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**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

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

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY'S
RESPONSE TO PETITIONERS'
OPENING BRIEF

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I. INTRODUCTION

This case involves Petitioners' challenge to Ecology's decision to set by administrative rule summer flows in the Spokane River at 850 cubic feet per second (cfs), as well as the agency's discretionary decision to deny their rulemaking petition. Both challenges fail. This is because the rule is expressly consistent with Ecology's statutory rulemaking authorities, and because the rule and petition denial are both well-reasoned and supported by the comprehensive record on record with the court.

Petitioners' challenges, brought pursuant to the Administrative Procedure Act (APA), are essentially an effort to have the Court substitute its judgment for that of Ecology when it comes to the complex scientific and technical determination of setting minimum flows by rule for specific statutory purposes. Here, Ecology's technical decision to set summer flows at 850 cfs based on fish needs is consistent with the agency's statutory authority, well supported by the record, and protective of all instream values, including recreation, aesthetics, and navigation. Petitioners simply disagree, believing Ecology should have set flows higher to *enhance* their preferred uses of recreation, aesthetics, and navigation.

With respect to both of their claims, it is Petitioners' burden to demonstrate that Ecology either exceeded its statutory authority or that Ecology's decisions were arbitrary and capricious. Petitioners do not satisfy their burden. The Court should therefore dismiss Petitioners' challenges with prejudice, and fully affirm the Spokane Rule.

II. COUNTER STATEMENT OF ISSUES

1. Whether Ecology's decision to set summer flows at 850 cfs is reasonable and supported by the record.

2. Whether Ecology's decision to deny Petitioners' rulemaking petition was reasonable and supported by the record.

1 **III. STATEMENT OF FACTS**

2 **A. Background on the Spokane River and Rathdrum Prairie Aquifer**

3 The Spokane River originates at the outlet of Lake Coeur d'Alene in Idaho and flows
4 west for approximately 111 miles to the Columbia River in Eastern Washington. AR 8062.¹
5 The Spokane River and Spokane Valley Rathdrum Prairie Aquifer are located in eastern
6 Washington and encompass portions of the cities of Spokane, Spokane Valley, Liberty Lake,
7 and Millwood. AR 2978. Though the river and aquifer are a shared resource between Idaho and
8 Washington, each state has distinct regulatory systems. AR 2979. Developing the Rule
9 establishes Washington State's interest in this shared resource and may also serve to protect
10 Washington's interest in the water in the river should an interstate dispute occur with Idaho.
11 AR 63, 72, 3383, 3390.

12 Flows in the river are declining due to increased groundwater use from the aquifer.
13 AR 63. Ecology thus ceased issuing new groundwater rights from the aquifer in the 1990s.
14 AR 2979. Idaho continues to issue water rights from the aquifer, which impacts flows in the
15 river in Washington. AR 63. The aquifer is the sole source of municipal water supply for the
16 area and there are enough existing municipal water rights to meet future demand. AR 2979.

17 The river is central to both the area's economy and its sense of community. AR 2983.
18 Today, the river serves both in and near-stream businesses, and is a key element of recreational
19 activities, such as floating, fishing, wading, sightseeing, or simply enjoying the riparian
20 corridor. Many surveys indicate the river is a central feature of the identity of the region. The
21 river has come to represent and reflect the community, and the aquifer that feeds it is central to
22 the well-being and future of the river and the economy of inland northwest. *Id.*

23
24
25 ¹ Citations are to the Administrative Record (AR) filed with the Court, which contains Ecology's file as
26 well as documents related to Ecology's denial of Petitioners' rulemaking petition. Documents will be cited as
"AR" followed by the Bates Number assigned to each corresponding page(s). Working copies of cited documents
are appended to this brief.

1 **B. How Hydroelectric Projects Govern River Flows**

2 Avista Corporation operates five hydroelectric projects located on the Spokane River in
3 northern Idaho and eastern Washington constructed from 1889 to 1949. AR 8063.² The Post
4 Falls development is the uppermost project on the river and consists of three dams on three
5 channels with natural islands connecting the structures. *Id.* The development includes
6 generating facilities and impounds nine miles of the Spokane River to the outlet of Lake Coeur
7 d'Alene. *Id.*

8 Importantly, Avista uses its Post Falls development to regulate flows in the Spokane
9 River typically for six months a year starting in late June or July, after spring runoff flows have
10 peaked and largely subsided. AR 8067. Avista regulates river flows in accordance with
11 minimum flow requirements in its *federal license*, which incorporates other considerations of
12 lake level, downstream flow considerations, energy demands, flood control, and upstream
13 recreational, residential and commercial interests. Throughout the summer recreation season,
14 Coeur d'Alene Lake is maintained at or near an elevation of 2,128 feet. Generally during the
15 week after Labor Day, Avista begins to release stored water at Post Falls, resulting in a gradual
16 drawdown in lake levels. The timing of the drawdown varies annually based on flow
17 conditions, weather forecasts, and energy demands. *Id.*

18 Avista, as a condition of its federal license to operate its projects, is required to
19 implement numerous measures to protect and enhance fish, wildlife, water quality, recreation,
20 cultural, and aesthetic resources at the project. AR 8074–8078. The license requires Avista to
21 operate the Monroe Street and Upper Falls dams to provide minimum flows of 850 cfs from
22 June 16 to September 30 each year. AR 8074. The flows are intended to enhance aquatic
23 habitat for rainbow trout and mountain whitefish in the Spokane River. *Id.* Avista's federal
24

25 ² A detailed description of each of these projects is found in the record at AR 8058–8224, which is The
26 United States of America, Federal Energy Regulatory Commission 2009 Order Issuing New License and
Approving Annual Charges for Use of Reservation Lands. More specifically, *see* AR 8063–8066.

1 license also requires Avista to release flows for whitewater boating from Post Falls dam
2 ranging from 3,300 cfs to 5,500 cfs. AR 8078. Flows that serve the recreational community
3 occur every year on the Spokane River, but the timing and duration of those recreational flows
4 varies. AR 2985.

