



2013 Report to the Legislature: Statewide Progress on Setting Instream Flows



DEPARTMENT OF
ECOLOGY
State of Washington

November 2013
Publication no. 13-11-004

Publication and Contact Information

This report is available on the Department of Ecology's website at <https://fortress.wa.gov/ecy/publications/SummaryPages/13-11-004.html>

For more information contact:

Water Resources Program
P.O. Box 47600
Olympia, WA 98504-7600

Phone: 360-407-6872

Washington State Department of Ecology - www.ecy.wa.gov

- Headquarters, Olympia 360-407-6000
- Northwest Regional Office, Bellevue 425-649-7000
- Southwest Regional Office, Olympia 360-407-6300
- Central Regional Office, Yakima 509-575-2490
- Eastern Regional Office, Spokane 509-329-3400

If you need this document in a format for the visually impaired, call the Water Resources Program at 360-407-6872. Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call 877-833-6341.

2013 Report to the Legislature: Statewide Progress on Setting Instream Flows

by

Ann Wessel

Water Resources Program

Washington State Department of Ecology
Olympia, Washington

Program Mission

The mission of the Water Resources Program is to support sustainable water resources management to meet the present and future water needs of people and the natural environment, in partnership with Washington communities.

Authorizing Laws

- RCW [18.104](#), Water Well Construction Act (1971)*
- RCW [43.21A](#), Department of Ecology (1970)*
- RCW [43.27A](#), Water Resources (1967)*
- RCW [43.83B](#), Water Supply Facilities (1972)*
- RCW [43.99E](#), Water Supply Facilities – 1980 Bond Issue (Referendum 38) (1979)*
- RCW [86.16.035](#), Department of ecology control of dams and obstructions (1935)*
- RCW [90.03](#), Water code (1917)*
- RCW [90.08](#), Stream patrolmen (1925)*
- RCW [90.14](#), Water rights claims registration and relinquishment (1967)*
- RCW [90.16](#), Appropriation of water for public and industrial purposes (1869)*
- RCW [90.22](#), Minimum water flows and levels (1969)*
- RCW [90.24](#), Regulation of outflow of lakes (1939)*
- RCW [90.28](#), Miscellaneous rights and duties (1927)*
- RCW [90.36](#), Artesian wells (1890)*
- RCW [90.38](#), Yakima river basin water rights (Trust Water) (1989)*
- RCW [90.40](#), Water rights of United States (1905)*
- RCW [90.42](#), Water resource management (Trust Water) (1991)*
- RCW [90.44](#), Regulation of public groundwaters (1945)*
- RCW [90.46](#), Reclaimed water use (1992)*
- RCW [90.54](#), Water resources act of 1971 (1971)*
- RCW [90.66](#), Family farm water act (1977)*
- RCW [90.80](#), Water conservancy boards (1997)*
- RCW [90.82](#), Watershed planning (1997)*
- RCW [90.86](#), Joint legislative committee on water supply during drought (2005)*
- RCW [90.90](#), Columbia River basin water supply (2006)*
- RCW [90.92](#), Pilot local water management program (Walla Walla) (2009)*

Case law

Washington case law plays a vital role in providing determinations and rulings that also govern water resources management. The Water Resources Program's website on laws, rules, and case law can be found at <http://www.ecy.wa.gov/programs/wr/rules/rul-home.html>.

Table of Contents

	<u>Page</u>
Abstract/Executive Summary	ii
Purpose.....	1
Instream Flow Progress.....	1
Overall Progress on Rulemaking	1
Rule Moratorium	3
2013 Rulemaking Progress	4
WRIA 3A - Samish Subbasin.....	4
WRIA 18 - Dungeness.....	4
WRIA 25 - Grays-Elochoman & WRIA 26 - Cowlitz	5
Spokane River – Portions of WRIAs 54, 55, & 57	5
Requests for Future Rulemaking	6
Rule Implementation.....	7
WRIAs 3 and 4 - Skagit.....	7
WRIA 14 - Kennedy-Goldsborough	8
WRIA 18 – Dungeness.....	9
Public Outreach and Involvement.....	10
Appendix.....	11
Statewide Map of Instream Flows Set by Rule.....	11

Executive Summary

On November 16, 2012 Ecology adopted WAC 173-518, the Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18. The rule took effect on January 2, 2013. Adoption of a rule for the Dungeness watershed was the culmination of local, state, and Tribal collaborative efforts that began in 1992 with the Dungeness-Quilcene pilot watershed planning process, and continued through watershed planning under RCW 90.82 (Watershed Planning Act).

