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No. 101838-0

**IN THE SUPREME COURT FOR
STATE OF WASHINGTON**

BENTON COUNTY WATER CONSERVANCY BOARD

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondent.

Court of Appeals Case No. 388034-III
Appeal from the Superior Court of the
State of Washington for Benton County

PETITION FOR REVIEW

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Preliminary Statement

A. IDENTITY OF PETITIONER

Petitioner/Respondent Benton County Water

Conservancy Board (“Board”) is a “public body corporate and politic and a separate unit of local government in the state” (RCW 90.80.50(1)) with the express power to “sue and be sued, and do any and all lawful acts required and expedient to carry out the purposes of [RCW Chapter 90.80] . . .”. RCW 90.80.060(1). In briefing before the Superior Court, the Washington State Department of Ecology (“Ecology”) described the Board as a “partner[] in water resources management, . . . [with] statutory authority to process water rights change and transfer applications . . .”. (CP329.) The Board acts “upon applications for the same kinds of [water rights] transfers that the department [of Ecology] itself is authorized to act upon” (RCW 90.80.055), making it a statutorily authorized co-administrator of water right changes and transfers.

B. COURT OF APPEALS DECISION

By published opinion filed February 28, 2023, the Court of Appeals determined that even though the Board has statutory authority to regulate changes and transfers of water rights, the Board lacked standing to contest Ecology's decisions that arbitrarily and illegally interfered with its operations, specifically Ecology's refusal to recognize and record changes in ownership for water rights temporarily placed in trust for instream purposes. The Court of Appeals thus reversed the summary judgment granted in favor of the Board in the Superior Court of Benton County, which had held Ecology's conduct arbitrary, capricious and contrary to law. (CP386.) A copy of the opinion is set forth in the Appendix at pages 1 through 11.

C. ISSUES PRESENTED FOR REVIEW

- 1.** Where the Board has jurisdiction by statute to process water rights changes and transfers, can Ecology unlawfully interfere with the Board's work without judicial

recourse for the Board on the theory that the Board lacks standing because any resulting increased costs, uncertainty and delay imposed on the Board do not prejudice it within the meaning of RCW 34.05.530?

2. Can Ecology lawfully reject and refuse to make of public record decisions by water rights holders to transfer ownership of portions of water rights temporarily held in trust pursuant to Chapter 90.42 RCW?

3. Where Ecology categorically justifies its refusal to accept and record the transfers by reference to a written policy not promulgated in compliance with rulemaking procedures under the Administrative Procedure Act, has Ecology engaged in unlawful rulemaking?

D. STATEMENT OF THE CASE

1. The Water Rights Tracking System.

Ecology has no authority to regulate ownership of Washington water rights, but maintains a database of the water rights held within the State of Washington, which among other

things identifies the owners of such rights. This database is called the Water Rights Tracking System (CP215-16), and is relied upon by Ecology and water professionals across the State, including the Board (CP177-78). It was established by statute declaring that all “information necessary for effective planning and management . . .

“shall be included in a ‘water resources information system’ established and maintained by the department. The department shall develop a system of cataloging, storing and retrieving the information and studies of the information system so that they may be made readily available to and effectively used not only by the department but by the public generally.”

RCW 90.54.030.

Ecology Form 070-88, established in connection with a formal written policy of Ecology, entitled “Administrative Policy for Recording the Agreed Division of Water Rights Among Multiple Property Owners”. (“POL-1070”), is typically used to provide Ecology with information concerning ownership changes. (CP181-83; CP22).

Regrettably, Ecology invoked POL-1070 to categorically bar from recognition and recording in the Water Rights Tracking System all transfers of ownership in water rights where the water right had been temporarily placed in trust pursuant to Chapter 90.42 RCW—thus being associated with in-stream flows rather than irrigated land. Water rights owners frequently “temporarily donate or ‘park’ their water right when they are not using it, to avoid relinquishment”. (CP18.)