5 To change the actual flow in the river to better suit a particular recreational use, one
6 would need to seek changes in Avista's license because it has control over water storage and
7 controls releases per its federal license. *Id.*, AR 8058–8224. The Rule does not, and cannot,
8 require control or release of water from storage. AR 2985. An instream flow rule does establish
9 regulatory flows with a priority date as to other water rights, meaning new uses are subject to
10 the flows. AR 5, 2798; RCW 90.03.247. The Rule does not, however, put water in the river or
11 affect existing water rights. AR 2798. Ecology rule writer Guy Gregory gave a presentation at
12 the public hearing for the proposed Rule in Spokane in October 2014 (AR 2789–2815) wherein
13 he makes clear that Avista's federal license controls minimum releases to the river, and that
14 "Ecology's Instream Flow rule *only addresses* new junior water uses and when they are
15 interruptible to protect the instream flow." AR 2809. The presentation also expresses that the
16 Rule "does not change the hydrograph." *Id.*³

17 **C. Ecology's development and adoption of instream flows for the Spokane River**

18 Ecology approaches instream flow rules differently in each watershed. Each rule area
19 has unique needs due to geography, geology, population, and local water management.
20 AR 100. As explained, summer Spokane River flows are dependent on releases from Post Falls
21 dam.

22
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25 ³ See also, e.g., AR 3006, Ecology's Concise Explanatory Statement and Response to Comments ("The
26 instream flow rule does not control the hydrograph of the river."); AR 3016 ("Flow in the River is controlled
largely by discharges from Avista Hydroelectric developments, regulated under the FERC license.").

1 **1. Watershed Planning**

2 Ecology has been working with watershed planning groups since 1998 to develop
3 instream flow protection for the Spokane River. AR 2984. Under RCW 90.82, the Watershed
4 Planning Act, the Legislature recognizes that “local development of watershed plans for
5 managing water resources and for protecting existing water rights is vital to both state and local
6 interests.” RCW 90.82.010. If a watershed planning unit reaches consensus on instream flows
7 during the watershed planning process, then Ecology must adopt those flows by rule.
8 RCW 90.82.080(1)(b). If a planning unit does not reach consensus on flows, then Ecology may
9 initiate rulemaking under the APA to adopt flows. RCW 90.82.080(1)(c).

10 Here, the planning unit failed to reach consensus on instream flow levels during their
11 planning process. AR 2985.⁴ Ecology thus chose to use science-based fish studies to develop
12 the instream flow rule. *Id.*

13 **2. Setting Instream Flows**

14 Ecology formally commenced rulemaking in January 2014. AR 72. The record reflects
15 that Ecology engaged in a deliberative process to ultimately set summer minimum flows at
16 850 cfs by relying on science-based fish studies that protected fish as a baseline and that also
17 served to protect other instream values, including recreation, navigation, and aesthetics.

18 In 2012, Washington Department of Fish and Wildlife (WDFW) Instream Flow
19 Biologist Dr. Hal Beecher wrote his flow recommendations for the Spokane River, which
20 Ecology ultimately adopted. AR 3831–3841. In his summary, Dr. Beecher writes that the
21 recommended minimum instream flow for the Spokane River is 850 cfs from June 16 to
22 September 30. AR 3831. Dr. Beecher notes that “[i]nstream flows should address what the
23 river needs to preserve its values and resources and ecological functions.” *Id.* He notes how

24 _____
25 ⁴ The Watershed Plan for Water Resource Inventory Areas 55 and 57 is in the record at AR 3421–3540.
26 At AR 3482, the plan discusses how “into the fall Avista controls the flow in the Spokane River with the Post Falls [development].”

1 flows were developed in cooperation with Ecology with an emphasis on fish⁵ and based upon
2 the results of four scientific studies:

3 In developing instream flows recommendations for the lower Spokane River,
4 the Washington Department of Fish and Wildlife (WDFW), in cooperation with
5 Department of Ecology (Ecology), has emphasized rainbow trout and mountain
6 whitefish. . . .

7 Results of several studies (EES Consulting 2007, NHC and HD 2004,
8 Parametrix 2003a,b, Addley and Peterson 2011) provide information on trout
9 and whitefish habitat at different flows and different seasons in the lower
10 Spokane River.

11 AR 3832.⁶

12 The EES Consulting Study, which uses the Instream Flow Incremental Methodology
13 (IFIM),⁷ particularly presented relationships between instream flow and fish habitat in terms of
14 what is called “weighted usable area.” Weighted usable area is a standard index that combines
15 habitat quantity and quality in instream flow studies and is based on a number of observed fish
16 preferences, for example, depth, velocity, and bed material at different life stages. *Id.* When
17 considering the need to protect the maximum weighted usable area for both trout and mountain
18 whitefish, Dr. Beecher concluded that “a flow of 850 cfs should be protected.” AR 3834. A
19 chart in the record perfectly demonstrates how a flow of 850 cfs during this period maximizes
20 the weighted usable area for both species:
21

22 ⁵ Mountain whitefish and rainbow trout are the species of concern, and are weighted equally. These
23 species were identified as the principal species of concern for WRIA 54 and 57 by WDFW and this decision was
24 supported by an established Instream Flow Technical Team guiding the study, and by the WRIA 54 and 55/57
25 Planning Units. Both species utilize the study area during a significant portion of their life cycle. AR 3858

26 ⁶ Each of these studies is found in the record at AR 3842, 3883, 3981, and 4157, respectively.

⁷ Ecology has used the IFIM in numerous watersheds throughout the state. *See* AR 1144–1168, “Instream
Flow Science The Trout the whole trout & nothing but the trout So help me cod,” a document by Ecology Natural
Resource Scientist James Pacheco explaining in detail how Ecology sets instream flows using methodologies such
as IFIM.