The 2013 Legislature authorized \$2.05 million to develop projects and acquire water rights to enhance stream flows and provide mitigation water for rural development in the Dungeness watershed. These funds will help “hydrate” the water bank, making a significant difference in implementing the new rule.

On Oct. 3, 2013, the Washington state Supreme Court ruled in *Swinomish Indian Tribal Community v. Department of Ecology* that Ecology exceeded its authority in establishing reservations of water when amending the rule for the Skagit watershed in 2006. The decision reinstates the 2001 Skagit Instream Flow Rule. Under the 2001 rule, water rights established on or after April 14, 2001, are subject to curtailment when the senior minimum instream flow rights are unmet.

Ecology and Washington Department of Fish and Wildlife (WDFW) staff members have continued to work with the WRIA 25 Grays-Elochoman and the WRIA 26 Cowlitz watershed planning unit to revise plan recommendations regarding closures and water management.

Ecology has also initiated rule development on a new rule for the Spokane River.

Ecology, WDFW, and contractors hired by watershed planning units continue to collect field data and conduct instream flow studies in many statewide watersheds. Several planning units also continued to work with Ecology on determining recommendations for, or adopting, instream flows.

The following watersheds have requested rulemaking:

- Wind-White Salmon (WRIA 29)
- Middle Snake (WRIA 35)
- Wenatchee (WRIA 45) (amendment)
- Methow (WRIA 48) (amendment)
- Foster/Moses Coulee (WRIAs 50 and 44)
- Colville (WRIA 59) (amendment)

Ecology resources for rulemaking are limited; however, we will do our best to honor these requests.

The Bertrand Creek Watershed Improvement District in Whatcom County has filed a petition to amend Chapter 173-501 WAC, the Instream Resources Protection for the Nooksack Water Resource Inventory Area (WRIA 1). The amendment request is to change year-round stream closures to seasonal closures. The petitioners argue this change will allow greater flexibility for stream flow enhancement projects. An agency response on the petition is due by December 7, 2013.

Purpose

The Department of Ecology (Ecology) has prepared this report to the Legislature on the progress of setting instream flows¹ as required by RCW 90.82.080(6), which states:

“The department shall report annually to the appropriate legislative standing committees on the progress of instream flows being set under this chapter, as well as progress toward setting instream flows in those watersheds not being planned under this chapter. The report shall be made by December 1, 2003, and by December 1st of each subsequent year.”

This is the eleventh annual report prepared by Ecology on the setting of instream flows.

Instream Flow Progress

The Watershed Planning Act (WPA) provided local planning units the option of addressing instream flows as part of their watershed management plans. If the local jurisdiction adopts instream flow levels and other water management schemes into their plan, then state law directs Ecology to adopt instream flows in rule.

Of the 34 watershed planning units created, 27 chose to examine instream flows as part of their plan development. There is a broad range of progress within these watersheds, ranging from preliminary scientific studies to rule adoption and implementation.

The WPA also reaffirmed Ecology’s authority to adopt instream flows by rule in basins where watershed planning units could not reach consensus on flow recommendations or where there was no formal watershed planning. Ecology has adopted two water management/instream flow rules in basins not planning under the WPA:

- WAC 173-505 for WRIA 5, Stillaguamish (August 2005).
- WAC 173-503 for WRIA 3 & 4, Lower and Upper Skagit (Amendment May 2006, invalidated by Court Order in October 2013, see page 7, below).

Overall Progress on Rulemaking

Although often referred to as “instream flow rules,” it is more accurate to call them “water management rules.” In addition to setting instream flow levels and stream management control points (points along a watercourse where instream flows are measured), today’s rules include:

¹ Instream flows are water rights that protect and preserve instream resources such as wildlife, fish, recreation, navigation, aesthetics, water quality, and livestock watering.