2. Changes in the *Use* of Water Rights.

In contrast to its lack of authority over water rights ownership, Ecology has extensive authority to regulate the use of water rights, with change/transfer approval pursuant to RCW 90.03.380 when the place of use, purpose of use, or point of diversion is changed. The Legislature has repeatedly admonished Ecology that, in an age of water scarcity, such changes should be facilitated—as opposed to the issuance of new rights. RCW 90.80.005; *see also* 2001 Laws, Ch. 237 (“ . . . providing timely decisions on water transfers, clarifying

the authority of water conservancy boards, and enhancing the flexibility of our water management system to meet both environmental and economic goals are important steps to providing a better future for our state”). Indeed, the Legislature created the Board precisely to facilitate and expedite changes and transfers of water rights.

3. The Proceedings Below.

The Board thought it had ended Ecology’s tactic of blocking change/transfers by rejecting ownership changes through certain 2013 litigation in which the Superior Court found Ecology had a duty to accept those changes. (CP175-76.) When the issue recurred in 2021, and was premised on a categorical refusal to recognize ownership changes in trusted rights, the Board concluded that Ecology’s “refusal to record certain ownership changes in the System interferes with [the Board’s] processing of . . . applications” and “creates confusion and extra expense for both [the Board] and the applicants appearing before it”. (CP178 (undisputed testimony of Board

representative.)) Indeed, it was at all relevant times undisputed that “Ecology’s ongoing refusal afflicts other transactions coming before the [Board] . . .”. (CP179.)

This time around, the Board determined to seek relief transcending any particular transaction, and filed a petition for relief, asserting claims for administrative mandamus (RCW 34.05.570(4)) and/or relief against unlawful rulemaking (RCW 34.05.570(2)). (CP1-18.) The Superior Court granted the Board’s motion for summary judgment, denying Ecology’s cross-motion for summary judgment, and entered an order finding Ecology’s refusal to accept and record administrative divisions forms involving water rights that had been temporarily donated to the Water Rights Trust Program was arbitrary and capricious; that its invocation of POL-1070 to justify this position made POL-1070 an unlawful rule; and enjoining Ecology from its continued refusal to accept the forms unless and until a lawful rulemaking proceeding was

completed governing acceptance and recording of changes in water rights ownership. (CP389-91.)

4. The Court of Appeals Decision.

The Court of Appeals recognized two components advanced to support the Board's standing: that Ecology's refusal to accept agreed divisions of water rights set forth in the administrative division form "interferes with [1] the Board's ability to accurately track ownership of water rights and [2] process change applications." (Slip op. at 9.) With respect to the first component, the Court of Appeals recognized that "the legislature has tasked Ecology with maintaining water rights records" (*id.*), referring to the agency's statutory duties under RCW 90.14.010 and RCW 90.54.030 (*id.* at 5 n.2). The Court of Appeals, however, declared that the legislature has not directed Ecology to maintain such records "in a specific manner" (*id.* at 10-11), thereby permitting Ecology to categorically refuse to recognize and record an entire category

of water rights transfers—notwithstanding its complete absence of authority to regulate water right ownership.

The Board contended that Ecology’s authority with respect to keeping records of who owns water rights cannot be legally distinguished from that of a county clerk with respect to recording deeds, but the Court of Appeals declared that “no statute, regulation or policy states that POL-1070 operates as a ministerial, quit claim deed process”. (Slip op. at 10.)

The Court of Appeals did not identify any authority for Ecology to reject ownership changes, or address the Superior Court’s finding that failure to recognize and record ownership transfers in trusted water rights was arbitrary and capricious, but concluded that the Board’s demonstration that “Ecology is failing in its record-keeping duties” was “nothing more than conjecture”. (Slip op. at 11.)

More importantly, the Court failed entirely to consider the impacts on the Board beyond the mere absence of accurate ownership records in Ecology’s Water Rights Tracking System.

In particular, applicants owning portions of water rights temporarily parked in the Water Rights Trust Program wish to come before the Board to seek a change in the status of this particular water right under RCW 90.03.380. Ecology's refusal, as an administrative matter, to recognize and record the changes in ownership means that the entire transaction has to be rejected—not just the ownership change but the RCW 90.03.380 application as well.

The Court of Appeals opinion discusses one example of this (slip op. at 5-6), but ignores the resulting rejection of that the change/transfer application under RCW 90.03.380. Ecology takes the position that “the water rights cannot be divided”—again, notwithstanding the lack of authority to regulate ownership—and in the record example declared the Board's RCW 90.03.380 decision had to be withdrawn because it did “not evaluate the entirety of the water rights”. (CP108). The Court did not explain why Ecology's insistence upon an unnecessary, more complex and laborious process imposing

additional costs and uncertainty upon the applicants and the Board was not *itself* “injury in fact” to the Board.