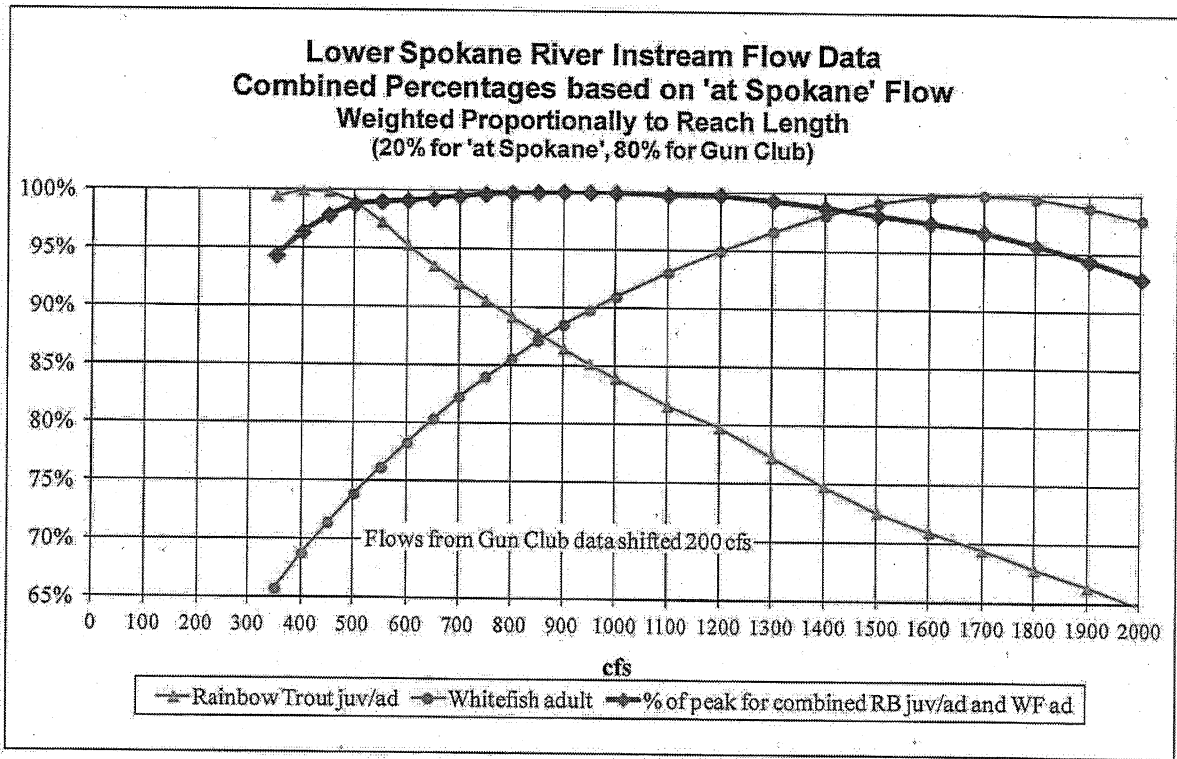


Figure 1. Modeled relationship between fish habitat (WUA) and flow in the lower Spokane River as determined by EES Consulting (2007) in a study commissioned by the Watershed Planning Unit. Juvenile and adult rainbow trout WUA, mountain whitefish WUA, and a combination of the two species were graphed in terms of percent maximum WUA. These relationships were used for recommending summer instream flow.

AR 3834, Figure 1.

The record demonstrates that Ecology and WDFW fish biologists at various times during the Watershed Planning process authored multiple opinions regarding flows. As they gathered more scientific data, their recommended flows were adjusted multiple times. In December 2007, Dr. Beecher wrote a memorandum wherein he recommended a summer flow of 900 cfs. AR 7749–7751. In September 2008, Ecology biologist Brad Caldwell wrote a memo noting that Ecology and WDFW were having difficulty determining the correct flow to protect trout from April 1 to June 15. AR 7747–7748. In December 2008, Dr. Beecher drafted a memo recommending “850 cfs as the summer flow measured at the Spokane gage.” AR 7772–7784. Dr. Beecher in his 2012 memo that recommends 850 cfs as the summer flow

1 notes that WDFW has revised its prior seasonal flow recommendations based upon “new
2 information from the Addley and Peterson study and to integrate a re-evaluation of the EES,
3 NHC and HD, and Parametrix studies.” AR 3833. The state caucus of fish biologists made it
4 clear that they had reached consensus regarding the appropriate minimum flow values in their
5 August 1, 2012, letter to the Watershed Planning Unit: “The recommended flows presented in
6 this document supersede any previously presented flow number proposals from the State
7 Caucus during the watershed planning process. Our intent is to use the revised
8 recommendations as the basis for instream flow rule-making for the Spokane River.” AR 4199.

9 During the Rule adoption period, Ecology received dozens, if not hundreds, of
10 comments regarding its decision to set summer flows at 850 cfs. *See, e.g.*, AR 3025–3050.

11 Ecology responded:

12 Ecology does not agree that the instream flow levels adopted in this rule are too
13 low to protect instream resources in the Spokane River. Ecology believes the
14 instream flows in this rule, based as they are on four independent fish studies,
15 are science-based. The flows have been vetted by top scientists, staff, and
16 management of all concerned state agencies. The instream flows have been
17 reviewed and analyzed by all local Water Resource Inventory Area Watershed
18 planning groups. **Since these flows were first proposed to the planning unit,
no entity has emerged with scientific information to indicate these flows are
not appropriate.** It is our opinion these flows are the best flows available to
protect the instream resources of the Spokane River. **They are flows necessary
for stream health, ecological function, and preservation of other instream
resources including scenic, aesthetic, and navigational values.**

19 AR 3031 (emphasis added).

20 Ecology also responded to concerns about recreation, aesthetics, and navigational
21 values, noting that it considered these issues at multiple stages throughout the rulemaking
22 process, and that the subjects were addressed in detail during Avista’s Federal Energy
23 Regulatory Commission (FERC) relicensing process for their hydroelectric facilities.⁸
24 AR 2985. The subject of recreational, aesthetic, and navigational flows was also addressed

25 _____
26 ⁸ See AR 8063–8066.

1 during the Watershed Planning Process⁹ and during the comment period on preliminary drafts
2 of the Rule. Ecology noted that it had read the whitewater paddling study conducted during the
3 Avista relicensing process, listened to many river users, and reviewed anecdotal observations,
4 opinions, and photos submitted by whitewater enthusiasts and others. Ecology then explained
5 in detail why it chose not to set flows based on recreational needs and why not setting flows
6 based on those needs is not the same as not considering them:

7 They [recreational flows] were considered by the department and rejected as the
8 primary basis for establishing instream flows. Ecology chose to use science-
9 based fish studies to develop the instream flow values for the rule when the
10 Watershed Planning unit failed to reach consensus about instream flow
11 values.... While [the flows] are based on fish habitat studies, the instream flow
12 levels established in [the] rule will preserve wildlife, scenic, aesthetic, and other
13 environmental values in the Spokane River, in accordance with
14 RCW 90.54.020.

15 *Id.*

16 Ecology specifically responded to comments and concerns regarding recreation
17 (AR 3001–3009), noting that “[f]lows that serve the recreational community occur every year
18 in the Spokane River.” AR 3009.¹⁰ The agency also addressed and responded to comments on
19 aesthetics (AR 3009–3011, 3033)¹¹ and climate change (AR 3050–3052).¹²

20 Following the APA rulemaking process, Ecology adopted the Rule on January 27,
21 2015, and the Rule became effective on February 27, 2015. AR 18130.

22 ⁹ See AR 3484–3485.

23 ¹⁰ The record shows that Ecology considered in detail the Berger 2004 Whitewater Boating Study, and
24 how the “whitewater community is one of many uses of the Spokane River [and] [a]mong its members, a
25 significant range of needs and desire are expressed.” AR 3031–3033.

26 ¹¹ See AR 3033 (“for aesthetics, we anticipate a range of flows in the river to be representative of the
needs and desires of those sampled and the entire population. No primacy among these uses exists in statute.”).

