26</sup>

12  
13  
14 CELP provided Ecology with a set of matched aesthetic photographs from thirty-seven  
15 Key Observation Points (KOPs) along the Spokane River taken in both 2014 and 2015.<sup>27</sup> These  
16 photographs provide information about how River conditions change at pool, riffle, and rapid  
17 locations and would have enabled Ecology to assess how flow levels affect aesthetic values.<sup>28</sup>  
18 There is nothing in the record that shows Ecology even looked at these photographs, let alone did  
19  
20

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21 <sup>22</sup> AR003001-11.

22 <sup>23</sup> AR002290-2494; AR002495-2514, AR002519-45.

23 <sup>24</sup> AR016257-59.

24 <sup>25</sup> AR002225-89.

25 <sup>26</sup> AR011552-11611. The expert report supplemented more general aesthetic-recreation flow recommendations from  
26 Drs. Shelby and Whittaker that were provided to Ecology during the rulemaking process. AR002516-18.

<sup>27</sup> AR000233-000417; AR000435-6; AR011612-5; AR011616-7.

<sup>28</sup> *Id.*

1 its own independent assessment or analysis of what flows would protect and preserve aesthetic  
2 uses of the river, or whether flows of 850 cfs would protect aesthetic values.

3 Ecology’s final rule was adopted as WAC Chapter 173-557 on January 27, 2015 and  
4 became effective February 27, 2015.<sup>29</sup> On February 29, 2016, CELP filed a Petition to Amend  
5 the Rule pursuant to RCW 34.05.320.<sup>30</sup> Ecology began work on the Petition on March 1 and  
6 made the decision to deny the 89-page Petition and 33 supporting exhibits just three days later,  
7 by the afternoon of March 4.<sup>31</sup> A letter formally denying the Petition was finally issued on April  
8 27, 2016.<sup>32</sup> CELP then petitioned this Court for review of both the final Spokane River Instream  
9 Flow Rule and Ecology’s decision denying the Petition to Amend.  
10

11 **III. ARGUMENT**

12 **A. Standard of Review**

13 This Court has jurisdiction over this matter pursuant to RCW 34.05.510. Venue is proper  
14 in this Court pursuant to RCW 34.05.514(1), 34.05.570(2)(b)(i).<sup>33</sup> The Washington  
15 Administrative Procedure Act (“APA”) authorizes relief if Ecology’s decision is  
16 unconstitutional, outside of Ecology’s statutory authority or the authority conferred by a  
17 provision of law, or arbitrary and capricious. RCW 34.05.570(2)(c) (review of a final rule);  
18  
19

20 <sup>29</sup> AR018130.

21 <sup>30</sup> AR010489-578; AR018245; AR010612-35; AR011185-205; AR011373-443; AR011514-17; AR011518-43;  
22 AR011544-51; AR011552-89; AR011612-5; AR011618-52; AR010636-60; AR019128-31; AR006039-6205;  
23 AR010725-29; AR010730-42; AR010743-8; AR010749-834; AR010835; AR010998-1169; 011170-184;  
24 AR011206-213; AR011245-304; AR011306; AR011307-16; AR011317-28; AR011329; AR011330-4; AR011335-  
25 72; AR011444-9; AR011451-5; AR011460-4; AR011467-77.

26 <sup>31</sup> AR018243; AR018519. The record shows that it was four days *after* Ecology recommended the Petition to  
Amend be denied when Ecology finally reviewed the recreation/aesthetic flow expert report attached as an exhibit to  
the Petition. AR018523.

<sup>32</sup> AR10598-10609.

1 RCW 34.05.570(4)(c) (review of other agency action). CELP has standing to bring this appeal  
2 because their members are aggrieved and adversely affected by Ecology’s decisions. RCW  
3 34.05.530.<sup>34</sup>

4 In deciding CELP’s Petition to Amend the Rule, Ecology was required to interpret and  
5 apply a number of statutes as well as the instream flow rule that Ecology adopted for the  
6 Spokane River, and thus under the “error of law” standard, this Court may substitute its  
7 judgment for that of the agency. *R.D. Merrill v. Pollution Control Hearings Bd.*, 137 Wn.2d  
8 118, 142-43, 969 P.2d 458 (1999). When the inquiry demands construction of a statute, review  
9 is de novo. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659  
10 (2004). Absent ambiguity, the Court does not defer to an agency’s interpretation of a statute.  
11 *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48,  
12 118 P.3d 354 (2005). Deference to an administrative agency “does not extend to agency actions  
13 that are arbitrary, capricious, and contrary to law.” *Skokomish Indian Tribe v. Fitzsimmons*, 97  
14 Wn.App. 84, 94, 982 P.2d 1179 (1999).

15 Administrative action is arbitrary and capricious if it is willful, unreasoned, and taken  
16 without regard to the attending facts and circumstances. *WA Dept. of Ecology v. Theodoratus*,  
17 135 Wn.2d 582, 598, 957 P.2d 1241 (1998). In reviewing an agency regulation, the court must  
18 “scrutinize the record to determine if the result was reached through a process of reason, not  
19 whether the result was itself reasonable in the judgment of the court.” *Aviation West Corp. v.*  
20  
21  
22

23 \_\_\_\_\_  
24 <sup>33</sup> Because Petitioners’ principal place of business is not within the boundaries of Division III of the Court of  
Appeals, or District three of Division I, this appeal may only be filed in Thurston County. RCW 2.06.020.

25 <sup>34</sup> See, e.g., AR010497-98; AR000556-564; AR001176-92; AR003790-3806; AR016256-59.