Argument

I. THE CASE INVOLVES SIGNIFICANT QUESTIONS OF WASHINGTON LAW OF SUBSTANTIAL PUBLIC INTEREST.

A. Whether Washington Governmental Agencies Seeking Judicial Redress for Illegal Interference In their Operations Should Be Denied Standing is a Question of Substantial Public Interest.

The notion that a public agency of the State of Washington has no legally cognizable interest in the complexity, efficiency and costs of its own operations is a novel and pernicious expansion of standing doctrine. RCW 34.05.530. The Court of Appeals decision did not invoke the “zone of interest” component of the test, RCW 34.05.530(2), because the Board has a unique and compelling interest in the subject of facilitating changes and transfers of Washington water rights. It relies upon Ecology’s record system, and Ecology is required by statute to “provide technical assistance”

to the Board. RCW 90.80.055(1)(d). Ecology's own regulations even emphasize the Board's reliance upon Ecology's technical information in cases "involving trust water rights". WAC 173-153-060.

The Court of Appeals' holding that no "injury in fact" is present when an agency takes a public records system established by statute and arbitrarily excludes highly relevant and necessary information from it is contrary to a large body of law holding that such "informational injury" is an injury that supports the exercise of judicial power. *See, e.g., Nat'l Urban League v. Ross*, 489 F. Supp. 3d 939, 967 (N.D. Cal. 2020) (collecting cases).

Worse still, the notion that an agency can arbitrarily interfere in the operation of local governments without any statutory basis to do so, and that the afflicted local governments lacks standing because increased cost, delay and complexity in its operations is not "injury in fact," threatens not only the rule of law but also the efficient and economical operation of

government itself in Washington. The Board is the entity most affected by Ecology's unlawful conduct and rulemaking, and best equipped to seek redress for its own benefit and the benefit of the water rights holders it was established to assist. There is no principled basis for expanding standing doctrine to lock units of local government out of the State's courts.

B. Whether Ecology Should Be Granted De Facto Power to Regulate Ownership of Washington Water Rights Is a Question of Substantial Public Interest.

Neither Ecology nor the Court of Appeals attempted to justify why Ecology might refuse to recognize ownership transfers in water rights that had been placed in trust, a tool “more and more frequently utilized by water rights holders appearing before the [Board]” (CP178). There was obviously no legal justification for the policy, *and, remarkably, the Court of Appeals acknowledged that Ecology's action was not “pursuant to a[ny] legislative mandate” whatsoever.* (See slip op. at 10.) Ecology did not even attempt to offer a policy justification for its action, much less a legal one. The Superior

Court easily recognized Ecology's conduct as quintessential arbitrary and capricious agency action, first in 2013 and then in the decision below.

Nor is there any dispute that the effect of Ecology's arbitrary refusal to recognize the ownership changes was to make water rights changes and transfers more complex and expensive, in direct opposition to the Legislative policy to "expedite the administrative process for water rights transfers" through conservancy boards. RCW 90.80.005. It interferes with powerful public policy objectives to "reallocate water use in a manner that will result in more efficient use of water resources . . . help alleviate water shortages, save capital outlays, reduce development costs, and provide an incentive in water conservation efforts by water rights holders". *Id.*

Whether Ecology can arbitrarily invent barriers to water rights transfers out of thin air, and force them upon the Board and the water rights holders of Washington is a matter of considerable public importance, and merits review.

C. Whether an Agency May Invoke a Written Policy to Support Decisionmaking While Avoiding Rulemaking is an Issue of Substantial Public Importance.

It should be obvious that when an agency says “our policy does not let us do that,”¹ referring to an entire category of cases, that policy must be in the form of a rule that has been enacted in compliance with the detailed requirements of RCW 34.05.310 through 34.05.395, and subject to legislative review pursuant to RCW 34.05.610 through RCW 34.05.650. The rulemaking process itself—and particularly legislative review of Ecology’s extraordinary conduct—would discourage Ecology from pursuing the extraordinary undermining of legislative policy it pursues here.