¹² See AR 3052 (“Climate change is an important topic. The instream flow rule does not control the
hydrograph of the river. It does not require nor control the release of water from storage. It cannot be used to
mitigate for climate change impacts.”).

1 **D. The Petition to Amend the Spokane Rule and Ecology's Response**

2 On February 29, 2016, Petitioners submitted a Petition to Ecology requesting that
3 Ecology amend the Spokane Rule pursuant to RCW 34.05.330. AR 10488–10577. The Petition
4 asserted that summer flows were set too low, and, consistent with most of their claims in this
5 case, “(1) do not protect recreation and aesthetics; (2) do not protect the Spokane River
6 fisheries; (3) ignore future impacts of inchoate water rights in Washington and Idaho; (4) fail to
7 account for how climate change will affect instream flows; (5) impose unreasonable costs on
8 the recreational boating industry; and (6) violate Ecology’s fiduciary responsibilities as
9 manager of our state’s water resources under the Public Trust Doctrine.” AR 10496. The
10 Petition requested “that Ecology carefully consider the best available scientific information
11 when establishing regulatory instream flows for the river.” AR 10577.

12 Ecology acknowledged receipt of the Petition on March 1, 2016. AR 10476. An
13 internal email between Ecology’s rule team and Water Resource’s management dated March 5,
14 2016, shows that the team met with the agency’s Director Maia Bellon and recommended she
15 deny the Petition. AR 18519. That message then outlines a detailed plan for timely responding
16 to the Petition. *Id.* During the review period, Ecology also received several public comments
17 on the Petition and responded to them, even though that is not part of the agency’s statutory
18 obligation when responding to Petitions. AR 10475, 10592.

19 On April 27, 2016, Ecology issued a detailed response denying the Petition. AR 10598–
20 10609. The Petition denial first summarizes each of the areas of concern raised by the
21 Petitioners. AR 10599. The response then specifically addresses each area of concern by
22 offering Ecology’s detailed reasons for denying the Petition. AR 10600–10608. Director
23 Bellon concludes her denial by expressing confidence in the Rule: “Keeping the Spokane River
24 healthy and flowing is vital to everyone in the region. Ecology is confident that the instream
25 flows set in WAC 173-557 are based on the correct studies, and on a careful review of all the
26 information available during rule adoption process.” AR 10608.

1 Upon denying the Petition, Director Bellon issued a statement on the agency’s website
2 explaining why Ecology got the flows right and why the agency denied the petition.
3 AR 10610–10611. Therein she states, “[t]he adopted flow numbers are based on studies of fish
4 habitat. When establishing flows the law allows us to determine which purposes are most
5 protective of the resource. While the flows are based on fish studies, the rule also protects
6 recreation, aesthetics and other environmental values.” AR 10611.

7 IV. STANDARD OF REVIEW

8 This case involves a challenge to WAC 173-557-050 that sets minimum flow levels in
9 the Spokane River at Spokane from June 16 to September 30 at 850 cfs, as well as Ecology’s
10 decision to deny Petitioners’ request that Ecology amend the Spokane Rule. Under the APA,
11 Appellants bear the burden to prove that the Rule and Ecology’s Petition denial are invalid.
12 RCW 34.05.570(1)(a).

13 With respect to Petitioners’ rule challenge, the Court may declare a rule invalid “only if
14 it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority
15 of the agency; the rule was adopted without compliance with statutory rule-making procedures;
16 or the rule is arbitrary and capricious.” RCW 34.05.570(2)(c).

17 Similarly, an agency’s decision to deny a rulemaking petition is subject to judicial
18 review as other agency action under RCW 34.05.570(4). *Rios v. Dep’t of Labor & Indus.*,
19 145 Wn.2d 483, 491–92, 39 P.3d 961 (2002). The court applies the APA standards directly to
20 the agency’s administrative record.¹³ *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp.*
21 *Comm’n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). The Court will grant relief in a challenge to
22 an agency’s decision to deny a rulemaking petition only if it determines that the agency action

23
24 ¹³ For rule challenges, the agency’s rule-making file serves as the record for judicial review.
25 RCW 34.05.370(4); *Musselman v. Dep’t of Soc. & Health Servs.*, 132 Wn. App. 841, 852–53, 134 P.3d 248
26 (2006). “The rule-making file is necessary for effective judicial review because it contains information the agency
considered contemporaneously with the adopting the rule.” *Musselman*, 132 Wn. App. at 854. Here, Ecology filed
its record with the Court on January 18, 2017.

1 is unconstitutional, outside the agency's authority, arbitrary or capricious, or taken by
2 unauthorized persons. RCW 34.05.570(4)(c).

3 Petitioners assert that Ecology's adoption of the Rule and the petition denial were
4 contrary to Ecology's statutory authority. Opening Br. at 12-14. The proper standard for each
5 challenge is whether the rule *exceeded* Ecology's statutory authority, RCW 34.05.570(2)(c), or
6 whether the petition denial was *outside* of Ecology's authority. 34.05.570(4)(c). A duly enacted
7 rule will be upheld if it is reasonably consistent with the statute that it implements. *Wash. Pub.*
8 *Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). Rules are presumed to
9 be valid. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986). The
10 wisdom or desirability of a rule is not a question for the reviewing court. *St. Francis Extended*
11 *Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1991).

12 Petitioners also rely on the arbitrary and capricious standard for both of their claims.
13 Arbitrary or capricious agency action is action that is willful, unreasoned, and taken without
14 regard to the attending facts or circumstances. *Port of Seattle v. Pollution Control Hearings*
15 *Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004). Neither the existence of contradictory evidence,
16 nor the possibility of deriving a separate conclusion from the available evidence, renders an
17 agency's action arbitrary and capricious. *Rios*, 145 Wn.2d at 504. Similarly, "[w]here there is
18 room for two opinions, and the agency acted honestly and upon due consideration, [we] should
19 not find that an action was arbitrary and capricious, even though this court may have reached
20 the opposite conclusion." *Port of Seattle*, 151 Wn.2d at 589.

21 Courts also avoid exercising discretion that our legislature has placed in the agency. *Id.*
22 An agency is accorded "wide discretion" when deciding to forgo rulemaking. *Rios*, 145 Wn.2d
23 at 507. Finally, it is well settled that courts "give the agency's interpretation of the law great
24 weight where the statute is within the agency's special expertise." *Cornelius v. Dep't of*
25 *Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). The Supreme Court has specifically
26

1 deferred to Ecology's expertise in interpreting water resources statutes. *Port of Seattle*, 151
2 Wn.2d at 593.

