Superior Court of the State of Washington
For Thurston County

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Letter Opinion

Re: *Swinomish Indian Tribal Community v. State Ecology*
Thurston County Cause No. 08-2-01403-4

Dear Counsel:

This case presents a challenge by the Swinomish Indian Tribal Community (the Tribe) and the City of Anacortes (City) to a decision on May 15, 2006, by the Washington State Department of Ecology (Ecology) to amend the 2001 Skagit River Instream Flow Rule, WAC 173-503. The Tribe challenges the amendments, which the Tribe asserts improperly established large reservations of water that are not subject to minimum stream flows. Amended Petition for Judicial Review filed October 13, 2008. The City intervened on this matter and supports the Tribe's challenges. The City and the Tribe also assert that Ecology failed to comply with the State Environmental Policy Act.

Prior to issuing its ruling, this Court has considered the entire court file in this matter, including specifically the briefs of the Tribe, the City, and Ecology, and extensively reviewed the administrative record filed with this Court. This Court also heard oral argument in this matter on July 9, 2010.

In this letter opinion, the Court follows the convention used by the parties by citing to "RA" and a page number when referencing the certified administrative record filed by Ecology.

Legal Standard

Under Washington law, an administrative rule may be declared invalid only if the court finds that the rule exceeds the statutory authority of the agency, was adopted without compliance with statutory rule-making procedures, or is arbitrary and capricious. RCW 34.05.570(2)(c). The determination of an agency's rulemaking authority is a question of law reviewed de novo. *Washington Public Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645 (2003).

Agency action is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Wilman v. Washington Util & Transp. Comm.*, 154 Wn.2d 801, 806 (2005). A rule will not be invalidated as arbitrary and capricious merely because a court could reach a different conclusion based on the evidence. *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 504 (2002). Also, a change in policy alone is not enough to show an agency's action is arbitrary and capricious.

Facts

On March 15, 2001, Ecology issued the Skagit River Basin Instream Flow Rule, WAC 173-503, which was adopted effective April 14, 2001. In September of 2004, Ecology issued a document entitled "Guidance Document for Setting Instream Flows and Allocating Water for Future Out-Of-Stream Uses." RA006955-77. The 2004 Guidance addressed the exception for overriding considerations of the public interest.

Later in 2004, Ecology published a rulemaking notice indicating that it intended to amend the 2001 rule "to address future small groundwater withdrawals (permit-exempt wells) to provide potable water for domestic and small business needs." RA 002979.

In February of 2005, Ecology published a proposed rule, but it was later withdrawn. On October 31, 2005, Ecology issued a new proposed rule. Each of these proposals met with significant opposition and litigation.

On May 15, 2006, Ecology issued a final rule amending the prior rule setting minimum flows of the Skagit River. On the same date, Ecology and Skagit County entered into a settlement agreement in which the County agreed to dismiss its pending litigation against Ecology over the latest proposed rule. The Settlement Agreement and Order of Dismissal

were filed May 19, 2008. RA031654. The documents accompanying the May 15, 2006, rule amendments explained, among other things, Ecology's analysis to support an exception based upon overriding considerations of the public interest. RA033772-76.

Legal Analysis

Each rule challenge will be addressed in turn.

First, the Tribe and the City assert that Ecology's rule determining that an exception to minimum flows based upon overriding considerations of the public interest was arbitrary and capricious as the determination exceeded Ecology's authority. Swinomish Tribe Opening Brief at 11.

The purpose of the Water Resources Act of 1971, RCW 90.54, was articulated by the Legislature.

> It is the purpose of this chapter to set forth fundamentals of water resource policy for the state to insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington and, in relation thereto, to provide direction to the department of ecology, other state agencies and officials, and local government in carrying out water and related resources programs. It is the intent of the legislature to work closely with the executive branch, Indian tribes, local government, and interested parties to ensure that water resources of the state are wisely managed.

RCW 90.54.010(2).

The authority relied upon by Ecology is the same authority that the Tribe claims it has exceeded in issuing the amended rule, RCW 90.54.010(3)(a). The statute requires certain base flows, but allows withdrawals that conflict with the base flows in certain situations. Ecology acknowledges that the instream flows established by the amended rule conflict with the minimum instream flows, but Ecology claims that such action is authorized. Specifically, Ecology relies upon RCW 90.54.020(3)(a), which states:

> Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

Ecology determined that it was clear that overriding considerations of the public interest will be served by the amended rule. RA02987

Ecology's determination is supported in the record. RA013649; RA006342-45; RA006368-71; RA02987; RA002863-64; RA002872.

