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NO. 101838-0

SUPREME COURT OF THE STATE OF WASHINGTON

BENTON COUNTY WATER CONSERVANCY BOARD,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Benton County Water Conservancy Board's Petition for Review does not present a question of substantial public interest that warrants this Court's review. *See* RAP 13.4. The Benton Board's entire case is premised on the false notion that the Washington State Department of Ecology has a practice of categorically denying the administrative division of water rights when those water rights are held by Ecology in the trust water rights program. But the Board alleges this so-called categorical "rule" based on *one singular instance* in which Ecology declined to process an administrative division of water rights for fact-specific reasons unrelated to those water rights being held in the trust water rights program. The parties who own the water rights did not appeal Ecology's denial and are not parties to this case.

The Benton Board cannot stand in place of an applicant and has not suffered an "injury-in-fact" required to obtain standing, as it has no interest in the underlying application and has no authority to handle administrative divisions. The Court of

Appeals correctly concluded that the Benton Board lacked standing under the Administrative Procedure Act (APA) because it could not demonstrate an "injury-in-fact." To the extent the Board asserts it has suffered an "informational injury," it failed to show that Ecology's water rights database contains any incorrect information whatsoever.

The Court should deny the Benton Board's Petition for Discretionary Review.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly concluded that the Benton Board has not demonstrated an "injury-in-fact" resulting from Ecology's administrative division decisions, and thus lacks standing under the APA to bring this case.
2. Whether one fact-specific denial of a request to administratively deny a water right that the applicants did not appeal constitutes an "illegal

rule" that arbitrarily and capriciously interferes with the Benton Board's statutorily limited operations.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

1. Brief overview of administrative divisions in Washington water law

In Washington, water rights are appurtenant to land. RCW 90.03.380(1) ("The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land…."). When property is sold or divided, it is presumed that the water right transfers with the land to the new owners.

In the early 2000s, Ecology identified a need to correlate water right ownership information with real property information, and subsequently adopted Policy 1070, Ecology's "Administrative Policy for Recording the Agreed Division of Water Rights Among Multiple Property Owners." *See* CP 00152–54 (Policy 1070). The stated purpose of Policy 1070 is "[t]o document generally applicable procedures that the

Department of Ecology uses to track and record the agreed division of a water right where multiple property owners own land to which the water right is appurtenant." *Id.* Multiple property owners who own a portion of land to which a single water right is appurtenant may apply to Ecology to receive a superseding document describing each owner's share of the original water right based on historic beneficial use. *Id.*

An administrative division is a streamlined process that allows applicants to record a change in ownership and allocation of a water right with Ecology without going through the more rigorous change application process in which Ecology would determine the extent and validity of a water right through a formal investigation. *Id.*; *see also* RCW 90.03.380 (change applications for surface water rights), RCW 90.44.100 (change applications for groundwater rights). Through the administrative division process, Ecology asks that the owners be in agreement regarding the new split of ownership rights (quantity and place of use) and that the right be based on the actual beneficial use of

the right prior to division. CP 00152–54. Ecology has made clear that an administrative division does not include an evaluation of the extent and validity of the water right, and that the right is valid only to the extent it has been historically used. *See* CP 00154, ¶ 5. This decision is appealable by a party with standing to the Pollution Control Hearings Board. RCW 43.21B.110. Nowhere in Policy 1070 is there any statement that rights that have been placed temporarily into trust cannot be administratively divided.

Further, administrative divisions are not the only pathway for an applicant, as nothing in Policy 1070 "prevents a water right holder from seeking clarification as to the apportionment of the water right among multiple property owners via RCW 90.03.380, RCW 90.44.100, or other applicable statutes.*"* *See* CP 00153.