- Determinations of seasonal and year-round closures.²
- Management of groundwater withdrawals to protect surface water resources, including permit-exempt groundwater withdrawals.
- Water management tools to ensure reliable future water supply, including water reservations³ for new consumptive uses, and mitigation to offset the impacts of new water use.

In most cases, developing instream flow recommendations through the Watershed Planning process has occurred with minimal controversy. Adopting new rules continues to be slower than anticipated when the Watershed Planning Act, RCW 90.82 was first adopted. When undertaking rulemaking based on adopted plan recommendations, a range of factors affect the timeframe:

- **Local Conditions** - Our changing physical and social environment—shrinking snow packs, increased frequency of drought years, continued population growth, and ongoing land use development—combine to increase demand and reduce water availability. At the same time, water levels and flows for needs such as fish habitat, recreation, and Endangered Species Act (ESA) listed fish must also be maintained or improved.
- **Unique Characteristics** - Since there is great geographic diversity in Washington State, each watershed requires site-specific assessments of stream flow characteristics, hydrogeology, and future water demand.
- **Local Agreement** - The responsiveness of local communities, and the extent of local cohesiveness or conflict on related issues such as land use management, critical areas protection, or economic development, influences rule development.
- **Groundwater Management Issues** - Scientific studies have increased our understanding of the physical connection between surface water and groundwater. Water resource professionals refer to this physical connection as “hydraulic continuity.” Court decisions also recognize hydraulic continuity, and instream flow rules must now address water supply and demand needs from a more comprehensive and holistic management perspective than in the past. Including groundwater management in rules—given the importance of groundwater in sustaining late summer flows—is very challenging, in particular the need to manage permit-exempt groundwater withdrawals.
- **Legal Issues** - Questions about the extent of permit-exempt water rights take additional time to evaluate. Recent legal interpretations limit the use of more flexible water management strategies in these rules. The 2012 Washington State Supreme Court decision in *Kittitas Ridge v. Eastern Washington Growth Management Hearings Board* held that counties need to ascertain legal, in addition to physical, water availability when making land use decisions.

² During seasons and in locations where water is not reliably available above the instream flow levels, streams and aquifers are closed to new appropriations and future uses. The purpose of a closure is to avoid impairment to existing water rights, including instream flows.

³ A reservation, or reserve, of water is a one-time, finite amount of water set aside for specific future uses.

On October 3, 2013, the Washington Supreme Court invalidated 2006 amendments to the rule for the Skagit Watershed that established reservations of water. Without water reservations, later water uses can be interrupted when dry spells impact the protected stream flows.

The Kittitas Ridge and Skagit decisions heighten the need to work closely with local government and other stakeholders when developing water supply solutions. These legal considerations contribute to a slower pace of rulemaking.

- **Funding** - Budget cuts at local governments and Ecology hamper our progress on instream flow rulemaking.
- **State-wide precedent** - As each rule is developed to implement the recommendations of locally-developed watershed management plans we have encountered challenges with unintentional precedent-setting that can have state-wide implications. These broader issues are another influence on the pace of rulemaking.

Comprehensive water management strategies continue to offer the best approach to achieve sustainable long-term planning goals and objectives. Examples of water management strategies include mitigation of new water uses, processing water rights in open water markets, and creating innovative groundwater storage projects. Experience has shown these activities occurring after rule adoption are often as complex as the rules themselves. However, we cannot ignore these water management strategies, as they are the cornerstone of implementing the rule.

The water management rules being developed today focus on protection of existing water rights and instream resources, while providing water for future urban and rural needs. The complexity and number of factors involved slow the rule development processes. However, the result provides Washington citizens with more comprehensive rules that effectively manage water into the future.

Rule Moratorium

Governor's Executive Order 10-06 suspended non-critical rule development and adoption through December 31, 2011. Executive Order 11-03 extended the rule suspension through December 31, 2012.

The executive orders suspended work on Instream Flow Rule adoption. Two rules (Grays/Elochoman, and Cowlitz) remained on the "to be determined" list through 2012 as negotiations and outreach continued with local entities. Ecology's Director removed the Dungeness rule from the suspended list in November of 2011 under exemption 3(e), "beneficial to or requested by the regulated entities, local governments, or small businesses that it affects."

Ecology is resuming instream flow rule adoption now that there is no longer a moratorium suspending rule development. In 2013 Ecology initiated rule development for the Spokane River.