The Tribe and the City argue that Ecology's use of the public interest exception to establish general reservations of water that are not subject to minimum flows exceeded the agency's statutory authority. Although the Tribe asserts that any withdrawal in conflict with the base flow must be determined on a case-by-case basis for each specific use authorized, this Court determines that it is permissible to analyze the withdrawals by classes of use. This Court finds the language and result in *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 90 (2000), helpful, and it distinguishes the cases cited by the Tribe to the contrary.

A private benefit is not the same as a public interest, nor does a private benefit preclude serving a public interest. Ecology properly considered the benefits of making water available to classes of individual users. There is statutory authority to support Ecology's argument that the reservations at issue in the amended rule supporting domestic, municipal, agricultural, industrial, and stockwater users are beneficial uses of the waters of the state. RCW 90.54.020(1). And there is support in the record for this argument as well. RA002987, RA002863-74. It is not for this Court to second-guess Ecology's determination that overriding considerations of the public interest are served by the withdrawals at issue.

Ecology's attempt to quantify the public interest through cost benefit analysis is neither required nor precluded by the statutory authorities. In fact, the economic well-being of the state is recognized in the Water Resources Act of 1971 as a reason for proper utilization of the state's water resources. Ecology merely attempted to gather information to quantify the public benefit, which often does not have dollar figures attached. After thorough analysis, Ecology concluded that the provision of water for economic development that would otherwise be lost clearly overrode other considerations. Incidentally, the term "overriding" seems to recognize that there may be public interest considerations on both sides of the equation. In Ecology's analysis, it appears that it attempted to measure losses in "private dollars" as well. RA033777. Contrary to the arguments of the Tribe, it does not appear that by considering financial analyses in determining that overriding considerations of the public interest will clearly be served converted the analysis to the maximum net benefits test in RCW 90.54.020(2).

The Tribe argues that the 2006 amendments were arbitrary and capricious because they violated Ecology's 2004 Guidance document. Even if Ecology did not strictly follow the guidance document, that alone does not meet standard for arbitrary and capricious action. The document is not an agency rule or policy statement under the Administrative Procedure Act. RCW 34.05.010(8) and (15); RCW 34.05.230. Deviations from the guidance document appear to be explained in the administrative record and do not prove that action was unauthorized.

The Tribe next argues that Ecology exceeded its statutory authority under RCW 90.54.050(1) by establishing reservations that are larger than necessary to serve any legitimate public need. RCW 90.54.050 states in part, "[i]n conjunction with the programs provided for in RCW 90.54.040(1), whenever it appears necessary to the director in carrying out the policy of this chapter, the department may by rule adopted pursuant to chapter 34.05 RCW . . . [r]eserve and set aside waters for beneficial utilization in the future . . ." Although the Tribe disagrees with the calculation of the reservations for domestic, municipal, and commercial/industrial purposes based upon a 50-year projection period, the reasons for doing so are supported in the record. RA002994-96; RA003518; RA000750. With regard to the .5 cfs stockwatering reservation, the Tribe cites to a document showing that the benefits of the reservation were unclear. Again, this reservation, although contested by the Tribe, is supported by the record. RA007500.

This Court finds that these reservations do not exceed Ecology's statutory authority under RCW 90.54.050(1). Additionally, the challenge to the reservations for domestic, municipal, and commercial/industrial purposes for the 22 tributaries at two percent of the predicted low flow ignores the other limitations and considerations in setting those reservations. The reservations are only allowed to the extent they are supported by the needs identified by Ecology's determination of overriding considerations of the public interest. So, it does not appear to this Court that those reservations are as open-ended as described by the Tribe.

The Tribe challenges Ecology's reliance on a two percent reduction of low flow as the biological standard to assess harm to resources. However, the argument seems to be that no amount of reduction in flow could ever be justified. This seems inconsistent with the statutory scheme indicating a full consideration and weighing of interests. As the Court indicated previously, the overriding public interest language assumes that there would be *some* interest to weigh against the overriding public interest. Thus, the Tribe's argument relies somewhat on its prior arguments which the Court has considered and rejected.

The record does support the determination that a reduction in stream flows of 2 percent or less during the historic summer low flow period would not impact the long term sustainability of the fish populations and is protective of fish, both from a scientific and policy perspective. RA038793, RA00081, RA033346. The Tribe does point out that the 2 percent calculation represents a slippery slope, especially when combined with the cumulative impacts of decades of development. While those are certainly concerns to this Court, it was reasonable for Ecology to consider potential harm to conditions as they existed at the time of analysis and not speculate that that 2 percent figure would be later increased. This Court is not in a position of second-guessing Ecology's analysis.