3 Lastly, in a review under RCW 34.05.570, the court may (a) affirm the agency action or
4 (b) order an agency to take action required by law, order an agency to exercise discretion
5 required by law, set aside agency action, enjoin or stay the agency action, remand the matter
6 for further proceedings, or enter a declaratory judgment order. RCW 34.05.574(1). Petitioners
7 seek only a remand. Opening Br. at 30.

8 V. ARGUMENT

9 A. The Spokane Rule's Summer Flows are Consistent with Ecology's Rulemaking 10 Authorities, Well-Reasoned, and Supported by the Record

11 Despite Petitioners' arguments to the contrary, the Rule is expressly consistent with
12 Ecology's statutory rulemaking authorities, its methodology for establishing flows having
13 previously been approved by the Supreme Court. Additionally, Ecology's decision to set
14 minimum flows at 850 cfs is well reasoned and supported by the record.

15 1. The Rule is consistent with Ecology's statutory rulemaking authorities

16 Ecology has exclusive authority for setting minimum instream flows by rule.
17 RCW 90.03.247. Once established, flow rules have the status of water rights. RCW 90.03.345.
18 Ecology derives its primary instream flow rulemaking authority from RCW 90.22, the
19 Minimum Water Flows and Levels Act.¹⁴ The Act provides:

20 The department of ecology may establish **minimum water flows or levels** for
21 streams, lakes or other public waters for the purposes of protecting fish, game,
22 birds or other wildlife resources, or recreational or aesthetic values of said
23 public waters whenever it appears to be in the public interest to establish the
24 same.

25 ¹⁴ The Watershed Planning Act also authorizes and requires Ecology to set minimum flows by rule when
26 a watershed planning unit reaches consensus on flows. RCW 90.82.080(1)(b). This did not occur here, and so
rulemaking defaulted to Ecology under the APA. RCW 90.82.080(1)(c)

1 RCW 90.22.010 (emphasis added). RCW 90.22.020 then provides in relevant part, “[f]lows or
2 levels authorized for establishment under RCW 90.22.010 . . . shall be provided for through the
3 adoption of rules.”¹⁵

4 Under the plain language of RCW 90.22.010, the Legislature, through its use of the
5 word “or” in the statute, has provided Ecology discretion to determine the purposes for which
6 Ecology sets minimum flows. This makes perfect sense, as explained in the record, because
7 each river, or rule area, is unique, thus requiring Ecology to approach rules differently in
8 different watersheds. AR 100. As Ecology explains, “Ecology is not required to establish
9 minimum flows for fish **and** recreational values or aesthetic values. The department has some
10 discretion and leeway in the process.” AR 2984. “As a default rule, the word ‘or’ does not
11 mean ‘and’ unless legislative intent clearly indicates to the contrary.” *Tesoro Ref. & Mktg. Co.*
12 *v. Dep’t of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008). Yet here, Petitioners’ primary
13 argument is that the “or” in RCW 90.22.010 should be read as an “and.” This construction
14 would remove discretion that the Legislature plainly provided to Ecology to determine the best
15 purposes for which to set minimum flows by rule; and here Ecology properly determined to set
16 flows on the needs of fish, a decision that is consistent with *numerous* provisions of law.¹⁶

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20 ¹⁵ The Water Resources Act of 1971 also provides the agency with general rulemaking authority.
21 Specifically, RCW 90.54.040 authorizes Ecology, through the adoption of rules, to ensure as a matter of high
22 priority “that the waters of the state are utilized for the best interests of the people, to develop and implement in
23 accordance with the policies of this chapter a comprehensive state water resources program which will provide a
24 process for making decisions on future water resource allocation and use.”

25 ¹⁶ *See, e.g.*, (1) RCW 90.54.005, wherein the Legislature recognizes that productive fish populations are
26 one of three critically important water resource objectives; (2) RCW 77.57.020, which states that it is “the policy
of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all
times in the streams of this state;” (3) RCW 90.22.060, which calls for establishing a statewide list of priorities for
evaluation of instream flows: (“In establishing these priorities, the department shall consider the achievement of
wild salmonid production as its primary goal.”); and (4) RCW 90.82.070, part of the Watershed Planning Act,
which calls for an assessment that includes “data necessary to evaluate necessary flows for fish,” and strategies
“to supply water in sufficient quantities to satisfy the minimum instream flows for fish.”

1 Petitioners' challenge to the Rule is rooted in the Water Resources Act of 1971,
2 RCW 90.54, which includes a list of *general fundamentals* for utilization and management of
3 waters of the state. Included in that list is the *general fundamental* that:

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

6 Perennial rivers and streams of the state shall be retained with base flows
7 necessary to provide for preservation of wildlife, fish, scenic, aesthetic and
8 other environmental values, and navigational values.

9 RCW 90.54.020(3)(a).

10 This statute doesn't mandate that minimum flows must be established by rule for each
11 listed value. It instead states the general fundamental that *base flows* for preservation of these
12 values must be retained. Petitioners' arguments make clear that they believe that summer flows
13 on the Spokane River should be *enhanced* to satisfy their preferred values of recreation,
14 aesthetics, and navigation.¹⁷ However, RCW 90.22 does not require Ecology to *enhance* flows
15 for any particular use when it establishes *minimum flows* by rule. RCW 90.54.020(3) states that
16 flows should be enhanced only "where possible."

17 Reading RCW 90.22 and RCW 90.54 together so as to give each statute meaning,
18 RCW 90.22 first provides Ecology with the discretion to establish minimum flows by rule for
19 certain purposes. In turn, the agency satisfies the *general fundamental* under
20 RCW 90.54.020(3) to preserve and protect *base flows* for all listed values so long as the
21 *minimum flows* established by rule do not undermine those values. As the record explains here,
22 the values in RCW 90.54.020 remain protected, albeit not at the *enhanced* levels preferred by
23 Petitioners for their preferred uses.¹⁸ Indeed, Petitioners cite to nothing in the record that

24 ¹⁷ Petitioners' Opening Brief at 16 contains a number of comments on recreational flows regarding the
25 *preferred* flows of this community. For example, they cite to AR 2243, which is a comment that states, "The
26 majority of study participants. . . unanimously *preferred* flows of at least 1500 cfs." (Emphasis added.)

¹⁸ See, e.g., AR 3003 ("The department considered the recreational, aesthetic, and navigational values
arguments for protecting the Spokane River at multiple stages throughout the process which concludes in
establishing these instream flows for the river. The subject, as you indicate, was addressed in detail during

1 supports the proposition that, at 850 cfs, there is no recreation or navigation on the river, and at
2 that flow aesthetic value is diminished or lost.