1 *Dep't of Labor & Industries*, 138 Wn.2d 413, 432, 980 P.2d 701(1999). Agency action with  
2 “disregard for the welfare of the whole community” has been held to be arbitrary and capricious.  
3 *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 870, 576 P.2d 401(1978);  
4 *Anderson v. Island County*, 81 Wn.2d 312, 325, 501 P.2d 594 (1972). Agency inaction in the  
5 face of significant new information may also be arbitrary and capricious. *Rios v. Dep't of Labor*  
6 *& Industries*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002) (agency’s failure to act when presented  
7 with new scientific evidence prepared by its team of experts was arbitrary and capricious).  
8

9 **B. Ecology’s Adoption Of The Rule And Its Denial Of The Petition To**  
10 **Amend Is Contrary To Its Statutory Authority.**

11 **1. The Relevant Statutes Require The Rule To Protect And Preserve All**  
12 **Instream Values, Including Navigation, Recreation and Aesthetics,**  
13 **Not Just Fish.**

14 The Legislature has given Ecology the authority to:

15 [E]stablish minimum water flows or levels for streams, lakes or other public  
16 waters for the purposes of protecting fish, game, birds or other wildlife resources,  
17 or recreational or aesthetic values of said public waters whenever it appears to be  
18 in the public interest to establish the same.

19 RCW 90.22.010. Ecology argues that the Legislature, by using the term “or” in RCW 90.22.010,  
20 gave it unfettered discretion “to determine the purposes to protect when establishing minimum  
21 flows in a rule.”<sup>35</sup> Based on that reading of the statute, Ecology selected the minimum flows in  
22 the Rule based on what flows it believed would be the least amount needed to protect fish  
23 habitat. AR002984 (“Under 90.22 Ecology is not required to establish minimum flows for fish  
24 **and** recreational values or aesthetic values.”); AR002985 (“The department has chosen not to  
25 establish instream flow values based on those recreational needs expressed during the FERC  
26

1 process or any other process including this comment period.”); AR010475 (“The adopted flow  
2 numbers are based on studies of fish habitat.”); AR013965 (“The proposed instream numbers are  
3 based upon fish habitat studies as surrogates for protection of instream values.”).

4 However, RCW 90.22.010 cannot be read in isolation. Related statutes are to be read  
5 together, and a court is to consider “all that the Legislature has said in the statute and related  
6 statutes.” *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). Ecology must  
7 exercise its authority to establish minimum instream flows in a manner that protects and  
8 preserves navigation, aesthetic and recreational values, not just fish:  
9

10 The quality of the natural environment shall be protected and, where possible,  
11 enhanced as follows: (a) Perennial rivers and streams of the state shall be retained  
12 with base flows necessary to provide for preservation of wildlife, fish, *scenic,*  
*aesthetic and other environmental values, and navigational values.*

13 RCW 90.54.020(3) (emphasis added). The legislature’s use of the term “shall” indicates that it  
14 did not give Ecology the discretion to select an instream flow that does not protect base flows for  
15 scenic, aesthetic navigation, and recreation uses. *Ecology v. PUD No. 1 of Jefferson Cnty.*, 121  
16 Wn.2d 179, 189, 849 P.2d 646 (1993). Ecology must protect and preserve all of the instream  
17 values listed in RCW 90.54.020(3), not simply fish. *Swinomish Indian Tribal Comm’y v.*  
18 *Ecology*, 178 Wn.2d 571, 587, 311 P.3d 6 (2013).

19 To comply with RCW 90.54.020, Ecology must first ascertain what flows are protective  
20 of all instream uses and strike a balance if there is any conflict among uses. *CELP, et al. v.*  
21 *Ecology, et al.*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law and Final Order) (As  
22 Amended Upon Reconsideration) (Aug. 30, 2013) (Appendix A) at 25. Otherwise it would be  
23

24 \_\_\_\_\_  
25 <sup>35</sup> AR010601.

1 impossible to know whether all uses are being protected. But here Ecology missed the first step  
2 because it never ascertained what flows would protect and preserve navigation, aesthetics and  
3 recreation. RCW 90.22.010 does not give Ecology the discretion to ignore other uses of the river  
4 simply because the agency believes (incorrectly as discussed below) that the 850 cfs flow will  
5 protect and preserve native fish populations.<sup>36</sup> Petitioners do not suggest that Ecology establish  
6 minimum flows that protect navigation, recreation and aesthetics to the detriment of fish, but  
7 rather that Ecology select a minimum flow that protects and preserves all instream uses.  
8

9 Courts have previously invalidated administrative rules when an agency too narrowly  
10 construes their authorizing statutes. In *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153  
11 P.3d 846 (2007), the Washington Supreme Court held that a Department of Labor & Industries  
12 rule that applied Minimum Wage Act protection to some but not all employees was inconsistent  
13 with the purposes of the Act and therefore invalid. Similarly, a rule that excluded some  
14 organizations from coverage under a campaign finance statute was invalid where the statute's  
15 plain language demanded coverage for all such organizations. *Edelman v. State ex rel. Pub.*  
16 *Disclosure Comm'n*, 152 Wn.2d 584, 591-2, 99 P.3d 386 (2004). Here, Ecology's Rule purports  
17 to protect only a subset of what the law requires (i.e. fish) and the Rule's 850 cfs flow provision  
18 is invalid for that reason.  
19

20 Ecology's legal obligation to protect all instream resources also stems from the Public  
21 Trust Doctrine. Ecology's statutory responsibilities contained in RCW 90.22 and RCW 90.54  
22 embody constitutionally-reserved public trust principles and Ecology cannot exercise its  
23

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24 <sup>36</sup> AR002985.