As one of Washington’s most famous justices, Justice William O. Douglas, has explained, “[p]ublic airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the

¹ *E.g.*, CP108 (“Our administrative division policy does not allow us to divide a water right when it has been separated from the property”).

growth of absolutism in the regime that now governs all of us.”
National Labor Relations Board v. Wyman, 394 U.S. 759, 778
(1969) (Douglas, J., dissenting); *see also Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 649 (1992)
(noting benefits of rulemaking procedure). Regrettably,
Ecology, as a matter of policy, one might say, prefers to operate
free of rulemaking constraints and has enacted more than fifty
formal written policies, many of which are utilized as unlawful
rules.²

Ultimately, the Court of Appeals opinion upholds a
decision to cast aside the rule of law itself, because according to
the Court, POL-1070 was not even “created pursuant to a
legislative mandate”. (Slip op. at 10.) Ecology, as a
Washington state agency, is a “creature of statute” whose
powers are conferred by the legislature, and whose conceptions
of the public interest must be based upon the statutes confided

² They are listed at <https://ecology.wa.gov/Regulations-Permits/Plans-policies/Water-rights-dam-safety-policies-procedures-guidan> (accessed 3/3/23).

to Ecology's administration. *Cf. Pope Res., LP v. Dep't of Nat. Res.*, 190 Wn.2d 744, 760 (2018). This Court has repeatedly emphasized this point in cases involving Ecology. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 233 (1993) (guidance for Ecology "is found only in the Water Code"); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 134 (1999). Ecology can and will interpret the Court of Appeals decision to free it from all constraints of democratically-determined statutory policy. Leaving it free to pursue its own utterly contrary visions of the public interest. This Court's review of the Court of Appeals decision is required to restore the constraint of law on Ecology's actions.

Conclusion

For the foregoing reasons, the Court of Appeals decision should be reversed, and the decision of the Superior Court reinstated.

This document contains 2,617 words, excluding the parts exempted by RAP 18.17.

Respectfully submitted this 24th day of March, 2023.




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CERTIFICATE OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of Washington that on March 24, 2023, I caused to be served a copy of the BENTON COUNTY WATER CONSERVANCY BOARD'S PETITION FOR REVIEW in the above-caption matter upon the parties herein by First Class mail and E-mail to the following:

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Carole A. Caldwell

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

BENTON COUNTY WATER)	No. 38803-4-III
CONSERVANCY BOARD,)	
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
WASHINGTON STATE DEPARTMENT)	
OF ECOLOGY,)	
)	
Appellant.)	

PENNELL, J. — The Benton County Water Conservancy Board petitioned the superior court for judicial review under the Administrative Procedure Act, chapter 34.05 RCW, seeking to enjoin the Department of Ecology’s refusal to accept and record certain agreed administrative divisions of water rights. The trial court ruled in favor of the Board, but we reverse. The Board has not established standing to challenge Ecology’s administrative division decisions. The petition must therefore be dismissed.

WATER RIGHTS BACKGROUND

Since the water code was initially adopted in 1917, Washington’s waters have been considered public property, not subject to private ownership. RCW 90.03.010; RCW 90.44.040.¹ Although private individuals cannot own water, they can acquire the

¹Surface water rights are addressed in chapter 90.03 RCW. Ground water rights are addressed in chapter 90.44 RCW. This case involves only surface water rights.

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right to appropriate water for beneficial use. *Id.* This is what is known as a water right.

Dep't of Ecology v. U.S. Bureau of Reclamation, 118 Wn.2d 761, 766, 827 P.2d 275 (1992).

Water rights attach to the “land or place upon which the same is used.”

RCW 90.03.380(1). Nevertheless, in appropriate circumstances, the right “may be transferred to another or to others and become appurtenant to any other land or place of use.” *Id.* The Washington Legislature has tasked the Department of Ecology with processing applications to change or transfer water rights. *Id.* The change application process is not automatic. Before approving an application to change a characteristic of a water right, including its place of use, Ecology must assess whether the change can be made without injury or detriment to existing rights. *Id.* This involves assessing whether the water right has been “beneficially used to its full extent.” *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 779, 947 P.2d 732 (1997). If Ecology approves a change application, it must issue a certificate, record the certificate internally, and make a duplicate copy available for the county auditor. RCW 90.03.380(1).

