



Welcome to the
Administrative Law Section's
E-Newsletter!

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our newsletter and
encourage your feedback.

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to your colleagues and encourage
them to join the Section if they
find the newsletter informative!
We also welcome your suggestions
for topics for future newsletters.

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Frank Homan Award for 2020 Goes to Richard Potter

By William Pardee

The Administrative Law Section's Executive Committee has approved the nomination of Richard Potter, the Section's Legislative Committee chair, to be the 2020 recipient of the Section's Frank Homan Award.

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. The Section will be hosting a virtual mini-CLE on Dec. 14, 2020, followed by a reception via Zoom to formally recognize Richard receiving the award. The nomination the Section received for Richard, from attorney John Gray, a fellow Section member, which Frank Homan Award Section Committee head Lea Dickerson provided the Executive Committee, reads as follows:

Homan Award nomination for Richard Potter, Oct. 20, 2019

I nominate Richard Potter for the 2020 Homan Award. He has had a long career in administrative law both in California and in Washington. In Washington, he frequently practiced before the Utilities and Transportation Commission.

The description of the Homan Award on the Administrative Law Section's website is: "The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law."

What sets Richard apart from many other good lawyers is his work as the chair of the Section's Legislative Committee. He has served in that capacity since at least 2010. He tracks bills in two ways: (1) the WSBA refers [bills] to the Administrative Law Section that may affect the practice of administrative law and (2) he spends the time needed to track bills on the Legislature's website and sometimes finds on his own without referral from the WSBA. Anyone who has seen Richard's "Session bill charts" can appreciate the significant amount of time and detail he has put into tracking bills that could affect administrative law as practiced in this state. He has done this for many years. It is this effort with tracking legislation—on very short turn-around times—that makes Richard well-deserving of the Homan Award. Richard is also a past-chair of the Administrative Law Section.

John M. Gray, *section member*

Congratulations Richard!

WSBA Administrative Law Section Executive Committee Officers & At-Large Members 2020-2021

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*Non-voting member

The Administrative Law Section welcomes articles and items of interest for publication. The editors and Executive Committee reserve discretion whether to publish submissions.

Send submissions to: Edward Pesik
(edward.pesik@oah.wa.gov).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

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SAVE THESE DATES!

Upcoming Administrative Law Section Mini-CLEs

The Administrative Law Section is busy organizing and planning several upcoming mini-CLEs in December 2020, and January through March 2021, which they hope you will attend, including:

DECEMBER 14, 2020

"Retaining, Disclosing, Redacting, and Requesting HIPAA Protected Healthcare Information under the PRA"

3:00 – 5:00 p.m.

Presented by **Matthew King** of *Washington Technology Solutions* and **Catherine Taliaferro** of the *Health Care Authority*

1.0 L&LP Credit; \$25.00 for WSBA Administrative Law Section members and law students (\$35/Non-members)

Followed by a reception on Zoom for Homan Award recipient Richard Potter

JANUARY 21, 2021

Public Act Resources and FAQs

12:00 – 1:00 p.m.

Presented by Oskar Rey of the *Municipal Research and Services Center*

1.0 L&LP Credits; \$25.00 for WSBA Administrative Law Section members and law students (\$35/Non-members)

Washington State Courts Recovery Task Force, Appellate Appeals Subcommittee:

The courts are looking for methods of reducing the backlog of superior court cases that has accumulated during the pandemic shutdown. This committee is specifically looking at administrative appeals and whether some can be pushed to the Court of Appeals directly under RCW 34.05.518. It is focusing on Land Use Petitions and APA cases.

Several judges and Eileen Keiffer, chair of the Administrative Law Section's Executive Committee, currently sit on the Appellate Appeals Subcommittee. The next meeting will be held on Dec. 4 at 9:00 a.m. ■

Join Our Section!

We encourage you to become an active member of the Administrative Law Section. Benefits include a subscription to this newsletter and networking opportunities in the field of administrative law.

[Click here to join!](#)

The Section also has **six committees** whose members are responsible for **planning CLE programs, publishing this newsletter, tracking legislation** of interest to administrative law practitioners, and more.

Feel free to contact the chair of any committee if you have an interest in or want more information.

Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

Pro Bono Representatives in Administrative Adjudications Conducted by OAH

Over the past two years, the **Office of Administrative Hearings (OAH)** has developed a small network of pro bono attorneys and legal services organizations to represent parties with disabilities. See WAC 10-24-010.