2013 Rulemaking Progress

Although no Instream Flow Rules were adopted during 2013, we made progress on setting instream flows. Early in 2013, we began implementing WAC 173-518, for the Dungeness portion of WRIA 18, the Elwha-Dungeness watershed, adopted in November 2012. Ecology and Washington Department of Fish and Wildlife (WDFW) staff worked with the WRIA 25 Grays-Elochoman and the WRIA 26 Cowlitz watershed planning unit to revise plan recommendations regarding closures and water management. Ecology initiated a new rule for the Spokane River. Ecology, WDFW, and contractors hired by watershed planning units collected field data and conducted instream flow studies in many statewide watersheds. Several local planning units worked with us to determine recommendations for, or adopt, instream flows.

WRIA 3A - Samish Subbasin

We filed a pre-proposal statement of inquiry (CR-101) in February 2005 to begin development of a water management rule in the Samish River subbasin. When a lawsuit was filed challenging the Skagit rule for WRIs 3 and 4, Ecology suspended Samish rulemaking until the outcome of that litigation was decided. On November 9, 2010, Thurston County Superior Court Judge Carol Murphy issued a letter opinion upholding the Skagit rule. On October 3, 2013, the Washington Supreme Court invalidated 2006 amendments to the rule for the Skagit Watershed that established reservations of water.

For additional information on the Skagit rule, read the section on Rule Implementation beginning on page 7.

WRIA 18 - Dungeness

On November 16, 2012, we adopted WAC 173-518, the Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18. The rule took effect on January 2, 2013. Adoption of a rule for the Dungeness watershed was the culmination of local, state, and tribal collaborative efforts that began in 1992 with the Dungeness-Quilcene pilot watershed planning process, and continued through watershed planning under RCW 90.82 (Watershed Planning Act).

An important provision of the new rule is that all water uses beginning after the rule takes effect must mitigate, or offset the impact of their consumptive water use.

In 2013, the Legislature approved Ecology's capital budget request for \$2,050,000 from the State Building Construction Account. The funds will be used to develop mitigation options, alternative water sources, and tools to make water available for stream flows and to mitigate for rural development in the basin. These funds are assisting in capitalizing or "hydrating" the water bank.

For additional information on the Dungeness rule, read the section on Rule Implementation beginning on page 7.

WRIA 25 - Grays-Elochoman & WRIA 26 - Cowlitz

Rulemaking has also advanced in the southwest corner of the state. After adopting two rules in 2008, for the Salmon-Washougal River watershed (WAC 173-528) and the Lewis River watershed (WAC 173-527), we continue rulemaking for other major tributaries to the Lower Columbia River (below Bonneville Dam). Since 2009, this work has focused on the WRIA 25 Grays-Elochoman and the WRIA 26 Cowlitz watersheds. Both of these watersheds are important fish habitat areas that contribute to the health of the Columbia River estuary.

We filed proposed rules for WRIsAs 25 and 26 with the State Code Reviser's Office and held public hearings in May 2010. Rulemaking was discontinued after receiving strong community opposition. The opposition was primarily over the level of local participation, supply for rural water users in WRIA 26 (Cowlitz watershed), and concerns over groundwater well metering.

We agreed to slow future rulemaking until the local watershed planning unit could thoroughly review its plan and update recommendations for both WRIsAs. From 2011 through 2013, the local planning unit broadened its base of citizen representation and public outreach. The renewed effort involves a closer investigation of fish habitat needs and future community demands by taking a stream-by-stream approach to planning. The watershed planning unit for WRIsAs 25 and 26, together with Ecology and WDFW, have reevaluated watershed plan recommendations relating to closures of smaller streams, and rural water supply. Also discussed was re-opener language for the proposed rule. On November 14, 2013 the planning unit finalized revised recommendations and amendments to the watershed plan. The plan amendments are being forwarded to County Commissioners in Lewis, Cowlitz, Wahkiakum, and Skamania Counties with a request for adoption.