An assessment of the term “beneficial use” is critical to understanding the contours of a water right. “[B]eneficial use’ encompasses two principles. . . . First, ‘beneficial use’ refers to the types of activities for which water may be used (e.g., irrigation or

agriculture) Second, 'beneficial use' determines the measure of a person's water right (i.e., a person is entitled to the amount of water he or she has traditionally put to beneficial use)." *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 605, 344 P.3d 199 (2015).

If a water right holder ceases putting water to beneficial use, the right may be subject to relinquishment. *See* RCW 90.14.130-.180; *Dep't of Ecology v. Aquavella*, 131 Wn.2d 746, 757-58, 935 P.2d 595 (1997). When a water right is relinquished, it reverts to the State of Washington. RCW 90.14.130.

A water right holder can avoid relinquishment by temporarily transferring its water right to the State through its trust water rights program, which is managed by the Department of Ecology. RCW 90.14.140(2)(h). "Trust water rights acquired by the [S]tate shall be held in trust and authorized for use by the [D]epartment [of Ecology] for instream flows, irrigation, municipal, or other beneficial uses consistent with applicable regional plans for pilot planning areas, or to resolve critical water supply problems." RCW 90.42.040(1). A water right temporarily donated to the trust water rights program eventually reverts back to the certificate holder, retaining its original use characteristics. RCW 90.42.080(9).

Over the years, the State has adopted procedures for facilitating uncontested water

right transfers. Water conservancy boards were created to administer uncontested transfers, changes, amendments, or other alterations of water rights within a board's geographic jurisdiction. *See* RCW 90.80.005, .020, .030, .070. All board decisions are subject to approval by the Department of Ecology. RCW 90.80.080; WAC 173-153-150. Ecology generally has 45 days to affirm, reverse, or modify an action by a conservancy board. RCW 90.80.080(4); WAC 173-153-150(5)(c). Ecology's decision is subject to appeal to the Pollution Control Hearings Board. RCW 90.80.090; WAC 173-153-180.

The Department of Ecology has also adopted an internal policy entitled the "Administrative Policy for Recording the Agreed Division of Water Rights Among Multiple Property Owners." Clerk's Papers (CP) at 152-54 (some capitalization omitted). Originally adopted in 2003, this policy is also commonly known as "POL-1070." *Id.* POL-1070 enables Ecology to track and record an agreed division of water rights when multiple parties own a piece of land to which a single water right is appurtenant. *Id.* at 152. Pursuant to POL-1070, Ecology has promulgated "Form ECY 070-88," entitled "Request for Administrative Confirmation of Division of a Water Right." *Id.* at 10-12; *see also id.* at 153-54. POL-1070 enables property owners requesting a division of water rights to receive superseding water-rights documents.

POL-1070 was not adopted pursuant to a statutory mandate. Instead, POL-1070

appears to have been adopted as a way of streamlining the apportionment of water rights pursuant to a division in ownership that reflects “the historic beneficial use of water on the property” to which the right attaches. *Id.* at 153. POL-1070 states in multiple instances that it does not prevent “a water right holder from seeking a change via RCW 90.03.380 . . . or other applicable statutes.” *Id.* at 152-53.

THE BOARD’S POSITION REGARDING
ADMINISTRATIVE DIVISIONS AND POL-1070

The Benton County Water Conservancy Board believes Ecology has been misusing POL-1070 in an effort to interfere with the alienation of water rights. According to the Board, Ecology refuses to confirm agreed divisions of water rights if the water rights are temporarily placed in trust. The Board claims this is problematic because a division confirmation “operates as a sort of quit claim deed to update the ownership records in Ecology’s Water Rights Tracking System.” *Id.* at 5.² The Board claims that when Ecology refuses to authorize a division request, it interferes with the Board’s ability to perform its legislatively authorized function of processing water right transfer applications. The Board also complains that by refusing to process divisional requests

² The authority cited in support of this claim is RCW 90.14.010 and RCW 90.54.030, which require Ecology to maintain records for the efficient administration of our state’s waters.

for rights that are temporarily held in trust, Ecology is not maintaining an accurate record of water rights ownership, in violation of statutory mandates. *See* RCW 90.14.010; RCW 90.54.030.