3 Lastly, as discussed, Ecology uses the IFIM to determine what flows are minimally
4 necessary for fish, and to preserve and protect other environmental values in
5 RCW 90.54.020(3)(a). Ecology's use of IFIM to set minimum flows was affirmed by our
6 Supreme Court in *Dep't of Ecology v. Public Utility District No. 1 of Jefferson County*,
7 121 Wn.2d 179, 202–203, 849 P.2d 646 (1993), *aff'd* 511 U.S. 700, 114 S. Ct. 1900, 128 L.
8 Ed. 2d 716 (1994) (*Elkhorn*). In *Elkhorn*, Ecology used IFIM to impose a flow condition on the
9 water quality certificate for a proposed hydroelectric project on the Dosewallips River.
10 *Elkhorn*, 121 Wn.2d at 189. The Supreme Court expressly affirmed Ecology's use of IFIM to
11 establish minimum flow levels for rivers. ("Ecology's stream flow conditions were necessary
12 to ensure compliance with RCW 90.54.020(3)(A)"). *Id.*

13 Finally, Petitioners wrongly argue that the Rule violates the agency's obligations under
14 the Public Trust Doctrine. Opening Br. at 14–15. The Supreme Court long ago ruled that the
15 Public Trust Doctrine does not serve as an independent source of authority for Ecology
16 decision making. *Postema v. Pollution Control Hearings Bd.* 142 Wn.2d 68, 98–99, 11 P.3d
17 726 (2000). ("Ecology's enabling statute does not permit it to assume the public trust duties of
18 the state; the doctrine does not serve as an independent source of authority for Ecology to use
19 in its decision-making apart from code provisions intended to protect the public interest.").
20 Thus, in the context of water resources management, Ecology's authority is provided in the
21 water resources statutes, including RCW 90.22 and RCW 90.54, and the agency has no
22 independent authority or obligations under the common law Public Trust Doctrine.

23 _____
24 Avista's FERC relicensing process for their Spokane hydroelectric facilities. (Berger, 2004) Ecology has read the
25 Whitewater Paddling Study conducted under the FERC process, listened to many river users, and reviewed the
26 anecdotal observations, opinions, and photos submitted by whitewater enthusiasts and others. . . . Choosing to not
to solely use recreational flow criteria to establish flows in an instream flow rule is different than not considering
them.").

1 In sum, Ecology's decision to set summer flows at 850 cfs is directly consistent with
2 the agency's rulemaking authorities.

3 **2. The rule is not arbitrary and capricious**

4 Petitioners offer multiple arguments as to why they think the Rule's summer flows are
5 arbitrary and capricious. Opening Br. at 23–31. Not one of these arguments, however, is
6 sufficient to overcome their heavy burden of demonstrating that Ecology's decision was
7 “willful and unreasoning and taken without regard to the attending facts and circumstances.”
8 *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606
9 (2003). Indeed, the comprehensive administrative record on file with the Court demonstrates
10 that Ecology's ultimate decision was adopted through a deliberative process of reason and that
11 Petitioners simply disagree with the ultimate decision that the agency made.

12 Petitioners first argue that Ecology arbitrarily and capriciously “assumed” the 850 cfs
13 flow protects navigation, recreation, and aesthetics. Opening Br. at 15–18. For support, they
14 cite, for example, to numerous recreational flow comments submitted to FERC during the
15 relicensing process for the Avista Hydroelectric Project. These comments, however, express
16 *preferred* flows for paddling.¹⁹ Petitioners also cite their own aesthetic flow study as proof that
17 these issues weren't considered by Ecology. Opening Br. at 18. This is simply not true and
18 contradicted by the record.

19 Petitioners' reliance on their aesthetics study here is misplaced because that was
20 conducted *after* Ecology adopted the Rule. The validity of an agency rule is determined as of
21 the time the agency took the action adopting the rule. *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at
22 906. To the extent Petitioners' arguments here go to Ecology's denial of their Petition for
23 rulemaking, their arguments fail for the reasons stated in Section V.B, below.

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25 ¹⁹ See, e.g., Opening Br. at 16 (“The majority of study participants stated that flows of at least 1000 cfs
26 were needed to run the upper river, and unanimously *preferred* flows of at least 1500 c.f.s.”) (citing AR 2243).

1 Further, the record demonstrates that Ecology thoroughly considered issues related to
2 recreation, aesthetics and navigation when it adopted the Rule. AR 2985, 2995, 3003, 3009,
3 3010, 3033. The record makes clear that the Rule does not put water into the river and that
4 flows are controlled by Avista. AR 2985. Avista's federal license requires Avista to release
5 flows for recreation. AR 8077. Flows that serve the recreational community occur every year
6 on the Spokane River. AR 2985. Avista's federally required flows from June 16 to September
7 30 are identical to Ecology's summer flows in the Rule, 850 cfs. The record demonstrates that
8 recreational flows and aesthetics were thoroughly evaluated during the Avista relicensing
9 process and the rule adoption process. Petitioners are thus flat out wrong when they assert that
10 Ecology arbitrarily and capriciously "assumed" the 850 cfs flow protects navigation,
11 recreation, and aesthetics.

12 Petitioners next argue that Ecology arbitrarily and capriciously violated its own
13 practices and policies by not assessing flows needed to protect navigation, recreation, and
14 aesthetics. Opening Br. at 19–20. Petitioners position appears to be that Ecology must study
15 each listed value in RCW 90.22.010 and RCW 90.54.020(3)(a) when it sets flows, a position
16 that is undermined by the discretion the Legislature has placed in Ecology in RCW 90.22.010
17 to determine the purposes for which the agency sets flows.

18 Moreover, in their arguments here, Petitioners cite to *their rulemaking* petition, which
19 in turn cites to guidance and policies unrelated to instream flow rulemaking. AR 10524–10525.
20 Turning to the Petition, Petitioners are simply arguing what they argue here, "Aesthetic &
21 Recreation Flows Can & *Should Be Scientifically Studied and Assessed.*" AR 10524 (emphasis
22 added). They cite no guidance or policy document related to instream flow rulemaking that
23 requires the study of aesthetics, and instead cite to an Ecology handbook related to *Water*
24 *Quality Certifications*, which do study recreation and aesthetics. *Id.* Simply put, the "guidance"
25 that Petitioners claim Ecology *should have followed* is not applicable to instream flow
26 rulemaking.