1 authority in a manner that operates to substantially impair the resource or destroy the public's  
2 interest in the continued viability of the resource. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387,  
3 453 (1892) (prohibiting government management of trust resource in a way that results in  
4 "substantial impairment of the public interest in" the resource). RCW 90.54.020(3) and RCW  
5 90.22 are similar in purpose to the Shoreline Management Act, RCW 90.58, because these  
6 statutes are designed to protect public access and use of navigable waterways for present and  
7 future generations. The Washington Supreme Court has held "that the requirements of the  
8 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the Shoreline  
9 Management Act of 1971, RCW 90.58." *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989  
10 (1987). Here, the instream flow statutes (RCW 90.54.020(3) and 90.22) must be interpreted and  
11 applied by Ecology in a manner that protects and enhances all of the public's interest in the  
12 waters of this state, and that ensures public trust resources will not be substantially impaired.  
13 Ecology's decision to protect only 850 cfs during the summer violates its obligations under the  
14 Public Trust Doctrine.  
15  
16

17  
18 **2. Ecology Arbitrarily And Capriciously Assumed The 850 cfs Summer**  
19 **Flow Automatically Protects Navigation, Recreation And Aesthetics.**

20 Ecology summarily asserts that the minimum flow levels it selected to protect fish  
21 automatically protect navigation, recreation and aesthetics.<sup>37</sup> But nothing in the administrative  
22 record supports this assumption. Indeed, the overwhelming evidence in the record shows just the  
23

24 \_\_\_\_\_  
<sup>37</sup> AR002985; AR009220-22.

1 opposite: Ecology’s protection of only 850 cfs minimum flows in the summer is detrimental to  
2 navigation, recreation and aesthetic uses of the river.

3 As part of the relicensing process for the Spokane River Hydroelectric Project located  
4 upstream of the stretch of the river protected in the Rule, the Lewis Berger Group conducted a  
5 recreation flow study, relied upon by Ecology in developing the Rule.<sup>38</sup> This study concluded  
6 that 1350 cfs was a “reasonable minimum for downriver paddling,” defined as the “lowest  
7 navigable flow.”<sup>39</sup> The majority of study participants stated that flows of at least 1000 cfs were  
8 needed to run the upper river, and unanimously preferred flows of at least 1500 cfs.<sup>40</sup> Nearly all  
9 participants indicated that they would prefer a flow higher than 1353 cfs in the lower River.<sup>41</sup>  
10 Similarly, a November 2014 survey conducted by Petitioner American Whitewater asked  
11 participants’ opinions on preferred flows for recreation, and the lowest flows at which navigation  
12 was possible.<sup>42</sup> In this survey, participants agreed that a flow of at least 1200-1500 cfs was the  
13 minimum needed for river navigation.<sup>43</sup> All participants agreed on a need for flows higher than  
14 850 cfs in order to pursue recreation and navigation on the river.<sup>44</sup>  
15

16  
17 Drs. Shelby & Whittaker, aesthetic flow and recreation experts who prepared comments  
18 and an expert report that was submitted along with the Petition to Amend, described their field  
19 experience running the Spokane River at flows of 710-790 cfs.<sup>45</sup> They concluded that  
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21 <sup>38</sup> AR002225-2289.

22 <sup>39</sup> AR002257.

23 <sup>40</sup> AR002243.

24 <sup>41</sup> AR002245.

25 <sup>42</sup> AR002290-2494; AR2495-2514; AR016257.

26 <sup>43</sup> AR016257.

<sup>44</sup> *Id.*

<sup>45</sup> AR011573-4.



1 commercial rafts would have had difficulty navigating parts of the river including the popular  
2 and scenic Devil’s Toenail and Bowl & Pitcher rapids at flows this low.<sup>46</sup> This corroborated the  
3 statements of commercial rafting guides whom they interviewed, who expressed a need for flows  
4 over 2000 cfs to run commercial trips through these rapids.<sup>47</sup> Using 2014 (an average flow year)  
5 as an example, they concluded that the number of days with flows over 1000 cfs (providing  
6 generally higher quality boating) would be cut in half if flows are managed down to 850 cfs,  
7 thereby significantly reducing the navigation and recreation opportunities on the River.<sup>48</sup>

9 Peter Grubb, owner of ROW Adventures, noted that the 850 cfs low flow could  
10 completely eliminate the whitewater portion of his business and limits the length of the trips he  
11 offers.<sup>49</sup> John Wilmot, owner of FLOW Adventures, stated that at the 850 cfs low flow level, he  
12 would be unable to guide clients down the river in rafts, but would have to switch to inner  
13 tubes.<sup>50</sup> He also stated that at low flows like 850 cfs, his guides are unable to navigate the Bowl  
14 and Pitcher/Devil’s Toenail section of the river, which is a major attraction for his business.<sup>51</sup>  
15 According to Mr. Wilmot, if the river flow were reduced to 850 cfs for much/all of the summer,  
16 it would have a “serious impact” on his ability to do business.<sup>52</sup> Sean Visintainer, owner of the  
17 Silver Bow Fly Shop in Spokane, stated that his employees guide approximately 110 days/year  
18 on the river, and that the river level affects what trips he is able to offer.<sup>53</sup> In the low-flow year of  
19  
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21 <sup>46</sup> AR011574.

22 <sup>47</sup> *Id.*

23 <sup>48</sup> AR011575-6.

24 <sup>49</sup> AR011451-5.

25 <sup>50</sup> AR011444-011448.

26 <sup>51</sup> AR011447.

<sup>52</sup> AR011448.

<sup>53</sup> AR011461-462.