The number of available suitable representatives has decreased in part due to the impact of COVID-19 on law practices and home life. The income of the party with a disability is usually a disability benefit from social security. The hearings are rarely more than two hours in length. OAH expects that your method of communication with the party would be by telephone or email. Most of the parties have appealed action by the Department of Social and Health Services for public assistance, food assistance, and child support, by the Health Care Authority for Medicaid, and by the Employment Security Department for unemployment insurance.

Please consider helping parties with disabilities participate meaningfully in telephonic administrative hearings by volunteering to be a suitable representative.

Contact Johnette Sullivan, Assistant Chief ALJ – ADA Coordinator, at Johnette.Sullivan@oah.wa.gov.

Caselaw Update

Nelson v. Spokane Cmty. Coll., 14 Wn. App. 2d 40, 469 P.3d 317 (2020)

By Eileen Keiffer

Daniel Nelson was a nursing student at Spokane Community College (SCC). A SCC professor concluded Nelson plagiarized a homework assignment; she characterized Nelson's conduct as intentional. The professor decided Nelson should receive both a zero on the plagiarized assignment, and a failing grade for the class, because Nelson had violated SCC's "Academic Integrity Policy." Nelson's failing grade in the class resulted in his dismissal from the nursing program. Mr. Nelson denied the plagiarism but SCC denied him a hearing, stating he could not receive a hearing because his dismissal was an academic decision, not a student conduct sanction.

RCW 28B.50.140(13) authorizes community colleges to enforce student conduct rules. SCC's rules are located in Washington Administrative Code (WAC) chapter 132Q-10. Under the WAC, students accused of student conduct violations have the right to an adjudicative hearing and appeal. See WAC 132Q-10-105(10), (11). Further, SCC faculty members individually lack authority to impose discipline for student conduct violations (excepting situations necessary to maintain classroom decorum). See WAC 132Q-10-500. The student conduct standards specifically address plagiarism and provide that such cheating can result in sanctions. WAC 132Q-10-210. Those potential sanctions include: temporary suspension, revocation of admission or degree, withholding of a degree, and expulsion. WAC 132Q-10-400(1)(i), (j), (2).

Washington's public colleges are subject to the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 34.05.010(2), (7); *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 884, 385 P.3d 251 (2016). The APA affords judicial review for three types of agency actions: (1) rules, (2) adjudicative proceeding orders, and (3) "other agency action." RCW 34.05.570(2)-(4). The Court of Appeals considered Nelson's appeal under the third category ("other agency action"). A court may afford relief from such "other agency action" if the action is: "(i) Unconstitutional; (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law; (iii) Arbitrary or capricious; or (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action." RCW 34.05.570(4)(c).

The court found the last category to be applicable, because the professor imposing the discipline lacked disciplinary authority. The court instead found that "the power to sanction acts of plagiarism lies with SCC's student conduct officer and the student conduct adjudicatory process." The court rejected SCC's characterization of the sanction as a grading decision, because that argument was contrary to the applicable WAC, which explicitly provides that plagiarism is a student conduct issue. SCC's WAC defines plagiarism as a student conduct issue, not an academic matter. WAC 132Q-10-210(a)(v). In this matter SCC's rules are unique, and the court cited several other postsecondary institutions in Washington that do provide a role for faculty to handle academic dishonesty violations.

The court also noted that the consequences for the plagiarism included both a grading decision (the zero grade

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on the assignment), but also the professor's failing of Mr. Nelson for the entire course as a penalty for violating SCC's academic integrity policy. Because the professor lacked authority to impose disciplinary action on Mr. Nelson, the court held Mr. Nelson had a basis for relief under the APA.

The court reversed the Superior Court order denying Mr. Nelson relief and remanded the matter to SCC for an administrative hearing pursuant to WAC Ch. 132Q-10. The court declined to award Mr. Nelson fees under the Equal Access to Justice Act (RCW 4.84.340-.360).

Freedom Found. v. Bethel School Dist., 14 Wn. App. 2d 75, 469 P.3d 364 (2020)

By Eileen Keiffer

RCW 42.17A.495(3) allows employees to request payroll deductions for political committees. For school districts, RCW 28A.405.400 requires districts to make such payroll deductions if 10 percent or more of the district's employees designate the same payee. For Bethel School District, roughly 24 percent of its employees named as a payee the Washington Education Association's Political Action Committee (WEA-PAC). Further, around 17 percent named as a payee the National Education Association Fund for Children and Public Educations (NEA-FCPE). The District has processed payroll deductions such as these for several years.