2. Water conservancy boards have limited authority to make preliminary decisions on water change applications, but are not authorized to process administrative divisions

The purpose of water conservancy boards is to provide an alternative, expedited pathway for processing an application for

a change or transfer of a water right. RCW 90.80; WAC 173-153. Generally, water conservancy boards can process the same kinds of water right changes and transfers that Ecology is authorized to act upon. RCW 90.80.055. A water conservancy board assists Ecology by completing an initial Report of Examination and issuing a Record of Decision, which are sent to Ecology for review and final decision. RCW 90.80.070(4)–(5). Ecology then has 45 days (with an additional 30 days available by extension) to affirm, reverse or modify the decision made by the conservancy board. RCW 90.80.080.

Importantly, boards do not have the authority to process administrative division requests. Administrative divisions are a tool that Ecology uses to document certain water divisions where a piece of land with one appurtenant water right is divided up between multiple owners. These divisions are filed directly with Ecology consistent with Ecology's general statutory authority to track water rights and maintain accurate water right records. RCW 90.03.380(1); RCW 90.54.030(1), (4); RCW 90.14.010;

RCW 43.27A.090(7); WAC 508-12-200. As the Court of Appeals correctly concluded, "[w]hile the legislature has tasked Ecology with maintaining water right records, it has not directed Ecology to do so in a specific manner." *Benton Cnty. Water Conservancy Bd. v. Dep't of Ecology*, No. 38803-4-III, slip op. at 10–11 (Wash. Feb. 28, 2023).

3. A water right donated temporarily into trust retains all the characteristics of the original water right

Trust water rights are governed by RCW 90.42. Under RCW 90.42.080(1)(a), the State may acquire all or part of a water right as a trust right that is expressly conditioned to limit its use to instream (e.g., not using the water right for irrigation). Trust water rights may be acquired by the State on a temporary or permanent basis. RCW 90.42.080(3). The Benton Board alleges that Ecology treats holders of water rights that have been placed into temporary trust differently than other users, and that Ecology categorically denies their administrative division requests.

When a temporary trust expires, the right reverts to the original owner with all of its original attributes, including place of use, quantity, and purpose of use. RCW 90.42.080(9), (11)(a) (providing the right must be based on historical beneficial use). Nowhere does Policy 1070 prohibit the administrative division of a right temporarily placed in trust. As with any administrative division, the right placed in trust would have to be based on the actual beneficial use of the right prior to entering trust.

4. The Plymouth Ranch decision giving rise to Benton Board's case

In 2021, Ecology received a request for the administrative division of water rights G4-26018C and G4-26464C from Plymouth Ranch, LLC and Frank Tiegs, LLC (collectively, Plymouth Ranch/Tiegs administrative division request). CP 00043–102. The water rights identified for administrative division were previously donated to Ecology's Trust Water Rights Program on a temporary basis. CP 20, ¶ 10.

After review, Ecology denied the Plymouth Ranch/Tiegs application based on numerous deficiencies in the request form,

as set forth in Ecology's decision letter to the applicants. CP 00141–43. First, the application was denied because it was not based on "historical beneficial use" of the right within the place of use. CP 00141–42. Second, the parcel numbers were incorrect. CP 00142. Third, the applicants failed to show whether the right had been perfected, that is, put to beneficial use. CP 00142. Fourth, the application did not have the signatures of three other property owners who owned property within the place of use of the water right. CP 00142. Thus, the applicants could not show agreement as to how the right was to be divided, as required by Policy 1070.

Following Ecology's denial of the Plymouth Ranch/Tiegs administrative division request, neither Frank Tiegs, LLC, nor Plymouth Ranch, LLC appealed Ecology's decision. Instead, Tiegs filed new water right change applications with the Benton Board, which are still pending review and decision by the Board. CP 00348 n.3.

B. Procedural Background

Following Ecology's denial of the administrative division, the Benton Board (without Plymouth Ranch, LLC or Frank Tiegs, LLC as a party) brought suit under the APA alleging that Ecology has a pattern or practice of routinely denying any administrative division of a water right when the right has been temporarily donated into the State's Trust Water Rights Program. CP 0001–09. The Board alleged two causes of action: illegal rulemaking under RCW 34.05.570(2) and that the denial of the Plymouth Ranch/Tiegs application was arbitrary and capricious per RCW 34.05.570(4). CP 0008–09.