Spokane River – Portions of WRIsAs 54, 55, & 57

We are beginning the rule adoption process for a new rule for the Spokane River. The watershed planning units for WRIsAs 55-57, and WRIA 54 recommended adoption of an instream flow rule to help protect flows for public resources that rely on clean flowing water (hydropower, water quality, recreation, esthetic values, fisheries, etc.). An instream flow rule is also needed for the Spokane River to help protect Washington State's interests in the event of an interstate water rights conflict with Idaho.

This rule proposal builds on the work, results, and recommendations of local watershed planning groups; recent scientific studies; and the re-licensing of Avista hydropower facilities; and is coordinated with efforts to improve water quality in the river. Rule development will begin in January 2014, with rule adoption about one year later.

Table 1, below, summarizes projected rulemaking progress through 2015.

In addition to instream flow rulemaking under the WPA, we completed or started rulemaking in three basins that are not planning under the Act:

- Stillaguamish (WRIA 5) — New rule adopted August 2005.
- Upper and Lower Skagit (WRIsAs 3 & 4) — Rule amendment adopted May 2006 (Invalidated by court order in October 2013).

- Lower Skagit-Samish (WRIA 3) — Rulemaking started 2005. The rule adoption process has been on hold pending the appeal of the Skagit instream flow rule amendment, WAC 173-503.

Table 1. Rule Development Progress under the Watershed Planning Act

Water Resource Inventory Area Name - Number	Start of Rule Development (File CR-101)	Rule Proposal (File CR-102)	Rule Adoption (File CR-103)
Entiat - 46	2004	2005	2005
Walla Walla – 32	2004	2007	2007
Wenatchee – 45	2007	2007	2007
Lewis – 27	2005	2008	2008
Salmon-Washougal – 28	2005	2008	2008
Quilcene-Snow - 17	2004	2009	2009
Elwha-Dungeness – 18 (Dungeness portion only)	2004	2012	2012
Grays-Elochoman – 25	2005	Target 2014	Target 2014
Cowlitz – 26	2005	Target 2014	Target 2014
Spokane 54, 55, & 57	2014	Target 2014	Target 2015

A map showing the statewide status of instream flow rulemaking activities is located in the appendix.

Requests for Future Rulemaking

Several watershed planning units have requested that Ecology initiate rulemaking to implement watershed plan recommendations regarding instream flows and future water management. Some watersheds are requesting new rules to protect instream flows and existing water users, and to make water availability determinations that will enable processing of pending water right permit applications. Other watersheds are requesting amendments to existing rules to refine instream flow protections and water management frameworks established in earlier rules. Ecology resources for rulemaking are limited; however, we will do our best to honor these requests.

The following watersheds have requested rulemaking:

- Wind-White Salmon (WRIA 29)
- Middle Snake (WRIA 35)
- Wenatchee (WRIA 45) (amendment)
- Methow (WRIA 48) (amendment)
- Foster/Moses Coulee (WRIAs 50 and 44)
- Colville (WRIA 59) (amendment)

The Bertrand Creek Watershed Improvement District in Whatcom County has filed a petition to amend Chapter 173-501 WAC, the Instream Resources Protection for the Nooksack Water Resource Inventory Area (WRIA 1). The amendment request is to change year-round stream closures to seasonal closures. The petitioners argue this change will allow greater flexibility for stream flow enhancement projects. An agency response on the petition is due by December 7, 2013.

Rule Implementation

WRIAs 3 and 4 - Skagit

On Oct. 3, 2013, the Washington state Supreme Court ruled in *Swinomish Indian Tribal Community v. Department of Ecology* that Ecology exceeded its authority in establishing reservations of water when amending the rule for the Skagit watershed in 2006. The decision reinstates the 2001 Skagit Instream Flow Rule. Under the 2001 rule, water rights established on or after April 14, 2001, are subject to curtailment when the senior minimum instream flow rights are unmet.

We amended WAC 173-503 in 2006 to allocate “reservations” of surface and groundwater that provide uninterruptible water supplies for future agricultural, residential, commercial/industrial, and livestock uses throughout the Skagit watershed. In 2008, the Swinomish Indian Tribal Community (Tribe) challenged the Skagit rule amendments, asserting that the amended rule established improperly large reservations of water.