Freedom Foundation filed a complaint with the PDC regarding the District's payroll deductions, alleging improper use of public facilities in violation of RCW 42.17A.555 in processing the payroll contributions. The PDC found the evidence did not support a violation of RCW 42.17A.555, "closed the matter" and did not conduct a formal investigation. The Foundation filed two lawsuits in Thurston County Superior Court. First, Freedom Foundation filed a citizen's action complaint against the District, which was dismissed upon summary judgment. Second, the Foundation sought judicial review under the Administrative Procedure Act (APA) of the PDC's dismissal of the Foundation's PDC complaint. The PDC filed a CR 12(b)(6) motion, which was granted. The District also moved to dismiss, which was also granted. Freedom Foundation appealed three orders from the two actions: (1) the order granting the District's motion for summary judgment dismissal regarding the citizen's action, (2) the order granting the PDC's motion to dismiss regarding judicial review under the APA, and (3) the order granting the District's motion for summary judgment dismissal regarding judicial review under the APA. We consolidated these appeals.

The Court of Appeals upheld the dismissal of the Foundation's citizen action suit. RCW 42.17A.775 contains several prerequisites for a citizen's action suit, one of which is that the PDC must fail to take action within 90 days of receiving a complaint. RCW 42.17A.755(1)(a). Such action could include dismissing the complaint. The court found that the PDC did dismiss the Foundation's complaint when it "closed the matter" and did so within 90 days of the Foundation's complaint. Because the PDC acted timely, the Foundation did not meet the prerequisites for a citizen's action suit.

With respect to the APA suit, the District and the PDC argued that the foundation lacked standing. The court agreed. RCW 34.05.530 provides standing if a person is aggrieved or adversely affected by agency action. "Aggrieved or adversely affected" requires three elements: "(1) The agency action has prejudiced or is likely to prejudice that person; (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action." RCW 34.05.530. Elements one and three are "injury-in-fact" requirements, and element two requires a "zone of interest."

The court found the Foundation could not meet the injury-in-fact test as it did not establish prejudice. The Foundation was not a party to the complaint under the APA. To be a party in an agency proceeding: "(a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding." RCW 34.05.010(12). "Agency action" means "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits." RCW 34.05.010(3).

The court found that a complainant lacks the ability to participate in any proceeding unless the PDC so requests. WAC 390-37-030(1). Therefore, the "Foundation was not a party to the PDC complaint." Indeed, the PDC action was not directed at the Foundation, nor was the Foundation permitted to intervene as a party in a PDC proceeding. It merely held the status of complainant. As the Freedom Foundation was not a party, it did not demonstrate specific and perceptible harm from denial of its complaint.

The court also held that the Foundation failed to demonstrate it suffered actual harm (not conjectural or hypothetical harm). It did not show an economic or competitive injury, nor indeed any direct economic effect or material adverse injury from the complaint's denial. The court found the Foundation did not show any specific harm. "The mere fact that an unfavorable result could

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become precedent to Freedom Foundation's potential future litigation is not a harm under RCW 34.05.530." The court affirmed the trial court's dismissal of the Foundation's two lawsuits.

Samish Indian Nation v. Dep't of Licensing, ___ Wn. App. 2d ___, 471 P.3d 261 (2020)

By Bill Pardee

The Samish Tribe is a federally recognized Indian tribe. In 2004, the Samish Tribe obtained a parcel of land in Skagit County, known as the Campbell Lake Property, which is held in trust. The tribe does not have a formal reservation. In 2018, the Samish Tribe sought to negotiate a fuel tax agreement with the Department of Licensing (DOL). DOL denied the request because the Samish Tribe "does not have a reservation within the state."

The Samish Tribe then appealed to the Skagit County Superior Court under RCW 34.05.570(4) of the Administrative Procedure Act (APA). In February 2019, the court determined that DOL's interpretation of RCW 82.38.310(1) was not "unconstitutional, outside its authority, arbitrary and capricious, or taken by a person not lawfully entitled to take such action."