1 2015, for example, his business was unable to operate float trips in the upper river for much of  
2 the summer, and he lost approximately 40 guiding days due to the low water.<sup>54</sup> Mr. Visintainer  
3 reports that at a flow of 850 cfs or below people are “likely to choose other activities over  
4 fishing.”<sup>55</sup> He stated that if the 850 cfs low flow were to become the summer norm, it would  
5 have a “major negative impact” on his business.<sup>56</sup>  
6

7 CELP provided Ecology with a flow-aesthetics photo database that contains photographs  
8 taken from thirty-seven Key Observation Points (KOPs) along the River at different instream  
9 flows.<sup>57</sup> No formal aesthetic flow study has been done using the 37 KOPs, but review by experts  
10 shows that the 850 cfs established as the “minimum flow in summer and fall provides little  
11 aesthetic diversity, exposes a low flow ‘bathtub ring’ at scenic locations such as Bowl and  
12 Pitcher, and may produce notably lower aesthetic evaluations compared to higher flows.”<sup>58</sup>  
13

14 In summary, the evidence before Ecology during the rulemaking process  
15 overwhelmingly showed that a summer flow of 850 cfs is not adequate to support aesthetic,  
16 navigation or recreation use of the River.<sup>59</sup> The administrative record does not support  
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18 <sup>54</sup> AR011463. CELP does not submit this factual information to suggest that Ecology can eliminate natural drought  
19 scenarios by putting more water into the river. Rather, by protecting such a low level of flow through the Rule,  
Ecology makes it much more likely that these low flow scenarios will become much more frequent.

20 <sup>55</sup> AR011462.

21 <sup>56</sup> AR011463.

22 <sup>57</sup> AR000233-000417; AR000435-6; AR011612-5; AR011616-7.

23 <sup>58</sup> AR011578.

24 <sup>59</sup> *See, e.g.*, AR003001-3009; AR015475 (river won’t be “raftable” at 850 cfs); AR015546 (“[f]lows under 2000cfs  
25 [are] hazardous to my equipment and simply no fun.”); AR016261-62; AR016273-74. The transcript of the public  
26 hearing on the proposal is also replete with comments regarding the inadequacy of the 850 cfs instream flow.  
AR002604-2634. A memo prepared for Director Bellon summarizing the public hearing on the proposed Rule states  
that “[a] majority of the people commenting felt the instream flow was too low . . . .” AR015224. Ecology appears to  
have ignored this information. The citation list, which “contains references for data, factual information, studies, or  
reports on which the agency relied in the adoption for this rule making,” contains not a single reference on the issue  
of recreation, navigation, or aesthetics. AR002594-6.

1 Ecology’s statements that the 850 cfs summer instream flow established in the Rule will protect  
2 aesthetic, recreation and navigation uses of the river rendering Ecology’s decisions arbitrary and  
3 capricious. *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Trans.Comm’n*, 148 Wn2d 887, 905, 64  
4 P.3d 606 (2003).

5  
6 **3. Ecology Arbitrarily And Capriciously Violated Its Own Practices And**  
7 **Policies By Not Assessing Flows Needed To Protect Navigation,**  
8 **Recreation and Aesthetics.**

9 Instream flows that protect and preserve navigation, aesthetic, recreational values are  
10 something that can and should be scientifically assessed as part of the development of an  
11 instream flow rule. Ecology admitted it did not independently study preferred flows for  
12 navigation, aesthetics and recreation.<sup>60</sup> But that approach is contradicted by current science, prior  
13 agency practice,<sup>61</sup> and Ecology’s own guidance document<sup>62</sup> setting forth the scientific means to  
14 evaluate, and establish, aesthetic and recreational flows.<sup>63</sup>

15 For example, in an appeal of a 401 Certification for the Enloe Hydroelectric Project, after  
16 finding that “[t]he record does not provide sufficient evidence to determine an instream flow  
17 level” which would protect both aesthetics and fish, the Board ordered Ecology to conduct an

18  
19 <sup>60</sup> AR003010 (“[a]esthetic appeal is among the most subjective of criteria, and a wide range of flows are seen as scenic to various people”).

20 <sup>61</sup> *See, e.g.*, AR019128-31 (“A modified [aesthetic/recreation] study using flows described in the above paragraph is needed in order for Ecology to make a decision on flows less than those in WAC 173-507. This should also involve the use of two focus groups using the newer flow images: one consisting of property owners, non profits, and regulators and another using a non-biased group – tourist types who are just there to see the falls, inform participants of the visual range of flows prior to asking for their assessment; then reconsider how the videos are ordered.”).

22 <sup>62</sup> AR010524-25 (quoting Ecology, *Water Quality Certifications for Existing Hydropower Dams*, Guidance Manual, Ecology Publication No. 04-10-022 (March 2005) at 54) (“A user based survey provides an excellent means to get qualitative responses from the user community regarding river conditions.”).

23 <sup>63</sup> AR011554 (Flow-recreation “[s]tudies have been conducted for over twenty-five years, helping to develop defensible minimum flows for recreation and aesthetics in a variety of decision settings.”); AR011561, AR011567-011570.

1 aesthetic flow study to gather the necessary information.<sup>64</sup> In the federal and state licensing of  
2 the Spokane River Hydroelectric Project on the Spokane River, Ecology imposed an aesthetic  
3 flow study requirement as part of the 401 Certification process, and Ecology staff directly  
4 participated in a science-based study to determine the appropriate aesthetic flow.<sup>65</sup> Importantly,  
5 Ecology has previously studied flows needed for recreation when establishing an instream flow  
6 rule.<sup>66</sup> Here, it is undisputed that Ecology never studied whether 850 cfs would protect  
7 navigation, recreation and aesthetic values, and made no attempt to determine what flows would  
8 protect those values while simultaneously protecting fish resources, even though it is a common  
9 practice of the agency, rendering Ecology’s decisions arbitrary and capricious. *See Rios*, 145  
10 Wn.2d at 508 (agency’s decision not to follow recommendations of its “own team of technical  
11 experts” was arbitrary and capricious).  
12

13  
14 **4. Ecology Arbitrarily And Capriciously Rejected Higher Summer  
15 Instream Flows For Aesthetics, Recreation, Navigation and Fish.**

16 In response to nearly two thousand<sup>67</sup> public comments requesting that summer instream  
17 flows be set at higher levels, Ecology claimed that the 850 cfs instream flows are “the best flows  
18

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19 <sup>64</sup> *See CELP, et al. v. Ecology, et al.*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law and Final Order) (As  
20 Amended Upon Reconsideration) (Aug. 30, 2013) (Appendix A) at 25, 28, 33-34.

