

COURT OF APPEALS
DIVISION II

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NO. 40923-2-II

STATE OF WASHINGTON
BY
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WELLS FARGO BANK, N.A.,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF CROSS-APPELLANT/RESPONDENT

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I. INTRODUCTION

The APA provides a right to sue to “any person” aggrieved by “agency action,” subject to a 30-day time limit for filing a petition for judicial review. A common law breach of contract action, in contrast, is subject to a six-year statute of limitations. The question in this cross-appeal is whether a taxpayer suing for statutory interest in addition to the amount paid in settlement of a tax refund claim may sue the State when the suit does not meet the time limit for an APA appeal of the disputed agency action. This Court should answer no.

II. ARGUMENT

A. **Wells Fargo’s Suit Is, In Essence, A Mandamus Action, Not A Breach Of Contract Action**

Wells Fargo asserts this is a “breach of contract case,” even though it originally filed its action under the APA. Resp. to Cross-App. at 5; CP 3. Wells Fargo recast its suit as a breach of contract action in response to the Department’s motion to dismiss its petition for judicial review as untimely. CP 7.

Wells Fargo’s suit is not really a contract action; in essence, it is a mandamus action. Wells Fargo argues that RCW 82.32.060(4) imposes a duty on the Department to pay interest even though the parties negotiated a settlement agreement that did not provide for interest. Wells Fargo concedes the closing agreement makes no provision for interest and Wells

Fargo did not even consider interest when it entered into the closing agreement. Resp. to Cross-App. at 39. Wells Fargo relies on the statute, not the written agreement, as the basis for its interest claim. It argues RCW 82.32.060(4) requires payment of interest and the statute is impliedly incorporated into the closing agreement.

Wells Fargo correctly recognized initially that the Department's denial of its interest demand was reviewable under the APA. RCW 34.05.570(4) replaces the writ of mandamus for seeking a judicial order requiring an agency to act where it has a mandatory duty to act. *See Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 92-93, 982 P.2d 1179 (1999). *See also* RCW 7.16.340 (writ of mandamus inapplicable to action reviewable under the APA).

In its petition for judicial review, Wells Fargo stated its claims for relief as follows:

16. The Department has violated RCW 82.32.060(4) by failing to pay the required interest on the tax refund allowed to Wells Fargo.

17. The Department's failure to perform its statutory duty to pay interest on Wells Fargo's tax refund is arbitrary and capricious and contrary to law.

18. Wells Fargo is entitled to a declaratory judgment that interest is due on the tax refund that was allowed and paid by the Department.

CP 5.

This case presents a classic case of statutory interpretation, not a case of contract interpretation. As Judge McPhee correctly recognized, Wells Fargo's real argument is that RCW 82.32.060(4) requires the payment of interest even though not negotiated in a settlement agreement. VRP at 65-66. In contrast to the straightforward question of statutory interpretation presented, Wells Fargo's "contract" theory is circuitous and strained. Relying on an assortment of inapposite tools of construction, it asks this Court to read into the closing agreement a provision the agreement does not contain.

The nature of this action is, in essence, a mandamus action, not a common law contract action. Wells Fargo's actual claim is that RCW 82.32.060(4) imposes a mandatory duty on the Department to pay interest on the settlement amount.

B. Wells Fargo's Claim For Statutory Interest Is Not Actionable As A Common Law Breach Of Contract Action

Wells Fargo claims it is entitled to bring a common law breach of contract action under RCW 4.92.010 in addition to whatever judicial review may be available under the APA. In support, it relies upon *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 568 P.2d 780 (1977), and *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979). Neither case is apposite because neither involved a dispute subject to the APA.

The APA provided Wells Fargo the right to sue to enforce its alleged right to receive statutory interest. Having forfeited that right by failing to file a timely petition for judicial review, Wells Fargo may not recast its suit as a common law breach of contract action subject to a longer limitations period. *See Banner Realty, Inc. v. Dep't of Revenue*, 48 Wn. App. 274, 277-79, 738 P.2d 279 (1987) (party's failure to file timely petition for judicial review precluded superior court from exercising original jurisdiction over Board of Tax Appeals' decision).

1. *Architectural Woods* did not involve “agency action” subject to judicial review under the APA or any other specific statutory review procedures.