On appeal, the Samish Tribe contends the meaning of "reservation" under RCW 82.38.310(1) includes tribal trust properties such as the tribe's Campbell Lake Property. The question whether DOL acted within its authority turns on the meaning of "reservation" in RCW 82.38.310(1). Under RCW 82.38.310(1):

The governor may enter into an agreement with any federally recognized Indian tribe located on a *reservation* within this state regarding fuel taxes included in the price of fuel delivered to a retail station wholly owned and operated by a tribe, tribal enterprise, or tribal member licensed by the tribe to operate a retail station located on *reservation or trust property*. [Emphasis added.]

Reservation is not defined in the above statute. Where the Legislature has not defined a term, we may look to dictionary definitions, as well as the statute's context, to determine the plain meaning of the term. The dictionary defines "reservation," in part, as "a tract of land set aside for a particular purpose (as schools, forest, or the use of Indians)." Here the parties agree the dictionary definition of "reservation" broadly includes tribal trust lands, along with formal reservations.

Although DOL concedes tribal trust property is included in the dictionary definition of "reservation," DOL points to the context provided by the Legislature's two separate uses of "reservation" in RCW 82.38.310(1). Where the identical word or phrase is used more than once in the same act, there is a presumption that they have the same meaning. If the term "reservation" does not include "trust property" at the end of the sentence, DOL argues "reservation" at the beginning of the sentence does not include "trust property." Neither party contends the statute is ambiguous, and we agree.

There is a nuanced context to the two different uses of "reservation" in the sentence. A retail gas station has a physical manifestation, typically consisting of gas pumps, a parking lot, and a building affixed to a specific parcel of property. But a federally recognized Indian tribe is a noncorporeal entity not physically affixed to a particular parcel of real property. The statute's reference to a tribe "located on a reservation" is different than the reference to the location where a retail station is affixed to a parcel of property. Because the context for the two uses of "reservation" in the statute vary, we are not compelled to apply an identical meaning. Rather, we conclude the plain meaning of "reservation" in the context of "any federally recognized Indian tribe located on a reservation" is consistent with the dictionary definition and extends to trust lands.

It would be an absurd result to bar DOL from negotiating fuel tax agreements with federally recognized tribes operating fuel stations located on trust property merely because the tribe lacks a formal reservation. There is authority that this court will avoid an absurd result even if it must disregard unambiguous statutory language to do so. *Dependency of D.L.B.*, 186 Wn.2d 103, 119, 376 P.3d 1099 (2016). We cannot conceive of any possible policy promoting litigation and denying citizens the benefit of agreed resolutions of such fuel tax disputes. It would be an absurd result to promote litigation rather than agreed resolutions of fuel tax disputes between the State and federally recognized Indian tribes operating fuel stations on trust property.

The plain meaning of RCW 82.32.310(1) authorizes the negotiation of fuel tax disputes with all federally recognized tribes with a formal reservation or trust property operating retail fuel stations. It would be an absurd result to read the statute otherwise.

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Ctr. For Envtl. Law and Policy v. Dep't of Ecology, 196 Wn.2d 17, 468 P.3d 1064 (2020)

By Bill Pardee

The Spokane River and the Spokane Valley-Rathdrum Prairie Aquifer are located in Eastern Washington and encompass portions of the cities of Spokane, Spokane Valley, Liberty Lake, and Millwood. The river and the aquifer are shared resources between Idaho and Washington.

Flows in the river are declining due to increased groundwater use from the aquifer. The Department of Ecology (Ecology) thus ceased issuing new groundwater rights from the aquifer in the 1990s.

Avista Corporation (Avista) operates five hydroelectric projects located on the Spokane River in northern Idaho and Eastern Washington. The uppermost on the river, the Post Falls development, consists of three dams on three channels with natural islands connecting the structures. The development impounds nine miles of the Spokane River to the outlet of Coeur d' Alene Lake. Avista uses its Post Falls facility to regulate flows in the Spokane River for six months a year starting in summer, after spring runoff flows have peaked and subsided. Avista regulates flows in accordance with minimum flow requirements in its federal license. Throughout the summer recreation season, Coeur d' Alene Lake is maintained at a higher level, but after Labor Day, Avista begins to release stored water at Post Falls, resulting in a gradual drawdown in lake levels.

As a condition of its federal license to operate its projects, Avista is required to implement measures to protect and enhance fish, wildlife, water quality, recreation, cultural, and aesthetic resources at its projects. The license requires Avista to operate the Monroe Street and Upper Falls dams to provide minimum flows of 850 cubic feet per second (cfs) from June 16 to Sept. 30 each year. The flows are intended to enhance aquatic habitat for rainbow trout and mountain whitefish in the Spokane River. Avista's federal license requires them to release flows from Post Falls dam ranging from 3,300 cfs to 5,500 cfs for whitewater boating.