<sup>65</sup> AR 006039-006205.

21 <sup>66</sup> *See, e.g.*, Ecology, Snohomish River Basin Instream Resources Protection Program Including Proposed  
22 Administrative Rules, And Supplemental Environmental Impact Statement (August 1979), at  
<https://fortress.wa.gov/ecy/publications/documents/79irpp7.pdf> (last visited April 19, 2017) (“To assess possible  
23 adverse impacts upon recreation, the following analysis compares the proposed flows to those required for white  
24 water kayaking. Though a specialized water contact sport, enjoyed by relatively few, kayaking represents an intense  
25 use of streamflow, requiring significantly higher instream flows than swimming, fishing or passive recreational  
26 activities.”); *Id.* (SEIS) at Table 1 (comparing whitewater canoeing and kayaking flows to instream resources  
protection flows to ascertain potential adverse impacts on recreational uses).

<sup>67</sup> *See, e.g.*, AR016352-018096.

1 available to protect the instream resources of the Spokane River.”<sup>68</sup> However, WDFW made it  
2 clear that the 850 cfs flows were the absolute minimum that would be protective of fish and that  
3 they would not oppose higher flows.<sup>69</sup> Professor Allan Scholz, who submitted an expert report on  
4 how the 850 cfs summer flow would affect the Spokane River’s fish populations, opined that  
5 flows higher than 850 cfs “almost certainly will improve survival” of redband trout and mountain  
6 whitefish.<sup>70</sup> Ecology’s decision to reject higher summer instream flows, in the face of all of the  
7 information regarding the need for higher flows to protect aesthetics, recreation and navigation,  
8 is not supported by the administrative record and is thus arbitrary and capricious and also  
9 contradicts Ecology’s statutory authority. Further, as demonstrated by the enormous volume of  
10 comments in opposition to 850 cfs flows, Ecology’s decision fails to take the “general welfare”  
11 into account. *Save A Valuable Env’t.*, 89 Wn.2d at 870 (rezoning that “failed to serve welfare of  
12 the community as a whole” arbitrary and capricious).

13  
14  
15 Ecology is not required to determine that water is always “available” before adopting an  
16 instream flow; they may select a level that is not met in all years or at all times. Once adopted,  
17 an instream flow does not require that water be put back in the river, or that water actually be  
18 present at any particular level. Rather, when water *is* present at the instream flow level, that flow  
19 is protected from future appropriations. Adopting an instream flow at a level that is not met in  
20 all years, but is the level that protects all instream resources, is fully consistent with protection of  
21

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22  
23 <sup>68</sup> AR002984.

24 <sup>69</sup> AR014232 (“The proposed flows are not seen by me as an enhancement, rather as a floor.”); AR018528 (“I would  
25 caution that you [Ecology] not state that instream flows above 850 cfs at Spokane Falls would harm native fish.”);  
AR010725 (“we are unaware of any rivers in the Pacific Northwest where high flow during summer was a limiting

1 “the quality of the natural environment,” as required by RCW 90.54.020(3) and fulfills WDFW’s  
2 stated goal of protecting the good flow years when they occur.<sup>71</sup> Ecology’s “race to the  
3 bottom”<sup>72</sup> approach of selecting the lowest flow possible to protect is inconsistent with  
4 legislative intent. RCW 90.54.020(2) (“Allocation of waters among potential uses and users  
5 shall be based generally on the securing of the maximum net benefits for the people of the  
6 state.”); *see also* RCW 90.54.020(3)(a) (emphasis added) (“The quality of the natural  
7 environment shall be protected and, *where possible, enhanced . . .*”).  
8

9 Ecology recognizes:

10 [i]f the instream flow number is high relative to the average stream flow in the  
11 stream in the summer, this does not mean that the instream flow number is  
12 wrong. Rather it means that the stream will provide more fish habitat in wet years  
13 than in dry ones. *Protecting the occasional “good water year” is needed to*  
14 *preserve a healthy population of fish.* If we want to protect the habitat available  
15 in those good wet years, then the instream flow needs to be set at that higher flow  
16 level.<sup>73</sup>

17 WDFW agrees that we “can’t afford to eliminate good years when they occur,” but that is  
18 exactly what Ecology has sanctioned by adopting the summer low flow of 850 cfs.<sup>74</sup> The 850 cfs  
19 summer flow in the Rule fails to protect even the current average low summer streamflows, let  
20

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21 factor for fish,” and in most cases evidence showed that low flows “limit fish.”); AR014229 (“maintaining natural  
22 flow is not harming the river.”).

23 <sup>70</sup> AR011377.

24 <sup>71</sup> AR010739.

25 <sup>72</sup> *See* AR000039 (a visual depiction of the “race to the bottom”).

26 <sup>73</sup> Ecology, *Intro to Streamflows and Instream Flow Rules*, at <http://www.ecy.wa.gov/programs/wr/instream-flows/isf101.html> (last visited April 25, 2017) (emphasis added).

<sup>74</sup> AR010739; AR007749 (“Native fish have survived natural flows for thousands of years.” “Setting a rule and issuing perpetual water rights that would not allow recovery to previous flows would not be prudent, just risky.”).