Wells Fargo asserts “RCW 4.92.010 authorizes suits against the State on contracts,” citing *Architectural Woods*, 92 Wn.2d 521. Resp. Br. to Cross-App. at 6. *Architectural Woods* involved a contract for construction services provided to Evergreen State College. The dispute in *Architectural Woods* was an ordinary breach of contract suit because disputes over public construction contracts were not subject to the APA. When the State is “acting in a private capacity,” it assumes “the same responsibilities and liabilities as [a] private party.” *Union Elevator & Warehouse Co, Inc. v. State ex. rel. Dept. of Transp.*, ___ Wn.2d ___, 2011 WL 543760 (2011) (distinguishing *Architectural Woods* in rejecting a claim for interest on an amount awarded under the Relocation Act).

Thus, the APA judicial review provisions did not, and do not now, apply to disputes arising from contracts for construction services, personal services, or real estate. *See* RCW 34.05.010(3).

RCW 82.32.350 authorizes the Department to “enter into an agreement in writing with any person relating to the liability of such person in respect of any tax imposed by any of the preceding chapters of this title for any taxable period or periods.” In authorizing the Department to use a written agreement as an alternative means to resolve tax disputes, the Legislature did not authorize a common law breach of contract action.

A statutory closing agreement is not like a contract between private parties. Although a statutory closing agreement is interpreted according to contract interpretation principles, the substance of the agreement is uniquely governmental. When it settles tax disputes, the Department is not acting “in a private capacity” or entering into “business reserved to the field of private enterprise.” *Union Elevator*, 2011 WL 543760, at 3 (2011); *Architectural Woods*, 92 Wn.2d at 528-29.

2. *Riley Pleas* was decided before the Legislature extended the scope of the APA.

Riley Pleas did not hold that a dispute arising from an agreement to settle a tax controversy can be litigated through a common law breach of contract action. The nature of the action was not at issue in *Riley Pleas*; nor was the question of the court’s jurisdiction. The taxpayer in that case

relied on a settlement agreement it had entered into with the Department as an alternative theory for relief in a tax refund action brought under RCW 82.32.180. *Riley Pleas*, 88 Wn.2d at 934.

Moreover, *Riley Pleas* was decided more than a decade before the Legislature revised the APA to make it the “exclusive means” of judicial review of “agency action.” RCW 34.05.510. Before 1988, the APA judicial review provisions applied only to rule challenges and final agency orders in adjudicative proceedings. *See* Senate Journal, 50th Leg., Reg. Sess., at 610 (Wash. 1987) (Comment 1) (“under the current chapter 34.04 RCW, a citizen affected by the agencies’ failure to perform has no administrative recourse, but must resort to special remedies in the courts.”). The 1988 APA superseded special writ procedures for disputed “agency action” absent an applicable exception. The Legislature greatly expanded the scope of the APA to ensure a swift and efficient resolution of disputes involving state agencies. In broadening the APA, the Legislature expressly intended to establish “one exclusive method for judicial review” of agency action. *Id.* at 627 (Comment 65).

Before 1988, this controversy would not have been subject to the APA’s judicial review procedures. Therefore, an aggrieved party could have invoked the superior court’s jurisdiction in a mandamus action as allowed by the general waiver of sovereign immunity provided by RCW

4.92.010. The 1988 APA withdrew such jurisdiction over “agency actions,” absent an applicable exception.¹ *Cf. James v. County of Kitsap*, 154 Wn.2d 574, 587-88, 115 P.3d 286 (2005).

Wells Fargo argues the APA does not provide the exclusive means of judicial review because Wells Fargo presents a claim under the superior court’s original jurisdiction, not its appellate jurisdiction. Resp. Br. to Cross-App. at 6-7. The Washington Supreme Court rejected the same argument in a LUPA case. *James*, 154 Wn.2d at 587-88.² In *James*, developers claimed they were not subject to LUPA’s 21-day time limitation for appeal because they sought to invoke the superior court’s original jurisdiction under article IV, section 6 of the Washington Constitution, not its appellate jurisdiction over “land use decisions.” *Id.*

The Court held that compliance with LUPA’s appeal deadline was required to challenge “land use decisions” even though the challenge involved allegedly invalid taxes formerly subject to the court’s original jurisdiction under article IV, section 6. *Id.* The Court held that the three-

¹ See William R. Andersen, *1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 822 (1989) (“Because the new Act provides review for a wide range of agency conduct, and because it provides a wide range of remedies, there would appear to be little need for special writs and the ‘inherent’ review power.”) (citations omitted).