To change the actual flow in the river to better suit a particular recreational use would require seeking changes in Avista's license because it has control over water storage and releases as provided in its federal license. Ecology's rule, WAC 173-557-050 does not require control or release of water from storage. But an instream flow rule (such as WAC 173-557-050) does establish regulatory flows with a priority date as to other water rights, meaning new uses are subject to the prior established instream flow rules. WAC 173-557-050 does not put water in the river or affect existing water rights. Ecology personnel explain that Avista's federal license controls minimum releases to the river and that Ecology's instream flow rule addresses only junior water

uses and when they are interruptible to protect the instream flow.

Ecology began working with watershed planning groups in 1998 to develop instream flow protection for the Spokane River. But because no consensus could be reached, Ecology chose to use science-based fish studies as a baseline to develop the instream flow rule. In 2014, Ecology formally commenced rulemaking. Using a deliberative process, Ecology set summer minimum flows at 850 cfs by relying on science-based fish studies that protected fish as a baseline and also served to protect other instream values, including recreation, navigation, and aesthetics.

In 2012, Washington Department of Fish and Wildlife (DFW) instream flow biologist Dr. Hal Beecher wrote his flow recommendations for the Spokane River, which Ecology ultimately adopted. In summary, Dr. Beecher wrote that the recommended minimum instream flow for the Spokane River is 850 cfs from June 16 to Sept. 30. He notes how flows were developed in cooperating with Ecology with an emphasis on fish and based on the results of four scientific studies.

During the rule adoption period, Ecology received many comments regarding its decision to set summer flows at 850 cfs, to which it responded in part:

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.

Ecology explained in detail why it chose not to set flows based on recreational needs and why not setting flows based on those needs is not the same as not considering them, stating:

They [(recreational flows)] were considered by [Ecology] and rejected as the primary basis for establishing instream flows. Ecology chose to use science-based fish studies to develop the instream flow values for the rule when the Watershed Planning unit failed to reach consensus about instream flow values.

Following the Administrative Procedure Act (APA), Ch. 34.05 RCW, rulemaking process, Ecology adopted WAC 173-557-050 on Jan. 27, 2015, and the rule became effective on Feb. 27, 2015. On Feb. 29, 2016, challengers petitioned Ecology to amend the rule pursuant to RCW 34.05.330,

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asserting that the summer flows were set too low. On April 27, 2016, Ecology denied the challengers' petition.

In May 2016, challengers brought suit against Ecology in Thurston County Superior Court under the APA, challenging the validity of the summer minimum instream flow rate and arguing that setting minimum flows at 850 cfs exceeded Ecology's authority and was arbitrary and capricious. The superior court denied the petition challenging the validity of Ecology's rule. But Division II of the Court of Appeals held the rule was invalid, agreeing with the challengers that Ecology's action exceeded its authority and was arbitrary and capricious. Ecology then petitioned for review concerning the exceeded authority and arbitrary and capricious issues. This court granted Ecology's petition.

Here the challengers claim that the portion of Ecology's rule (WAC 173-557-050) setting instream flows at 850 cfs from June 16 to Sept. 30 is invalid because in promulgating the rule, Ecology exceeded its authority and acted arbitrarily and capriciously. The Center for Environmental Law and Policy's (CELP) invalidity assertion rests on its contention that Ecology failed to give consideration to recreational, navigational, and aesthetic values as required by RCW 90.54.020(3)(a).

The party asserting the invalidity of an agency rule must show compelling reasons why the rule conflicts with the intent and purpose of the legislation. *Wash. Fed'n of State Emps. v. Dep't of Gen. Admin.*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009). Any rule that is reasonably consistent with the underlying statute should be upheld. *Id.*

This court considers the statutory context, related statutes, and the entire statutory scheme when ascertaining the plain meaning of a statute concerning water rights. *Swinomish Indian Tribal Cmty.*, 178 Wn.2d at 582. This case concerns the interplay of two statutes, RCW 90.22.010 and RCW 90.54.020(3)(a).

RCW 90.22.010 states in relevant part: "[Ecology] may establish minimum water flows or levels for streams, lakes or other public waters for the purpose of protecting fish, game, birds, or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." [Emphasis added.]