1 alone “the occasional ‘good water’ year” needed to protect fish.<sup>75</sup> The Rule will result in  
2 drought-level stream flows in most years because Ecology plans to condition new appropriations  
3 of water on the 850 cfs instream flow.<sup>76</sup> Such a result, where drought conditions become the  
4 norm, does not comport with Ecology’s statutory duties to protect and (where possible) enhance  
5 all instream values, RCW 90.54.020, and is arbitrary and capricious.  
6

7 **C. Ecology Arbitrarily And Capriciously Concluded Summer Flows Of 850 cfs**  
8 **Protect & Preserve Fish In The Spokane River.**

9 Previous recommendations to protect fish rearing habitat during the summer have  
10 historically been higher than 850 cfs. A 2007 study conducted for the Spokane County Public  
11 Works Department recommended a flow of 1100 cfs (measured at the Spokane gage) to  
12 “optimize habitat.”<sup>77</sup> An instream flow of 900 cfs was found to “maximize the ability to  
13 withdraw further water,<sup>78</sup>” and a “balanced” approach arrived at flow recommendations of 850-  
14 1100 cfs.<sup>79</sup> Also in 2007, WDFW reviewed instream flow data and determined that “[f]lows of  
15 900-1,050 cfs, as measured at the Spokane gage are suitable for summer.”<sup>80</sup> The WRIA 55/57  
16 Watershed Plan, based on the 2007 study as well as one conducted in 2004 by Hardin-Davis,<sup>81</sup>  
17 recommended a flow in the upper section of 500 cfs measured at Barker Road (equating to  
18  
19

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20 <sup>75</sup> AR000039-40. Median daily flow is currently above the 850 cfs summer instream flow for essentially the entire  
summer. AR000040.

21 <sup>76</sup> Ecology recognizes this concept, demonstrating that if an instream flow is set at a “frequently achievable dry year  
level,” allocations of additional water could “make a dry year normal.” AR010659.

22 <sup>77</sup> AR003881.

23 <sup>78</sup> It should go without saying that “maximize the ability to withdraw water” is not consistent with Ecology’s  
statutory mandate. RCW 90.54.020.

24 <sup>79</sup> *Id.*

<sup>80</sup> AR007749.

<sup>81</sup> AR003883-3980.

1 approximately 1050 cfs at the Spokane Street gage).<sup>82</sup> The watershed plan also refers to a 1999  
2 recommendation by Ecology for a 2000 cfs flow at the Spokane gage.<sup>83</sup>

3 WDFW ultimately recommended 850 cfs at the Spokane gage for summer, apparently  
4 derived by changing its previous course and considering only the lower river.<sup>84</sup> However, 850 cfs  
5 conflicts with the 500 cfs flow set for the Barker gage and risks loss of upper river habitat. A  
6 flow of 850 cfs at the Spokane gage corresponds to roughly 300 cfs at the Barker Road gage,  
7 because of groundwater inflow below Barker.<sup>85</sup> When flows are managed down to the 850  
8 figure, the result will be that habitat in the upper river is not protected. The 500 cfs instream flow  
9 established at Barker cannot prevent this, as it applies only to surface water diversions in the  
10 upper river and most new appropriations would likely be of groundwater. WAC 173-557-040.  
11 Conversely, if an instream flow of 500 cfs was truly protected at Barker Road, flows protected at  
12 Spokane would need to be approximately 1063 cfs, unless significant water withdrawals are made  
13 downstream of the Barker gage.<sup>86</sup>

14  
15  
16 The IFIM studies<sup>87</sup> on which the 850 cfs flow was largely based do not represent the best  
17 science for determining fish habitat in this case. First, as recognized by WDFW, the model used  
18 to calculate usable habitat as a function of streamflow is not appropriate for use on a large river  
19

20  
21 <sup>82</sup> AR003483. Due to inflow of groundwater, the River gains flow between Barker Road and Monroe Street, so that  
22 actual flows in the lower section are generally higher than in the upper (for example, a flow of 850 cfs in the lower  
section at Spokane equates to approximately 300 cfs in the upper section at Barker Road). AR007736.

<sup>83</sup> AR003433.

23 <sup>84</sup> AR007752. In another, nearly identical memo, also dated January 9, 2008, Dr. Beecher recommends summer  
flows of 900 and 1100 cfs at the Spokane gage. AR19091-2.

24 <sup>85</sup> AR007736.

25 <sup>86</sup> AR007787.



1 such as the Spokane.<sup>88</sup> Dr. Allan T. Scholz, an expert in Spokane River fish biology, submitted  
2 comments on the draft rule and prepared an expert report that accompanied the Petition to  
3 Amend.<sup>89</sup> Dr. Scholz stated that reduced streamflow is the “most plausible explanation for the  
4 decline in redband trout abundance” between 1980 and 2015, thereby calling into question  
5 Ecology’s decision to select a “floor” flow of 850 cfs.<sup>90</sup> Given the importance of river  
6 temperature to fish survival, Dr. Scholz advised Ecology to study how the relative contributions  
7 of river flow and aquifer discharge into the river affect temperature before adopting a final  
8 minimum flow, and expressed his “surprise” that a temperature component was not incorporated  
9 into the IFIM analysis.<sup>91</sup> Ecology’s decision to disregard Dr. Scholz’ opinions contained in his  
10 expert report is arbitrary and capricious.  
11

12  
13 **D. Ecology’s Decision To Ignore Climate Change Violates Its Statutory  
Obligations And Is Arbitrary And Capricious.**

14 Ecology arbitrarily and capriciously failed to take climate change into account when  
15 establishing the summer instream flow for the River, in violation of the agency’s statutory  
16 obligations. As a factual matter, Ecology neglected to account for how a warming climate will  
17 affect instream flows now and in the future even though there is ample scientific information on  
18 this topic. As a legal matter, Ecology ignored its statutory obligations and internal policy “to  
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21 <sup>87</sup> Instream Flow Incremental Methodology (IFIM) combines physical measurements of a streambed and water  
velocities with computer modeling (Physical Habitat Simulation or “PHABSIM”) to develop curves of usable habitat  
for fish as a function of steamflow. *See* AR011403-5 for more detailed discussion of the method.