FACTS AND PROCEDURAL HISTORY

In 2015, Plymouth Ranch, LLC, temporarily donated a portion of its water right, G4-26018C, to Ecology's trust water program. At some point after the donation, Plymouth Ranch sold a portion of its property, but retained the water rights associated with that property, some of which were those donated to the trust water program. In June 2020, Plymouth Ranch extended its water right donation of portions of G4-26018C through the year 2030, and donated additional water rights to the trust program, including portions of water rights G4-26464C and G4-31006C.

Soon after Plymouth Ranch extended its donation, it sold the trusted portions of water rights G4-26018C and G4-26464C to Frank Tiegs, LLC. Tiegs did not own the land to which those water right certificates were appurtenant. In June 2021, Plymouth and Tiegs filed a request for administrative confirmation of a division of a water right, using Form ECY 070-88.³ CP at 45-46.

³ The administrative division documents were submitted by the Benton County Water Conservancy Board on behalf of Plymouth Ranch and Frank Tiegs, LLC.

Ecology denied the request for administrative confirmation of division, referencing POL-1070. In an August 2021 letter directed to Plymouth and Tiegs, Ecology identified several deficiencies in the requested administrative divisions which it stated “must be addressed prior to Ecology agreeing to divide” the certificates. *Id.* at 31. One of the problems identified by Ecology was the fact that Tiegs did not own the property within the authorized place of use. Ecology’s denial of the administrative division informed Plymouth and Tiegs of their right to appeal Ecology’s decision to the Pollution Control Hearings Board within 30 days of receipt of the denial. No appeal was filed.

In September 2021, the Board petitioned the Benton County Superior Court under the Administrative Procedure Act (APA), chapter 34.05 RCW, for judicial review of Ecology’s decision. The Board stated it had the power to “‘sue or be sued’” and was bringing the action because Ecology’s refusal to administratively divide water rights interfered with the Board’s statutory duty to process water right transfer applications. CP at 2 (quoting RCW 90.80.060)). The Board claimed it was entitled to judicial review of Ecology’s actions under the APA because Ecology’s denial of voluntary division requests was “‘outside the statutory authority of the agency or the authority conferred by provision of law’” or “‘arbitrary or capricious.’” *Id.* at 8 (quoting RCW 34.05.570(4)(c)(ii)-(iii)). Alternatively, the Board claimed Ecology’s ongoing refusal to administratively divide

water rights placed in trust represented an agency rule that was not promulgated pursuant to required rulemaking procedures, as outlined in RCW 34.05.570(2).

ANALYSIS

This case comes to us as a challenge to agency action under the APA. A preliminary issue under the APA is standing. The Board, as the petitioner for judicial review, bears the burden of establishing standing. *KS Tacoma Holdings, LLC v. Shorelines Hr'gs Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012). We review de novo the question of whether this burden has been met, without deference to the superior court. *In re Est. of Becker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013); *Patterson v. Segale*, 171 Wn. App. 251, 257, 289 P.3d 657 (2012).

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 three conditions are present:

- (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.

Id. The first and third of the aforementioned prongs “are generally called ‘injury-in-fact’ requirements, while the second is called the ‘zone of interest’ prong.” *Allan v. Univ. of Wash.*, 92 Wn. App. 31, 36, 959 P.2d 1184 (1998) (quoting *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 739, 887 P.2d 891 (1995)), *aff'd*, 140 Wn.2d 323, 997 P.2d 360 (2000). A petitioner must satisfy all three prongs in order to establish standing. *Id.*

We focus our analysis on the APA’s injury-in-fact prongs. The Board argues it has suffered an injury-in-fact as a result of Ecology’s handling of POL-1070. According to the Board, Ecology’s refusal to accept all agreed divisions of water rights under POL-1070 interferes with the Board’s ability to accurately track ownership of water rights and process change applications. We disagree.⁴

The Board’s criticisms of Ecology stem from a mischaracterization of POL-1070. According to the Board, the administrative division of water rights under POL-1070 and Form ECY 070-88 operates as a type of quit claim deed, which Ecology is duty-bound to record. But the only authority offered by the Board for the analogy to a quit claim deed

⁴ The Board also claims it has standing because it has the power to “sue and be sued.” RCW 90.80.060(1). The right to sue is fairly ubiquitous and is insufficient to confer standing under the APA.

is its own statements. *See* CP at 5, 123, 171. No statute, regulation, or policy states that POL-1070 operates as a ministerial, quit claim deed process.