RCW 90.54.020 is a "[g]eneral declaration of fundamentals for utilization and management of waters of the state," and provides that:

[U]tilization and management of the waters of the state shall be guided by the following general declaration of fundamentals: [including] ... [t]he quality of the natural environment shall be protected and, where possible, enhanced as follows: ... 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."

RCW 90.54.020, .020(3)(a). [Emphasis added.]

Division Two read the above emphasized language in RCW 90.54.020(3)(a) as requirements and held that "Ecology must meaningfully consider the instream values enumerated in RCW 90.54.020(3)(a), and attempt to preserve them to the fullest extent possible." Division II reversed the dismissal of the challengers' suit, which was in error.

The word "shall" in a statute imposes a mandatory duty unless a contrary legislative intent is apparent. *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). A contrary legislative intent is apparent from the context and language of RCW 90.54.020. The meaning of "shall" is not gleaned from that word alone because our purpose is to ascertain legislative intent of the statute as a whole. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

Here the express language of RCW 90.54.020(3)(a) provides "general declaration of fundamentals," which are guidelines, not elements that must be met. Even if this court were to interpret RCW 90.54.020(3)(a) as embodying a mandatory requirement, the plain language at issue would direct only that "[p]erennial rivers ... of the state shall be retained with *base flows* necessary to provide for preservation of ... fish ... and other environmental values, and navigational values." [Emphasis added.] Ecology's summer instream flow river at issue achieves such base flows as borne out by the administrative record.

Division II's elevations of the *general guidance* provided in RCW 90.54.020(3)(a) to required elements does not comport with the plain language of that statute read as a whole and is erroneous. Rather, we agree with Ecology that RCW 90.22.010's plain language provides it with the authority to "establish minimum water flows ... for the purpose of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." [Emphasis added.] And thus, Ecology has the authority to balance competing interests and values when setting instream flow rates.

Further, "[a]s a default rule, the word 'or' does not mean 'and' unless legislative intent clearly indicates to the contrary." *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008)(plurality opinion). Accordingly, here, the Legislature's use of the disjunctive "or" in RCW 90.22.010 indicates that Ecology has authority to establish minimum water flows based on *any* of the listed values, and there is no legislative intent suggesting otherwise.

The statutes discussed give Ecology the authority to decide instream flows and to exercise its discretion in doing

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so, guided by the statutes. Moreover, the administrative record (some 19,000 pages) concerning rulemaking supports that Ecology appropriately did so. That record included multiple fish habitat studies and recreational considerations as contained in dam license renewals that were included in the record. Also, many comments were submitted by recreational users stating that they *preferred* to have greater summer cfs flows (they typically preferred 1500 cfs). Ecology responded to all such comments, explaining that its rule provided for both fish habitat and other values (recreation, navigation, and aesthetics). This conclusion is supported by the record, which includes photographs of recreational/navigational use of the river at flow rates lower than those provided in Ecology's rule.

Based upon the evidence above, the challengers' contention that Ecology acted outside its authority in promulgating a rule setting the minimum instream summertime flow rates for the Spokane River at 850 cfs fails.

This court has defined arbitrary or capricious agency action as action that is willful and unreasoning and taken without regard to the attending facts or circumstances. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004). Here it cannot be said that Ecology's promulgation of the rule concerning summertime minimum flow rates was unreasoning. As noted, the substantial administrative record concerning the rule making included multiple fish habitat studies and recreational considerations contained in documentation concerning dam license renewals. Also, many comments were submitted by recreational users stating that they *preferred* to have greater summer cfs flows. Ecology responded to all such comments, explaining that its rule provided for both fish habitat and other values (recreation, navigation, and aesthetics).

For the reasons discussed above, the challengers failed to meet their burden to show that Ecology's rule that set summertime minimum flow rates for the Spokane River was invalid. We reverse the Court of Appeals. ■

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If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please email Edward Pesik at edward.pesik@oah.wa.gov.

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Alternative Dispute Resolution
Animal Law
Antitrust, Consumer Protection and Unfair Business Practices
Business Law
Cannabis Law
Civil Rights Law
Construction Law
Corporate Counsel
Creditor Debtor Rights
Criminal Law
Elder Law
Environmental and Land Use Law
Family Law
Health Law
Indian Law
Intellectual Property
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Labor and Employment Law
Legal Assistance to Military Personnel
Lesbian Gay Bisexual and Transgender (LGBT) Law
Litigation
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Solo and Small Practice
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