22 <sup>88</sup> AR019102; AR010725. Evidence in the record shows WDFW believed that the IFIM methodology used was  
23 developed for smaller, slower rivers than the Spokane, and that its habitat predictions may not be as accurate when  
24 applied to a river like the Spokane. AR018589 (“our models leave some doubt about big rivers because our models  
do not address the vertical distribution in the water column of habitat and the potential (which I have observed  
snorkeling in big rivers) of different fish stacked at different levels in the water column”).

25 <sup>89</sup> AR011373-443; AR015466-7; AR 011373-76.

1 prepare for, address, and adapt to the impacts of climate change.” RCW 43.21M.010. In the  
2 rulemaking record, Ecology acknowledges that “[c]limate change is an important topic,” but  
3 justified its disregard of current climate science based upon its belief that the instream flow rule  
4 “cannot be used to mitigate for climate change impacts.” AR003052. Ecology completely misses  
5 the point and misapplies its own climate change policies.  
6

7 Studies have shown that “climate changes will decrease Spokane River low flows.”<sup>92</sup>  
8 Indeed, the hydrograph of the river is expected to change significantly between now and 2080.<sup>93</sup>  
9 The River is “expected to have increased streamflows during the peak flow season . . . and  
10 *decreased flows in the summer.*”<sup>94</sup> Transient rain-snow watersheds such as the Spokane River  
11 basin are expected to experience “substantial impacts by the 2020s.”<sup>95</sup> It is already well  
12 understood that climate change impacts include both changes in recharge and changes in  
13 streamflow<sup>96</sup> and that “climate changes will decrease low flows, exacerbating the current  
14 problem” and causing increase in River temperatures.<sup>97</sup>  
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16  
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18 <sup>90</sup> AR011386.

19 <sup>91</sup> AR011394; AR011407-8.

20 <sup>92</sup> AR011540; AR010552.

21 <sup>93</sup> AR010549; AR010552.

22 <sup>94</sup> AR010612-635.

23 <sup>95</sup> AR011366; AR 010551-52 (“Low summer streamflow conditions are projected to become more severe in about  
24 80% of watersheds across Washington State. Rain dominant and mixed rain and snow basins show the greatest and  
most consistent decreases in minimum flows, while changes for snow dominant basins are smaller.”).

25 <sup>96</sup> AR010556-57.

26 <sup>97</sup> AR010557; AR006473-74 (SVRPA area expected to become dryer in the summer); AR010556 (“Stream  
temperatures are projected to increase in response to warming and decreases in summer streamflow. Projections for  
124 stream temperature locations across the state find that more sites will experience temperatures that elevate stress  
for adult salmon. Many will experience thermal tolerances for the entire summer season by 2080 (2070-2099),  
despite rarely being in excess of these temperatures in the recent past.”).

1 If Ecology only protects 850 cfs (i.e. the “floor” in today’s climate) from future  
2 appropriations, then Ecology is selecting a flow that will soon be too warm for fish.  
3 Furthermore, Ecology is eliminating the number of “good years” of instream flow in the River  
4 that will occur in the future, contradicting WDFW’s recommendations. Ecology states that  
5 “[t]emperature in the river is a complex issue, and at this time there is not sufficient data to  
6 permit any specific conclusions about habitat.”<sup>98</sup> That is contradicted by the record and there is  
7 nothing to show that protecting only 850 cfs minimum flows in the summer will ensure the  
8 protection of all instream uses given the anticipated impacts of climate change.  
9

10 The legislature has designated Ecology “a central clearinghouse for relevant scientific and  
11 technical information about the impacts of climate change on Washington’s ecology, economy,  
12 and society, as well as serve as a central convener for the development of vital programs and  
13 necessary policies to help the state adapt to a rapidly changing climate.” RCW 43.21M.010(2).  
14 In that role, Ecology, and other agencies, developed an integrated climate change response  
15 strategy “to better enable state and local agencies . . . to prepare for, address, and adapt to the  
16 impacts of climate change.” RCW 43.21M.010(1). Ecology has recognized that it should take  
17 climate change into account when adopting instream flows, but it neglected to do so here.<sup>99</sup> By  
18 setting the summer flows at 850 cfs in the Rule (i.e. the lowest flow it deems protective of fish in  
19  
20

21 \_\_\_\_\_  
22 <sup>98</sup> AR002997.

23 <sup>99</sup> AR010553 (citing Ecology, Preparing for a Changing Climate: Washington State’s Integrated Climate Response  
24 Strategy (April 2012), Chapter 7 at 102, at  
[http://www.ecy.wa.gov/climatechange/ipa\\_responsestrategy.htm#REPORT](http://www.ecy.wa.gov/climatechange/ipa_responsestrategy.htm#REPORT)); *Id.*; see also AR001115 (“The Director  
25 of the Department of Ecology and the Secretary of the Department of Health, in consultation with other affected  
26 state, local and federal agencies, shall develop specific guidelines, tools, and recommendations to assist the state and  
its water users to meet the anticipated changes in water resources due to climate change impacts.”).

1 the present day),<sup>100</sup> Ecology deviated from its own policies and has illegally failed to follow its  
2 own recommendations in violation of the APA.