1 Petitioners again cite to their own aesthetics study, which, again, was not considered by
2 Ecology when it adopted the Rule. Petitioners then cite to an administrative case to support
3 their position that an aesthetics study is required: *Center for Environmental Law & Policy*
4 (*CELP*) v. *Dep't of Ecology*, Pollution Control Hearings Bd. (PCHB) No. 12-082 (Aug. 30,
5 2013) (Findings of Fact, Conclusions of Law and Final Order (As Amended Upon
6 Reconsideration)). This is a non-binding case from an administrative tribunal. Regardless, in
7 this case, the PCHB upheld Ecology's decision to approve a water permit application
8 conditioned to incorporate a pending aesthetics study that was part of a concurrent *water*
9 *quality certification* for a hydroelectric project in Okanogan County. In other words, that study
10 was part of a water quality certification, and not a requirement of Ecology's water permit at
11 issue. CELP unsuccessfully argued that Ecology could not issue the water permit until the
12 aesthetics study was completed. The Court of Appeals affirmed. *CELP v. Dep't of Ecology*,
13 196 Wn. App. 360, 383 P.3d 608 (2016). This case is thus not probative of any policy that
14 Ecology has violated as it pertains to setting instream flows under RCW 90.22.

15 In sum, Ecology did not "arbitrarily and capriciously" refuse to consider irrelevant
16 guidance when it set instream flows by rule under its relevant authorities, discussed above.²⁰

17 Petitioners next argue that Ecology arbitrarily and capriciously rejected higher summer
18 flows for aesthetics, recreation, navigation, and fish, and that Ecology arbitrarily and
19 capriciously concluded that flows of 850 cfs protect and preserve fish. Opening Br. at 20–24.
20 In support of their arguments here, Petitioners cite to many of the documents in the record that
21 reflect Ecology's deliberative process in arriving at a summer flow of 850 cfs. Ecology does
22 not dispute that higher flows were once contemplated in differing contexts, for example

23 ²⁰ Petitioners' footnote 66 inappropriately and selectively cites to information outside of the record that
24 pertains to Ecology's 1979 Instream Resources Protection Program for the Snohomish Basin,
25 <https://fortress.wa.gov/ecy/publications/documents/79irpp7.pdf>. The Court should strike this footnote from the
26 Opening Brief, though if the information is considered, the Court should be aware that the document affirms
Ecology's approach here to focus on fish: "fish represent the most sensitive instream resource, and impacts upon
their production are indicative of the effect of the proposed instream flows on all other instream resources."

1 watershed planning or the relicensing process for the Avista projects. But the record reflects
2 that Dr. Hal Beecher ultimately recommended the 850 cfs flow based upon new information
3 from four new scientific studies.²¹ AR 3833.

4 Petitioners did not submit any competing science during the Rule adoption process.²²
5 They simply disagree with the ultimate decision that Ecology made. “Where there is room for
6 two opinions, and the agency acted honestly and upon due consideration, [courts] should not
7 find that an action was arbitrary and capricious, even though [the] court may have reached the
8 opposite conclusion.” *Port of Seattle*, 151 Wn.2d at 589. The record shows that Ecology
9 reasonably concluded that the flows it selected are “necessary for stream health, ecological
10 function, and preservation of other instream resources including scenic, aesthetic, and
11 navigational values.” AR 3031.

12 Petitioners lastly argue that Ecology’s decision to set summer flows at 850 cfs was
13 arbitrary and capricious because the agency disregarded the effects of climate change when it
14 adopted the Rule and also disregarded the impact of the future exercise of inchoate water rights
15 on instream flows. Opening Br. at 25–31. The Court can dismiss these remaining arguments
16 outright.

17 With respect to Petitioners’ climate change argument, under RCW 90.22 Ecology is
18 required to set flows at levels that are scientifically determined to be necessary to satisfy the
19 listed instream values. As Ecology reasonably explains in its Concise Explanatory Statement,
20 the Rule cannot be used to mitigate for climate impacts because the Rule *does not control the*

21 ²¹ Petitioners in their Opening Brief, footnote 88, cite to AR 18589, an October 2014 email from Dr. Hal
22 Beecher to Ecology’s rule team for the proposition that WDFW had doubts about the IFIM for the Spokane River.
23 They selectively cite this document, as Dr. Beecher concludes his message, “I still believe that our [850 cfs] figure
is the most defensible I can come up with.” AR 18589. The only explanation for Petitioners’ selective citation to
this document is that they did not want the Court to be aware that Dr. Beecher stood by the 850 cfs figure.

24 ²² As part of their Petition, Petitioners reference a report prepared by Dr. Allan T. Scholz, dated February
25 24, 2016. This report is irrelevant to Petitioners’ Rule challenge because it was not considered by Ecology during
26 the Rule-adoption process. *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 906. To the extent Petitioners’ arguments here
go to Ecology’s denial of their Petition for rulemaking, their arguments fail for the reasons stated in Section V.B,
below.

1 hydrograph of the river. AR 3052. As Director Bellon further explains in her denial of the
2 Petitioners' Petition for Rulemaking, "[c]limate change impacts on the Spokane River will
3 happen independently of the instream flow rule" and more importantly, "[c]limate change
4 models . . . do not provide a legal methodology for determining specific instream flow levels."
5 AR 10606 (emphasis added). Until scientists can use climate change models to determine what
6 flows are minimally necessary to preserve and protect instream values such as fish under
7 RCW 90.22, then Ecology is correct to rely on trusted and approved methods such as the
8 IFIM.²³

9 Petitioners lastly argue that Ecology should have accounted for large inchoate water
10 rights in Idaho and Washington when it set flows.²⁴ As a matter of law, Ecology has no
11 regulatory authority over water rights in Idaho. Additionally, any inchoate (unused) water
12 rights in Washington as a matter of law are senior to the instream flow Rule, which only gains
13 the status of a water right once the flow Rule is adopted. See RCW 90.03.345 ("The
14 establishment of . . . minimum flows or levels under RCW 90.22.010 or 90.54.040 shall
15 constitute appropriations within the meaning of this chapter with priority dates as of the
16 effective dates of their establishment."). The Rule makes clear that it does not affect existing
17 rights. WAC 173-557-020(3)(a). There is, simply put, no legal authority for Ecology to "adjust
18 flows" to account for people and entities that came along before the Spokane Rule and have the
19 authorization to take water out of the river. Washington is a "prior appropriation state,"
20 meaning the first in time to the resource is the first in right. RCW 90.03.010. Petitioners'
21 concern is not with the Rule itself, so much as it is with the hardships of the prior appropriation

22 ²³ Petitioners citation to RCW 43.21M.010 is not useful to their position here. This statute requires
23 certain agencies, including Ecology, to collaborate to develop an integrated climate change strategy. It has nothing
to do with instream flow rulemaking.

24 ²⁴ An inchoate water right is "an incomplete appropriative right in good standing. It comes into being as
25 the first step provided by law for acquiring an appropriative right is taken. It remains in good standing so long as
the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last
step provided by law." *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 596, 957 P.2d 1241 (1998).