By its plain terms, POL-1070 was adopted to streamline the apportionment of water rights stemming from certain types of simple property divisions.⁵ The benefit of POL-1070 is to avoid the more cumbersome change application process under RCW 90.03.380. POL-1070 was not created pursuant to a legislative mandate. Thus, Ecology is not duty-bound to process division requests that do not meet Ecology's chosen criteria. The fact that a request to divide water rights fails to meet the criteria set by Ecology in POL-1070 does not mean that the parties to the request have not validly transferred ownership in a water right. It simply means the parties must use a separate process, such as a change application under RCW 90.03.380, to determine how the water right will be apportioned.

The Board seems to suggest that if Ecology is not using POL-1070 as a method of recording water right transfers, it is failing its statutory duty to maintain water right records under RCW 90.54.030. We disagree. While the legislature has tasked Ecology with maintaining water right records, it has not directed Ecology to do so in a specific


⁵ As previously explained, POL-1070 applies only to the unique situation where a piece of land with one appurtenant water right is divided up between multiple owners.

manner. Ecology admits it uses POL-1070 as a tool for documenting certain divisional water right transfers. But this does not mean it is the only tool for documenting changes in water rights. The Board's claim that Ecology's limited use of POL-1070 means Ecology is failing in its record-keeping duties amounts to nothing more than conjecture. This is insufficient to establish an injury-in-fact as required for APA standing. *Freedom Found. ex rel. State v. Bethel Sch. Dist.*, 14 Wn. App. 2d 75, 86, 469 P.3d 364 (2020).

The Board has not demonstrated any injury-in-fact resulting from Ecology's application of POL-1070. It has therefore failed to establish standing pursuant to the APA. RCW 34.05.530(1), (3). The trial court's decision granting relief under the APA must therefore be reversed.


CONCLUSION

The trial court's order of summary judgment in favor of the Benton County Water Conservancy Board is reversed. The petition for judicial review is dismissed for lack of standing.

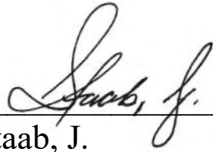


Pennell, J.

WE CONCUR:



Fearing, J.



Staab, J.

RCW 34.05.530 Standing. A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

(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. [1988 c 288 § 506.]

RCW 34.05.570 Judicial review. (1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b) (i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that 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. [2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

RCW 90.03.380 Right to water attaches to land—Transfer or change in point of diversion—Transfer of rights from one district to another—Priority of water rights applications—Exemption for small irrigation impoundments—Electronic notice of an application for an interbasin water rights transfer. (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 or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right. Before any transfer of such right to use water or change of the point of diversion of water or change of purpose of use can be made, any person having an interest in the transfer or change, shall file a written application therefor with the department, and the application shall not be granted until notice of the application is published as provided in RCW 90.03.280. If it shall appear that such transfer or such change may be made without injury or detriment to existing rights, the department shall issue to the applicant a certificate in duplicate granting the right for such transfer or for such change of point of diversion or of use. The certificate so issued shall be filed and be made a record with the department and the duplicate certificate issued to the applicant may be filed with the county auditor in like manner and with the same effect as provided in the original certificate or permit to divert water.

RCW 90.14.010 Purpose. The future growth and development of the state is dependent upon effective management and efficient use of the state's water resources. The purpose of this chapter is to provide adequate records for efficient administration of the state's waters, and to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use. [1967 c 233 § 1.]

RCW 90.54.030 Water and related resources—Department to be advised—Water resources data program. For the purpose of ensuring that the department is fully advised in relation to the performance of the water resources program provided in RCW 90.54.040, the department is directed to become informed with regard to all phases of water and related resources of the state. To accomplish this objective the department shall:

(1) Develop a comprehensive water resource data program that provides the information necessary for effective planning and management on a regional and statewide basis. The data program shall include an information management plan describing the data requirements for effective water resource planning, and a system for collecting and providing access to water resource data on a regional and statewide basis;

(2) Collect, organize and catalog existing information and studies available to it from all sources, both public and private, pertaining to water and related resources of the state;

(3) Develop such additional data and studies pertaining to water and related resources as are necessary to accomplish the objectives of this chapter; and

(4) Develop alternate courses of action to solve existing and foreseeable problems of water and related resources and include therein, to the extent feasible, the economic and social consequences of each such course, and the impact on the natural environment.