3 **E. Ecology Arbitrarily And Capriciously Failed To Account For The Future**  
4 **Exercise Of Inchoate Water Rights In Washington And Idaho.**

5 Ecology violated its mandate to “retain[] base flows necessary to provide for preservation  
6 of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values” when  
7 it opted to protect the lowest possible summer instream flow, knowing that existing instream  
8 flows will be depleted in the future when pre-existing inchoate (presently unused) water rights  
9 are exercised. RCW 90.54.020(3)(a). Ecology has issued large water rights to Spokane-area  
10 municipal water suppliers that have not been fully exercised to date.<sup>101</sup> Unused water accounts  
11 for around 50% of total rights issued to eighteen Spokane-area public water suppliers.<sup>102</sup> Given  
12 population growth projections,<sup>103</sup> these presently unused water rights will be exercised in the  
13 future, further depleting flow in the River.<sup>104</sup> Indeed, a hydrogeologic model of the aquifer-river  
14 system concluded that full exercise of these inchoate rights will deplete flows by up to 200-250  
15 cubic feet per second, as measured at the Spokane gage during summer months.<sup>105</sup> Ecology  
16 recognizes that exercise of these inchoate rights will further deplete the River.<sup>106</sup>  
17  
18

19 \_\_\_\_\_  
20 <sup>100</sup> “The department regards the minimum permissible flow consistent with legislative intent as the lowest flow  
capable of protecting and preserving instream values, in this case native fish populations.” AR002985.

21 <sup>101</sup> AR010538.

22 <sup>102</sup> AR010538-41.

23 <sup>103</sup> AR010547-8

24 <sup>104</sup> *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247 (2010); *Cornelius v. Washington Dept. of Ecology*,  
182 Wn.2d 574 (2015).

25 <sup>105</sup> AR010548; AR012388. Other evidence in the record suggests that use of the full inchoate municipal water rights  
would take another 208-280 cfs out of the River. AR007737. In Idaho, public water suppliers literally raced to  
26 obtain priority over Washington’s new instream flow rule by filing applications for nearly 100 cfs in new municipal  
water rights between December 2014 and February 2015, just weeks and days before the Spokane rule went into

1 Assuming for argument's sake that 850 cfs is an acceptable flow for fish (it is not),  
2 Ecology's approach has made it impossible to achieve that flow in the future when the inchoate  
3 rights are put to use. Ecology has thus failed to fulfill its statutory mandate to protect instream  
4 values, even for fish. RCW 90.54.020(3)(a). Ecology's response to CELP's request to account  
5 for inchoate water rights appears to be 'deliberate ignorance.' Ecology acknowledged that  
6 inchoate rights "may have an impact on flows in the Spokane River," and that inchoate rights are  
7 senior to the instream flow rule.<sup>107</sup> Seniority has no bearing, however, on whether Ecology  
8 should account for predictable future depletions caused by pre-existing rights. Ecology suggests  
9 that RCW 90.22 prohibits adjustments to instream flow levels based on other water management  
10 considerations, such as the exercise of inchoate rights.<sup>108</sup> However, the response cites no  
11 statutory law or case law to support this assertion, no doubt because there is none. RCW 90.22  
12 authorizes Ecology to establish flows to protect instream values such as fisheries, but contains no  
13 language prohibiting Ecology from accounting for the impacts of its own past water resource  
14 management activities and decisions. Indeed, Ecology's position ignores the very purposes of  
15 the comprehensive watershed planning process, which was specifically designed to inform  
16 development of the instream flow rule, including impacts of inchoate rights on instream flows.  
17 RCW 90.82.048(1). The WRIA 55-57 Watershed Planning Unit produced a detailed (and  
18 expensive) technical assessment and several subsequent reports that, among other products,  
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23 effect. AR010542-44. Hydrogeologic modeling suggests exercise of these rights will produce a smaller, but still  
24 significant reduction of 20-25 cfs as measured at the Spokane gage during summer months. AR010548-9.

25 <sup>106</sup> AR000063 ("Over the long-term, increasing water use will result in reduced flows and potentially no flow in the  
26 river during critical summer months.").

<sup>107</sup> AR010606.

1 modeled the impact of inchoate water rights on instream flows and this information should be put  
2 to use, not ignored. *See* RCW 98.82.070(1). Further, Ecology’s authority over water resources  
3 provides ample basis for the agency to utilize all data and relevant water management  
4 information when adopting instream flow rules. RCW 43.21A.064, 43.21A.080; *see also* RCW  
5 90.54.030; RCW 90.54.040. Ecology’s refusal to address past actions of its own making<sup>109</sup> and  
6 others (e.g., Idaho Department of Water Resources) that will affect future flows in the Spokane  
7 River is arbitrary and capricious, outside statutory authority, an erroneous interpretation of the  
8 law, and not supported by the evidence. RCW 34.05.570(2)(c), (4)(c).

10 **IV. CONCLUSION**

11 For the reasons set forth above, CELP respectfully requests that this Court order Ecology  
12 to grant the Petition to Amend, set aside that part of the Rule that establishes summer instream  
13 flows of 850 cfs, and remand the matter back to Ecology with instructions to assess what summer  
14 flows are needed to protect, preserve and enhance (where possible) all instream values, including  
15 fish, navigation, recreation and aesthetics and establish flows in the Rule that fulfill Ecology’s  
16 legal obligations as described herein. CELP also respectfully requests that this Court order such  
17 other relief pursuant to RCW 34.05.574 as justice requires and that the Court enter an order  
18 awarding CELP its attorneys’ fees and costs in bringing this matter pursuant to RCW 4.84.350.

19 Respectfully submitted this 25th day of April, 2017.

21 /s/ Dan Von Seggern /s/

22 <sup>108</sup> AR010605-6.

23 <sup>109</sup> It was Ecology who granted such large municipal water rights in this area in the first place, the size of which did  
24 not go unnoticed during the rulemaking process. *See* AR012432-33 (“Impressive utility coverage over the Rathdrum  
25 aquifer. 150,000 acre feet of inchoate water . . . that’s like two Lake Tapps[] which is supposed to meet the needs of  
King and Pierce County for 50 plus years. I guess they just do it big on the east side.”).

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