1 doctrine. It was not, therefore, arbitrary and capricious for Ecology to conclude consistent with
2 state law that it could not consider the effects of senior, inchoate water rights, when it adopted
3 the Spokane Rule.

4 In summary, Petitioners' arguments demonstrate that they have a simple difference of
5 opinion regarding what the flows should be. However, the record fully supports the decision
6 Ecology made, even if Petitioners, and the Court, disagree. Where there is room for two
7 opinions the Court should not find that an action was arbitrary and capricious, even though the
8 Court, if it was the initial decision-maker, might reach a different conclusion. *Port of Seattle*,
9 151 Wn.2d at 589.

10 **B. Ecology's Petition Denial is Expressly Consistent with RCW 34.05.330(1) and is**
11 **Well Reasoned**

12 Although Petitioners maintain that Ecology's denial of their rulemaking petition was
13 contrary to Ecology's statutory authority, they neglect to even discuss RCW 34.05.330(1), the
14 authority relevant to rulemaking petitions. Their challenge to Ecology's denial of their
15 rulemaking petition fails because the denial is expressly consistent with RCW 34.05.330(1)
16 and is well reasoned.

17 **1. The Petition denial is consistent with RCW 34.05.330**

18 RCW 34.05.330(1) provides:

19 Any person may petition an agency requesting the adoption, amendment, or
20 repeal of any rule. . . . Within sixty days after submission of a petition, the
21 agency shall either (a) deny the petition in writing, stating (i) its reasons for the
22 denial, specifically addressing the concerns raised by the petitioner, and, where
appropriate, (ii) the alternative means by which it will address the concerns
raised by the petitioner, or (b) initiate rule-making proceedings in accordance
with RCW 34.05.320.

23 The statute imposes specific obligations on an agency when reviewing a petition.
24 Unlike the formal rulemaking process, an agency's response to a petition must be issued in
25 only 60 days. RCW 34.05.330(1). If the agency denies a petition, it must provide written
26 responses to the concerns raised in the petition. "The purpose of requiring an agency to provide

1 reasons for rejecting a rulemaking request is to give notice to interested parties and enable a
2 reviewing court to determine whether challenged agency action is arbitrary, capricious, an
3 abuse of discretion, or otherwise contrary to law.” *Squaxin Island Tribe v. Dep’t of Ecology*,
4 177 Wn. App. 734, 741, 312 P.3d 766 (2013). In *Squaxin*, the Court affirmed an Ecology
5 decision to deny the Tribe’s rulemaking petition and offer alternatives to rulemaking.

6 The Court in *Squaxin* made clear that an agency’s denial need not *redress* a Petitioner’s
7 listed concerns so long as the agency offers sufficient reasons for its denial: “Although
8 Ecology’s response does not resolve the Tribe’s concerns about the low flows in Johns Creek,
9 it does ‘specifically address’ them.” *Id.*

10 Here, as in *Squaxin*, Ecology’s petition denial is consistent with RCW 34.05.330(1)
11 because it specifically addresses and responds, in detail, to each of the Petitioners’ listed
12 concerns. AR 10598–10608 (insufficient flows for recreation and aesthetics, AR 10601)
13 (insufficient flows to protect fish, AR 10604) (concerns about inchoate water rights, AR
14 10605) (concerns about climate change, AR 10606) (concerns about Ecology’s economic
15 analyses, AR 10606) (Petitioners’ public trust doctrine argument, AR 10607) (violation of
16 instream flow policies, AR 10607–10608). Petitioners’ argument that Ecology’s Petition denial
17 is contrary to Ecology’s statutory authority thus fails because Ecology’s decision offered
18 sufficient and reasonable explanations for the petition denial, consistent with the requirements
19 of RCW 34.05.330(1).

20 **2. The petition denial was not arbitrary and capricious**

21 In the *Squaxin* case, after discussing the sufficiency of Ecology’s petition denial, the
22 Court stated, “[w]e evaluate the sufficiency of Ecology’s explanation under RCW 34.05.330(1)
23 in light of its purpose to facilitate judicial review of whether the agency’s decision not to
24 engage in rulemaking was arbitrary and capricious.” *Squaxin Island Tribe*, 177 Wn. App. at
25 741.

1 Here too, the Court must evaluate whether Ecology's decision to forego rulemaking
2 was arbitrary and capricious. It was not. An agency has wide discretion in deciding to forego
3 rulemaking. *Rios*, 145 Wn.2d at 507. This is because rulemaking is a resource intensive
4 discretionary agency activity; and for the reasons just stated, Ecology's decision to deny the
5 rulemaking petition was well-reasoned, even if the Petitioners disagree with the outcome. The
6 record reflects that Ecology staff briefed Director Bellon within days of receiving the petition,
7 recommended denial (a decision with which Director Bellon agreed), and established a
8 thorough action plan for working on the petition response. AR 18519. This plan included
9 preparing a draft response and contacting individual experts "needed to pull together relevant
10 information,"²⁵ meetings, seeking legal support, and preparing a briefing packet for Director
11 Bellon. *Id.* Ecology even accepted and responded to multiple public comments on the petition
12 even though that is beyond the agency's statutory obligations under RCW 34.05.330(1).
13 AR 10475, 10592. Ecology denied the petition because it was confident in the Rule. AR 10608,
14 10610-10611. Collectively these actions are not the actions of an irrational decision maker.
15 Arbitrary or capricious agency action is willful and unreasoning action taken without regard to
16 the attending facts or circumstances. *Wash. Indep. Tel. Ass'n*, 149 Wn.2d at 26. "[N]either the
17 existence of contradictory evidence nor the possibility of deriving conflicting conclusions from
18 the evidence renders an agency decision arbitrary and capricious." *Rios*, 145 Wn.2d at 504.

19 In the *Squaxin* case, in concluding that Ecology's decision to deny the Tribe's
20 rulemaking petition was not arbitrary and capricious, the Court noted that the "Tribe's true
21 grievance is with the merits of Ecology's decision." *Squaxin Island Tribe*, 177 Wn. App. at
22 741. Here too, Petitioners' true grievance is with the merits of Ecology's decision. However,
23 that alone is insufficient to overcome their burden of demonstrating that Ecology's petition
24 denial was arbitrary and capricious.

25 ²⁵ This included contacting expert Water Rights biologist Steve Boessow with WDFW for his input
26 regarding the petition. AR 18530.

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VI. CONCLUSION

For the reasons stated, Ecology respectfully requests the Court to dismiss Petitioners' challenges to the Spokane Rule and Ecology's discretionary decision to deny their rulemaking petition.

DATED this 22d day of May 2017.

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