The superior court ruled in the Benton Board's favor on summary judgment and enjoined Ecology from exercising its exclusive authority to deny certain administrative divisions of water rights until the agency engages in rulemaking. CP 00389–92. Ecology appealed to the Court of Appeals, which reversed and dismissed, holding that the Benton Board lacked an "injury-

in-fact" sufficient to acquire standing. *Benton Cnty. Water Conservancy Bd.*, slip op. at 11.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Petitions for review are governed by the four criteria set forth in RAP 13.4(b). The Benton Board contends that its Petition meets one of these criteria: that it involves issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4); *see* Pet. at 11–17. But none of the issues the Benton Board identifies is of statewide importance warranting this Court's review because the Benton Board lacks standing to raise them. Like any other entity, the Board must demonstrate standing under the APA. RCW 34.05.530.

First, Ecology's denial of the administrative division here in no way illegally interfered with the Benton Board's operations. No party appealed that denial and the applicant instead filed an application to change the water right. CP 00348 n.3. Nor is Ecology exercising any sort of "de facto" power to regulate ownership of water when it denies an administrative

division, as it did here, because the application lacked required information. The ownership of the water right has not changed, and may still be transferred. Indeed, the underlying parties filed an application to change the water right with the Benton Board. *Id*. Finally, one fact-specific denial that no party appealed does not amount to denying an "entire category of cases" as the Board hyperbolically asserts. *See* Pet. at 15. There is no illegal rule, and the Court of Appeals correctly concluded the Board has no standing. This Court should deny the Board's Petition for Review.

A. The Court of Appeals' Decision Presents No Issue of Substantial Public Interest That Should Be Determined by the Supreme Court

The Court of Appeals decision addressed a situation in which a water conservancy board, a local government entity with limited statutory authority to act on water change applications, improperly seeks to stand in the place of an applicant. Only the applicant, and not the water conservancy board, could acquire an "injury-in-fact" when a request for an administrative division is

denied. The wrong party brought the suit. If Tiegs, LLC or Plymouth Ranch, LLC, the applicants, were aggrieved by Ecology's denial, they could have appealed to the Pollution Control Hearings Board. They did not, which should have ended this matter. The Benton Board cannot usurp the rights of the applicants, avoid appeal to the Pollution Control Hearings Board altogether, and instead bring suit in superior court.

Further, the case presents no issue of substantial public importance because the Benton Board presented no evidence that Ecology categorically denies administrative division of water rights donated temporarily into trust. The only example the Benton Board points to, the Plymouth Ranch/Tiegs administrative division request, was denied for specific, documented reasons unrelated to water rights being in trust. Nowhere in Policy 1070 is such a categorical rule stated or implied.

1. Ecology has not illegally interfered with the Benton Board operations

Under the APA, a party has standing to obtain judicial review of an agency action if that person is aggrieved or adversely affected by the agency action. RCW 34.05.530. A party is aggrieved or adversely affected when (1) the agency prejudiced or is likely to prejudice the aggrieved party; (2) that party's asserted interest was required to be considered; and (3) judgment in favor of that party would substantially eliminate or redress the prejudice caused by the agency action. *Id.*

The Court of Appeals properly applied existing law and precedent regarding standing in APA cases to the narrow facts here. The "injury-in-fact" requirement, found in prongs one and three, arises from well-settled law. *Benton Cnty. Water Conservancy Bd., s*lip op. at 9 (citing *Allan v. Univ. of Wash*., 92 Wn. App. 31, 36, 959 P.2d 1184 (1998)).

Ecology's denial of the underlying administrative division did not interfere with the Benton Board's operations. The Board's assertion that it "relies upon Ecology's records system"

and that its operations—the processing of change and transfer applications—is undermined by inaccurate records, *see* Petition at 11, is specious because there is no evidence of any inaccurate records here. Ecology denied the Plymouth Ranch/Tiegs application for administrative division. The applicants did not appeal; therefore Ecology has no records in this case to update.