Ecology Director Maia Bellon has decided to exercise enforcement discretion and not curtail the water use of 475 homes and 8 businesses that have relied on the 2006 reservations for their water supplies since April 14, 2001. The Swinomish Indian Tribal Community, which successfully challenged our decision to establish the 2006 reservations, has said they will support it if the impacts of the 483 water uses are fully mitigated. We remain committed to working with Skagit County, the Swinomish Tribe, homeowners, and other stakeholders to ensure adequate water supply for homeowners and stream flows in the Skagit Basin.

Prior to the Oct. 3, 2013, State Supreme Court decision, the reservations in some subbasins had been depleted (Carpenter-Fisher) or nearly depleted (Nookachamps). In April 2012, the Washington State Legislature appropriated \$2.225 million in state funds to develop mitigation options, alternative water sources, and tools to make water available for stream flows and for rural domestic permit-exempt uses within the Carpenter- Fisher, East Nookachamps, and Upper Nookachamps subbasins. We are working with local government, tribal leaders, and stakeholders to determine the best and most cost-effective package of actions to address both instream and out-of-stream needs in these subbasins. This has included a number of projects:

- On October 11, 2013, Ecology took possession of three water rights from the Big Lake Water Association, a public water system near Mount Vernon making about 15 acre-feet of water available for mitigation purposes and 18.56 acre-feet of water for stream flow enhancement. A draft mitigation proposal will be out for input in 2014 for the Big Lake Water Rights, including the area served by the mitigation and the process for obtaining mitigation credits.

- We retained the non-profit organization Washington Water Trust (WWT) to identify existing rights that Ecology might acquire to offset new groundwater uses. In 2013 Ecology began negotiating with water right holders in the Nookachamps and Fisher Creek basins for transfer of water for future mitigation use and flow enhancement.
- We commissioned a feasibility review of existing public water systems in the Lower Skagit River tributaries to assess whether existing public water systems could provide water solutions. The RH2 Engineering Firm completed a draft feasibility report in December 2012 evaluating nine public water systems in the region and identifying five potential projects that would provide water for growth in the Carpenter-Fisher and Nookachamps basins. Preliminary cost estimates for these projects range from \$500,000 to \$12,000,000. Additional technical studies are being done and a final feasibility report will be issued by the end of the year. In the meantime, we are talking with key stakeholders in the Skagit Basin to discuss the report findings to determine which projects are the most viable and worthy of public investment.
- We are evaluating water storage projects that could capture and store surface or groundwater during the wet season and then release this water during the dry summer months.
- We are reviewing mitigation plans developed by individual property owners in the Carpenter-Fisher subbasin and approved one. The approved mitigation plan was appealed and we are working with the parties to try to resolve the appeal.

We are encouraging Skagit and Snohomish counties to remove any remaining obstacles to the use of captured rainwater or trucked-in water by property owners in the Carpenter-Fisher Basin who wish to build without delay. We will also work with interested property owners to develop and implement site-specific land development and water conservation practices to mitigate for new development consistent with legislative directive.

WRIA 14 - Kennedy-Goldsborough

The Squaxin Island Tribe raised concerns in 2008 and again in late 2009 that groundwater wells in the area are hurting stream flows in the Johns Creek subbasin of WRIA 14. The Tribe twice petitioned Ecology to amend the rule to limit future well use. We denied both petitions, and instead pursued an agreement with Mason County to require new wells put to use near Johns Creek to serve in-home needs only. The current rule language allows this action if warranted.

The Tribe then appealed to the Governor for reconsideration of Ecology's denial of the second petition. The Governor did not change our decision to deny the petition, but did direct Ecology to meet with the Tribe to discuss future rulemaking priorities.

Still dissatisfied with our actions, the Tribe filed a lawsuit to direct that Ecology amend WAC 173-514 to restrict new well use in the Johns Creek subbasin of WRIA 14. On March 16, 2011, Thurston Superior Court Judge Paula Casey determined that Ecology acted arbitrarily and capriciously when it denied the Squaxin Island Tribe's rulemaking petition. In September 2011,

the Court remanded this matter to Ecology to engage in rulemaking in accordance with the Tribe's 2009 petition. We sought and received a stay of the Superior Court's Order and filed an appeal of that Order to the Court of Appeals. On November 14, 2013, the Court of appeals **reversed** the Thurston County Superior Court's decision that found our petition denial to be arbitrary and capricious and that also ordered us to engage in rulemaking.