² LUPA was modeled after the APA. Courts rely on *James* and other cases decided under LUPA when addressing similar issues that arise under the APA. See, e.g., *AOL, LLC v. Dep’t of Revenue*, 149 Wn. App. 533, 555, 205 P.3d 159 (2009) (relying on *James* for proposition that courts will not exercise jurisdiction when a taxpayer fails to comply with applicable procedural requirements).

year statute of limitations under RCW 4.16.080(3), which it had applied in *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), no longer applied. *Henderson Homes* was:

...no longer viable in the wake of LUPA, which establishes uniform procedures and by its own terms is the “*exclusive* means of judicial review of land use decisions . . .” RCW 36.70C.030(1) (emphasis added).

James, 154 Wn.2d at 587. Because the county’s imposition of impact fees was a land use decision, it necessarily followed that “the procedures established by LUPA to challenge that decision” governed. *Id.*

Similar reasoning applies here. If *Riley Pleas* suggested at all that a dispute arising from a tax settlement can be litigated as a common law contract action,³ it is no longer good law. Just as the enactment of LUPA replaced former procedures for suits relating to local impact fees, the APA replaced any other general court procedures relating to “agency action,” absent an applicable statutory exception in the APA.

³ Although the Court in *Riley Pleas* court applied the principles of contract interpretation and settlement, it did not characterize the action as a breach of contract suit. Rather, the settlement agreement provided an alternative refund theory of relief in the taxpayer’s action under RCW 82.32.180. *Riley Pleas*, 88 Wn.2d at 934.

C. The Legislature Has Provided Specific Statutory Appeal Procedures That Govern Actions Against The State Involving Both Contested Taxes And “Agency Actions”

The Washington Constitution specifically reserves to the Legislature the right to regulate lawsuits against the State. *Medina v. Pub. Util. Dist. No. 1 of Benton Cy*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002); *AOL, LLC v. Dep’t of Revenue*, 149 Wn. App. 533, 555, 205 P.3d 159 (2009); Wash. Const. art. II, § 26 (“The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.”).

1. The APA controls over RCW 4.92.010.

Wells Fargo argues that RCW 4.92.010 authorizes its action. RCW 4.92.010 was enacted to implement Wash. Const. art. II, § 26, which provides that the Legislature directs by law in what manner and in what courts suits may be brought against the State; the statute confers general jurisdiction on superior courts to hear claims against the State and establishes venue requirements. *See generally J.A. v. State Dep’t of Soc. & Health Servs.*, 120 Wn. App. 654, 86 P.3d 202 (2004). But for review of agency actions, the APA provides a detailed, comprehensive scheme for obtaining judicial review.

It is well-established that a precisely drawn, detailed statute controls over more general court procedures. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm’n*, 123 Wn.2d 621, 630, 869 P.2d

1034 (1994). *Accord In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004) (holding that more specific procedural statute governing procedure for petitioning superior court superseded more general statute).

Where statutes prescribe specific procedures for the resolution of a particular type of dispute, Washington courts require “substantial compliance” or satisfaction of the “spirit” of the procedural requirements before they will exercise their jurisdiction over the matter. *AOL*, 149 Wn. App. at 555. The “failure to comply with a statutorily set time limitation cannot be considered substantial compliance” with that statute. *City of Seattle v. PERC*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991).

The Department’s refusal to pay interest on the settlement amount stated in the closing agreement was an “agency action” within the meaning of RCW 34.05.010(3) because the Department implemented and applied statutes and rules governing refunds, statutory interest, and closing agreements. Wells Fargo seems to concede this. *See Reply Br. & Resp. to Cross-Appeal* at 4-14. Nevertheless, Wells Fargo appears to advance the untenable legal theory that the court could have simultaneously exercised both original and appellate jurisdiction over this action.

2. Regardless of the legal theory of relief, the APA provides the procedures for obtaining judicial review of “agency action.”