The Benton Board argues that it has suffered an "informational injury" without showing that any information is inaccurate or has injured the Board. Pet. at 12. The Board cites *National Urban League v. Ross*, 489 F. Supp. 3d 939, 955 (N.D. Cal. 2020), for the proposition that "a large body of law" holds that an informational injury supports the exercise of judicial power, *see* Petition at 12, but that case involved a challenge by various parties, including local governments, to a plan by the Trump administration to drastically cut the amount of time used to take the 2020 federal census. The federal district court found the plaintiffs had standing because an invalid census would affect

how governments would spend their money on health services and how citizens would be counted.

This matter is nothing like *National Urban League*, where the risk of inaccurate information demonstrably stood to injure the interested parties. Here, in contrast, the Benton Board can point to no invalid information in the record that has injured the Board or otherwise prevented the Board from performing its duties. Ecology's database is accurate. The denial of the underlying application was not appealed. Nowhere does the Benton Board show that it has suffered an injury such as that demonstrated by the local governmental entities in *National Urban League*. There is no "informational injury" that confers standing on the Board.

The Court of Appeals rightly recognized that the Benton Board has not been injured. The Board does not handle administrative divisions of water rights and it is not the applicant. It has not established that it has an interest here that Ecology could interfere with, let alone injure. The Board states it has

suffered increased cost, delay and complexity without citation to any instance in which the Board itself has suffered these supposed injuries. *See* Pet. at 12. The Court of Appeals properly found that the Board lacked standing, and this Court should decline review.

2. Ecology is not asserting de facto power to regulate ownership of water rights

Nowhere in the record has the Benton Board shown that Ecology is attempting to regulate the ownership of water rights by denying a single request to administratively divide a water right because that application had *numerous* deficiencies. CP 00141–42. The Court of Appeals correctly concluded that the administrative division process as described in Policy 1070 is *not* a "quit claim deed process," as the Board baselessly asserts, and is instead a policy and process "adopted to streamline the apportionment of water rights stemming from certain types of simple property divisions." *Benton Cnty. Water Conservancy Bd.*, slip op. at 9–10.

The Court of Appeals correctly explained that Ecology's administrative division policy is not the only path for an applicant, who may use a change application instead. *Benton Cnty. Water Conservancy Bd.*, slip op. at 10-11; CP 00153. A denial of an administrative division does not stop an owner from accomplishing a division of a water right through a standard change application. RCW 90.03.380; RCW 90.44.100; and *Benton Cnty. Water Conservancy Bd.*, slip op. at 10. As the Court of Appeals found, "[t]he Board's claim that Ecology's limited use of [Policy 1070] means Ecology is failing in its record-keeping duties amounts to nothing more than conjecture." *Benton Cnty. Water Conservancy Bd.*, slip op. at 11.

The record reflects that the Plymouth Ranch/Tiegs administrative division request was denied for a myriad of fact-specific reasons. Ecology's denial of the administrative division in no way amounts to a "de facto" regulation of the ownership of the underlying water right. The Court of Appeals correctly concluded that Ecology is not "duty bound" to record

administrative divisions as if they were some sort of quit claim deed, and that "no statute, regulation, or policy" states that Ecology's Policy 1070 operates as a quit claim deed process. *Id.* at 9–10. The only "authority" for the Benton Board's argument that the administrative division process amounts to a quit claim deed process are the Benton Board's "own statements." *Id*. These conclusory statements fail to show how Ecology is in any way regulating ownership of water rights through its administrative division process. The Court of Appeals thus correctly recognized that the Board failed to establish any injury.