The appeals Court first found that our denial of the Tribe's petition specifically addressed the Tribe's concerns under the APA, RCW 34.05.330(1). The Court essentially concluded that the purpose of this statute is to give notice of an agency's reasons for denial of a petition, and that our petition denial satisfied that requirement. The court next found that our decision not to engage in rulemaking was *not* arbitrary and capricious given the agency's contemplation of the petition, our competing priorities, and budgetary and staffing concerns. At this time we do not know if the Tribe will choose to appeal this latest decision.

WRIA 18 – Dungeness

The water resources management rule for the Dungeness was adopted on November 16, 2012, and took effect on January 2, 2013. On December 21, 2012, then Ecology Director Ted Sturdevant, signed an agreement with Clallam County to implement the new Dungeness water management rule.

The agreement helps ensure that implementation of the Dungeness rule is integrated into the county's building permit process. To help building permit applicants meet the new mitigation requirements, we are working with Clallam County to establish the Dungeness Water Exchange, commonly called a "water bank." The exchange will make mitigation credits (water rights or portions of water rights) available to rural landowners and developers drilling wells or putting well water to a new beneficial use after January 2, 2013. This will guarantee that their water use is legally protected and will not harm stream flows.

We also provided Clallam County with a \$100,000 grant to provide financial assistance for building permit applicants who seek mitigation credits for indoor household water uses.

On January 17, 2013, we jointly hosted a public workshop with Clallam County to explain implementation of the new rule. Approximately 80 -100 people attended. Since then the County and Ecology have formed an implementation committee and held several implementation forums. The vision for the forums is to provide a regular opportunity during the first 18 months of rule implementation for dialogue, discussing glitches and solutions, and monitoring overall progress of the various elements of the new rule.

In 2013 the Legislature approved spending \$2.05 million to develop projects and acquire water rights to enhance stream flows and provide mitigation water for rural development in the Dungeness watershed on the Olympic Peninsula. The Dungeness budget proviso provides funding for projects in four categories:

- **Shallow aquifer recharge** - Acquire property and easements and design and construct projects to collect water from the Dungeness River during high-flow periods that would be released back into the river through increased groundwater base flow. Unlined irrigation ditches, for example, can be used to supplement the natural recharge of the river.

- **Source substitutions** - Undertake technical analysis of existing deep wells to study whether they could provide groundwater for late-season irrigation in lieu of surface water.
- **Water rights acquisition** - Purchase water rights from Dungeness irrigators and other water right holders to provide mitigation credits for new homes. State funds have been providing these mitigation credits since the rule was adopted in January. The new funding will continue this practice for a bit longer. More information on how to obtain these credits is available from the Washington Water Trust, which has been operating the Dungeness Water Exchange under contract with Clallam County.
- **Off-stream storage** - Conduct feasibility studies and potentially purchase land for off-stream water storage reservoirs.

Public Outreach and Involvement

Outreach and communication are essential to maintaining steady progress and developing improved instream flow rules. Building local awareness and acceptance is key to fostering future governance.

Strong communication and coordination with local county and city governments are also essential. Rule implementation depends upon effective shared governance, and requires close coordination between Ecology and the local entities responsible for managing growth and complying with the water availability requirements under the State Growth Management Act.

Our outreach approach is to establish early, open, and ongoing communication with watershed planning units and interested stakeholders in each watershed involved in rulemaking. Ecology staff works with key decision makers in each WRIA, including elected officials, tribal representatives, realtors, farmers, environmental organizations, business communities, and other interested parties.

Open houses and other public meetings create opportunities for the public to learn about local water issues, voice their concerns, and take part in water management decisions. We've developed tools to help locals keep stakeholders informed and engaged.

We've increased reliance on electronic media to disseminate information and to interact directly with community members. Email communication is popular with the public and local government representatives. Regular updates to rule-specific Web pages provide technical and procedural information on water management. For example, Ecology filmed several interviews with community leaders in the Dungeness watershed about water management issues that we posted on the Web as YouTube videos.

Our goal is to improve the public's overall understanding of complex water resource issues and to include the public in the rulemaking process. This approach helps gain local ownership and buy-in when instream flows are set in rule.

Appendix

Statewide Map of Instream Flows Set by Rule