Wells Fargo confuses a “cause of action” with a right to bring suit against the State. Although a claim for interest may arise from different sources of law, e.g. a statute, constitution, or contract, the right to bring suit against the State is subject to the specific statutory procedures the Legislature has provided under Wash. Const. art. II, § 26. *See Medina v. Pub. Util. Dist. No. 1 of Benton Cy*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002) (right to sue the State is not a fundamental right; the Legislature may prescribe limitations upon that right). *Cf. United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008) (taxpayer’s failure to satisfy procedural requirements of tax refund statute precluded recovery under claim brought under the Export Clause). Having forfeited its right to bring suit under the APA by failing to file a timely petition for judicial review, Wells Fargo may not recharacterize its suit as a breach of contract action.

3. Both the Department and a Taxpayer can bring suit to enforce a closing agreement.

Wells Fargo suggests it would be inequitable to hold a taxpayer to the 30-day time period for bringing an action to enforce a closing agreement when the Department would not be so bound. Resp. Br. to Cross-App. at 6. That the range of enforcement mechanisms available to

the Department may be broader than those available to a taxpayer is of no consequence.⁴ The issue is whether the taxpayer has an adequate legal remedy.

Because the Department has a mandatory, statutory duty to give “final and conclusive” effect to a statutory closing agreement, a taxpayer may bring suit under the APA to enforce a closing agreement if it contends the Department has breached the agreement. RCW 34.05.570(4). Alternatively, the taxpayer may rely on the closing agreement as a defense to any tax enforcement action, or, as in *Riley Pleas*, as the basis for a refund suit. 88 Wn.2d at 933.

Had this interest controversy arisen from a determination rather than a settlement, Wells Fargo would have had 30 days to appeal if it believed the Department failed to properly credit or refund the full amount it was entitled to receive. RCW 82.32.180; RCW 34.05.570(4). There is no reason the time for seeking judicial review should be extended to six years when an interest dispute arises from a written agreement rather than a determination.

⁴ It is unlikely the Department would bring a breach of contract action against a taxpayer who breached the terms of a closing agreement. The Department would rely on the mechanisms ordinarily applicable to the administration and enforcement of the tax laws. For example, if the taxpayer agreed to pay a specific sum in settlement of a tax assessment but failed to do so, the Department may deem the parties’ agreement void and reinstate the assessment.

D. RCW 4.92.010 And The Common Law Of Contracts Do Not Fall Within The Exception From The APA's Judicial Review Procedures For "Expressly Authorized" "De Novo" Actions

Wells Fargo contends that an action based on RCW 4.92.010 and the common law of contracts satisfies RCW 34.05.510, which provides:

This chapter establishes the exclusive means of judicial review of agency action, except:...

(3) To the extent that de novo review or jury trial review of agency action is **expressly authorized** by provision of law.

(emphasis added). Resp. Br. to Cross-App. at 8.

When the Legislature modified the APA in 1988, it provided two examples that fall within the exception provided by RCW 34.05.510(3): RCW 82.32.180, which expressly authorizes de novo review of a final order in an informal proceeding before the Board of Tax Appeals, and RCW 51.52.115, which expressly authorizes de novo review in a jury trial (on the agency record) of a BIIA decision. Senate Journal, 50th Legislature (1987), at 627 (Comment 65). CP 1030. Unlike those statutes, RCW 82.32.350, which authorizes the Department to enter into a closing agreement, does not "expressly" authorize any kind of judicial review, let alone "de novo" review, and thus is not a "provision of law" that supersedes the APA's judicial review procedures.⁵

⁵ See *Washington Citizens Action v. Office of Ins. Comm'r*, 94 Wn. App. 64, 72, 971 P.2d 527, review denied, 138 Wn.2d 1004 (1999) (APA judicial review procedures control over de novo procedures under the Public Records Act because a statutory exemption from disclosure did not expressly authorize de novo review).

RCW 4.92.010 is primarily a procedural statute and does not confer a cause of action. *Systems Amusement, Inc. v. State*, 7 Wn. App. 516, 500 P.2d 1253 (1972) (RCW 4.92.010 did not provide a basis for jurisdiction over a constitutional claim where plaintiff's rights were adequately protected by the remedies available under the APA and/or the Tort Claims Act, which the plaintiff had failed to pursue).