The Tribe next challenges Ecology's use of 350 gallons per day as a measure of the maximum average consumptive daily use for a single-family residence. The specific rule at issue, WAC 173-503-073(7), in its entirety, reads as follows:

> (7)(a) A record of all withdrawals from the domestic, municipal, and commercial/industrial reservation shall be maintained by the department. The record will readily show both the allocated and unallocated quantities of water that are in reserved status.
>
> (b) All uses of this reservation shall be debited against the reservation. The department will account for water use under the reservation based on actual measured water use or a standard quantity. If actual measuring data are not available, the department will deduct the authorized quantities under water right permits or certificates from the reservation. For permit exempt appropriations, the department will deduct a standard amount of 350 gallons per day for each domestic or residential service connection in a group domestic water system. The standard amount will be adjusted periodically based on reported water use to reflect the maximum average daily use before any recharge credit for those users that are required to measure and report water use. The department will deduct 5,000 gallons per day for each commercial/industrial use, unless actual measured use is available. Additionally, the department reserves the right to account for water use based on the best available information contained in well logs, water approvals issued by local jurisdictions, water rights issued by the department, public water system approvals or other documents.

Although the Tribe disagrees with Ecology's use of the 350 gallons per day figure, the Tribe has not met its burden to show that use of the figure is arbitrary and capricious. Use of 350 gallons per day is supported by the record. RA00724, RA040587-89, RA 040593. The parties here simply disagree as to the conclusions reached based on the record. While Ecology notes that it has previously used the very same figure as an estimate of the average annual day, which it acknowledges is different than maximum average consumptive daily use (which measures use of water during the highest period of use), the record shows that Ecology referred to actual data rather than estimates to reach the 350 figure. Also, consideration of the entire rule reveals that safeguards are in place to address the legitimate concerns raised by the Tribe.

Next, the Tribe challenges Ecology's credit for septic recharge in WAC 173-503-073(7)(c). The Tribe asserts that Ecology's decision to award such credit is inconsistent with the board decision of *Manke Lumber Co. v. Dep't of Ecology*, 1996 WL656039 (Nov. 1, 1996), and others. However, Ecology is not precluded from providing the credit by any statutory or case law cited by the Tribe, and Ecology's determination of a 50 percent mitigation credit is not arbitrary and capricious. RA002999, RA022748, RA043066-67. This is true even if it represents a change in position.

Finally, the Tribe and the City of Anacortes argue that Ecology's Determination of Nonsignificance violated the State Environmental Policy Act. The Act requires that government agencies to prepare an environmental impact statement when taking major actions having a probable significant, adverse environmental impact. *Kucera v. Dep't of Transportation*, 140 Wn.2d 200, 213 (2000). Here, Ecology made a threshold

determination not to require an environmental impact statement. The Determination of Nonsignificance was issued on October 24, 2005, following the preparation of an environmental checklist and consideration of environmental impacts. RA00638-68. Many of the Tribe's arguments challenging the Determination of Nonsignificance restate prior arguments challenging the rule amendment, and those are addressed above.

An agency's threshold determination that an environmental impact statement is not necessary is accorded substantial weight. *Leavitt v. Jefferson County*, 74 Wn.App 668, 680 (1994). The City argues that Ecology did not comply with its obligation to consider alternatives in RCW 43.21C.030(2)(e). This Court finds that, when read together with the surrounding statutory language, the provision cited by the City is describing an obligation when completing an environmental impact statement, not an environmental checklist.

The record shows that Ecology did consider potential environmental impacts of stream flows, aquatic resources, and water quality. RA002992-94, RA 003304, RA003006-9, RA003311-12. This Court further finds that Ecology was not required to consider the potential environmental impacts of previously enacted changes in the Skagit County Comprehensive Plan and Land Use Code. Ecology's amended rule is not a zoning regulation, even though it was consistent with the County's Comprehensive Plan and zoning. It appears from this record that the County had already considered potential impacts from construction and development in its environmental impact statements and State Environmental Policy Act review involved in the County's Comprehensive Plan and zoning regulations. There is no obligation that Ecology does so as well.

The Court concludes that Ecology's amended rule does not exceed its statutory authority, and is not arbitrary and capricious. Further, the Court finds that the State Environmental Policy Act was not violated when Ecology issued a Determination of Nonsignificance. Therefore, the rule is upheld. The Court will sign Findings of Fact and Conclusions of Law consistent with this ruling upon presentation.

Sincerely,

Carol Murphy

Carol Murphy
Superior Court Judge

CM/dkr

cc: Court file