3. Ecology has not engaged in illegal rulemaking

The Benton Board's last gasp at establishing an injury is an allegation that Policy 1070 contains an illegal rule that Ecology categorically denies all administrative divisions of water rights donated into trust. *See* Pet. at 15. But the only evidence the Board cites is the Plymouth Ranch/Tiegs administrative division request, which the record shows Ecology denied for unrelated reasons.

In *Northwest Pulp & Paper v. Dep't of Ecology*, 200 Wn.2d 666, 520 P.3d 985 (2022), this Court addressed whether revisions to Ecology's Water Quality Permit Writer's manual are a "rule" under the APA, RCW 34.05.010(16). The Court ruled that the manual was not a "directive of general applicability," which is required for an agency action to be considered a rule under RCW 34.05.010, because it was not directed to the regulated community as a whole, allowed for discretion, and provided for case-by-case analysis. *Northwest Pulp & Paper*, 200 Wn.2d at 8.

Here, similarly, Ecology's Policy 1070 contains no directive of general applicability that Ecology must deny any request to administratively divide a water right that is held in Ecology's Trust Water Rights Program. The application about which the Benton County Water Conservancy Board complains was denied for *fact specific* reasons notwithstanding the Benton Board's attempt to infer a broadly applicable rule. CP 00031–32.

For the Court to find an illegal rule here, it would have to read into Policy 1070 a provision that does not exist, namely that Ecology will categorically deny the administrative division of water rights if those water rights are held in the trust water rights program on a temporary basis. This claim is absurd, and the Court of Appeals was correct to conclude that the Benton Board has not been injured by a so-called "rule" that does not exist.

The record reflects that Ecology followed Policy 1070 when it considered the underlying administrative division request and that it denied the division because the Plymouth Ranch/Tiegs application was lacking in *numerous* respects, as set forth in Ecology's decision letter to the applicants. CP 00141–43. The application was not denied because it involved a right donated temporarily into trust: it was denied for failing to reflect historic beneficial use, incorrectly identifying land parcel numbers, failing to even show that the water right had been used, and not having all the landowners in agreement. CP 00141–42.

These defects in the application surely could have been corrected by the applicants, who did not bother to appeal Ecology's denial.

The Benton Board cannot connect this one denial to its claim that Ecology has adopted a categorical rule where the record reflects the application was denied for numerous fact-specific reasons that had nothing to do with the right being in trust.

Policy 1070 explains the reasons that Ecology seeks certain information to process administrative divisions. For example, the policy explains that when multiple owners of a property seek an administrative division of a single water right appurtenant to the property, the apportionment "shall reflect the historic beneficial use of water on the property. It shall be the responsibility of each property owner to verify his or her 'share' of the original right reflects the historic beneficial use of water on the property." CP 00153. This makes perfect sense, as Ecology cannot properly divide a water right amongst owners if it does not know how to properly apportion the water right. And

signature requirements and proper parcel descriptions further help the agency ensure water rights are properly divided amongst proper owners.

Policy 1070 contains no “categorical rule” to deny the administrative division of water rights held in trust, nor is such a rule found anywhere else. The Board points to no instance of Ecology denying an administrative division simply because the water right is temporarily in trust. This simply is not an issue of significant public interest warranting review by this Court.

None of the issues raised by the Benton Board is of sufficient statewide public interest to warrant this Court’s review. The Court of Appeals correctly concluded that the Benton Board failed to demonstrate an injury-in-fact, a conclusion easily supported by the record of this case. The Court should therefore decline review.

V. CONCLUSION

For the reasons stated, this case does not present issues of substantial public interest that should be determined by this

Court. Ecology respectfully requests the Court deny the Petition for Review.

This document contains 3,745 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of April 2023.

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CERTIFICATE OF SERVICE

I certify that on April 24, 2023, I caused to be served the Department of Ecology's Answer to Petition for Review in the above-captioned matter upon the parties herein via the Appellate Court filing portal.

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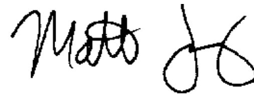
the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of April 2023, in Olympia, Washington.



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