All the foregoing shall be included in a "water resources information system" established and maintained by the department. The department shall develop a system of cataloging, storing and retrieving the information and studies of the information system so that they may be made readily available to and effectively used not only by the department but by the public generally. [1997 c 32 § 1; 1990 c 295 § 2; 1988 c 47 § 4; 1971 ex.s. c 225 § 3.]

RCW 90.80.005 Findings. The legislature finds:

(1) Voluntary water right transfers can reallocate water use in a manner that will result in more efficient use of water resources;

(2) Voluntary water right transfers can help alleviate water shortages, save capital outlays, reduce development costs, and provide an incentive for investment in water conservation efforts by water right holders; and

(3) The state should expedite the administrative process for water right transfers by authorizing the establishment of water conservancy boards. [2001 c 237 § 6; 1997 c 441 § 1.]

RCW 90.80.050 Corporate powers—Board composition—Members' terms, expenses—Alternates—Eligibility to be appointed. (1) A water conservancy board constitutes a public body corporate and politic and a separate unit of local government in the state. Each board shall consist of three commissioners appointed by the county legislative authority or authorities as applicable for six-year terms. The county legislative authority or authorities shall stagger the initial appointment of commissioners so that the first commissioners who are appointed shall serve terms of two, four, and six years, respectively, from the date of their appointment. The county legislative authority or authorities may appoint two additional commissioners, for a total of five. If the county or counties elect to appoint five commissioners, the initial terms of the additional commissioners shall be for three and five-year terms respectively. All vacancies shall be filled for the unexpired term.

RCW 90.80.055 Additional board powers. (1) Except as provided in subsection (2) of this section, a board shall operate on a countywide basis or on an area-wide basis in the case of a board with jurisdiction in more than one county or water resource inventory area, and have the following powers, in addition to any other powers granted in this chapter:

(a) Except as provided in subsection (2) of this section, a board may act upon applications for the same kinds of transfers that the department itself is authorized to act upon, including an application to establish a trust water right under chapter 90.38 or 90.42 RCW. A board may not act upon an application for the type of transfer within an irrigation district as described in RCW 90.03.380(3). If a board receives an application for a transfer between two irrigation districts as described in RCW 90.03.380(2), the board must, before publication of notice of the application, receive the concurrence specified in that section.

(b) A board may act upon an application to transfer a water right claim filed under chapter 90.14 RCW. In acting upon such an application, the board must make a tentative determination as to the validity and extent of the right, if any, embodied in the claim and may only issue a record of decision regarding a transfer of such a claim to the extent it is tentatively determined to be valid. Neither the board's tentative determination, nor the director's acceptance of such a tentative determination, constitutes an adjudication of the right under RCW 90.03.110 through 90.03.240 or 90.44.220, and such a determination does not preclude or prejudice a subsequent challenge to the validity, priority, or quantity of the right in a general adjudication under those sections.

(c) A board may establish a water right transfer information exchange through which all or part of a water right may be listed for sale or lease. The board may also accept and post notices in the exchange from persons interested in acquiring or leasing water rights from willing sellers.

(d) The director shall assign a representative of the department to provide technical assistance to each board. If requested by the board, the representative shall work with the board as it reviews applications for formal acceptance, prepares draft records of decision, and considers other technical or legal factors affecting the board's development of a final record of decision. A board may request and accept additional technical assistance from the department. A board may also request and accept assistance and support from the county government or governments of the county or counties in which it operates.

(2) The jurisdiction of a board shall not apply within the boundaries of a federal Indian reservation or to lands held in trust for an Indian band, tribe, or nation by the federal government. [2001 c 237 § 9.]

RCW 90.80.060 Board powers—Funding. (1) A water conservancy board may acquire, purchase, hold, lease, manage, occupy, and sell real and personal property or any interest therein, enter into and perform all necessary contracts, appoint and employ necessary agents and employees and fix their compensation, employ contractors including contracts for professional services, sue and be sued, and do any and all lawful acts required and expedient to carry out the purposes of this chapter.

MURPHY & BUCHAL LLP

March 24, 2023 - 2:29 PM

Filing Petition for Review

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(388034)

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