The procedural requirements imposed by the APA, including its time limitation on seeking judicial review, would be meaningless if persons failing to comply with them were nonetheless allowed to bring suit under the longer statute of limitations periods applicable to ordinary civil controversies, including common law breach of contract actions.

- 1. RCW 34.05.510(3) provides an exception where the Legislature has authorized a de novo review proceeding, not de novo review of a particular issue.**

Wells Fargo argues that a contract action necessarily falls within the exception for “de novo” actions because in the absence of disputed issues of material fact contract interpretation presents a question of law subject to de novo review. Resp. Br. to Cross-App. at 8.

Wells Fargo confuses the concept of a de novo review proceeding with de novo review of particular issues. The exception provided by RCW 34.05.510(3) for instances where “de novo” review is “expressly authorized” refers to the type of court action allowed, not the applicable

scope of review. The “de novo” exception applies where the court is authorized to disregard the agency record, such as in tax refund suits brought under RCW 82.32.180.

If Wells Fargo were correct, the exception provided by RCW 34.05.510(3) would swallow the rule that the APA is the “exclusive means” for judicial review of agency actions. Courts review questions of statutory interpretation de novo as well as contract interpretation. That does not mean every disputed agency action presenting an issue of statutory interpretation falls within RCW 34.05.510(3).

When a person has a breach of contract claim against the State involving “agency action” subject to the APA, RCW 34.05.510(1), not subsection (3), provides the applicable exception:

The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

RCW 34.05.510(1) provides an exception for tort claims and actions seeking contract damages. In a tort claim, the plaintiff seeks money damages for harm caused by the State’s tortious conduct. In a breach of contract action, the plaintiff seeks contract damages for the agency’s alleged breach of contract. Such cases are outside the APA because an agency generally does not have authority either to award money damages

or to determine its own alleged tort or contractual breach.

2. Wells Fargo’s action is not a claim for “money damages or compensation” because it is seeking specific relief under RCW 82.32.060(4), not contract damages.

Wells Fargo’s claim does not fall within RCW 34.05.510(1)

because the remedy it seeks is specific relief allegedly provided by RCW 82.32.060(4). Although Wells Fargo obviously is seeking monetary relief, that is not the same thing as “money damages or compensation” within the meaning of RCW 34.05.510(1). Federal case law involving subject matter jurisdiction under the federal APA and the federal Tucker Act is instructive on this point.⁶

In addressing disputes over subject matter jurisdiction, federal courts distinguish claims for “monetary relief” from claims for “money damages.” For example, in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988), the Court held that a suit brought by the State of Maryland for amounts owed under the Medicaid program was not a claim for money damages subject to the Court of Claims’ exclusive jurisdiction, but rather a claim for specific relief subject to the federal APA:

⁶ Under federal law, the Court of Claims has exclusive jurisdiction in claims for more than \$10,000 in “money damages,” including all contract claims against federal agencies. *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). The federal APA, like Washington’s APA, provides a cause of action for “other than money damages” to any person “adversely affected or aggrieved by agency action.” *Id.* at 892.

The State's suit to enforce [a statutory provision] of the Medicaid Act, which provides that the Secretary "shall pay" certain amounts for appropriate Medicaid services, is not a suit seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money. The fact that the mandate is one for the payment of money must not be confused with the question whether such payment, in these circumstances, is a payment of money as damages or as specific relief.

487 U.S. at 900-901.

Here, as in *Bowen*, the essence of the action is for specific relief, not money damages from an alleged breach of contract. Wells Fargo concedes the parties' agreement makes no provision for interest. It is seeking an amount to which a statute allegedly entitles it, rather than money in compensation for an alleged breach of contract. *Cf. Clark v. Library of Congress*, 750 F.2d 89, 104 n.33 (D.C. Cir. 1984) (describing action to compel an official to repay money improperly recouped as 'in essence, specific relief').

Further, the question whether Wells Fargo is entitled to statutory interest on tax overpayments is undoubtedly one that the Department is authorized to determine. The Legislature has charged the Department with implementing and enforcing Washington's tax statutes, including RCW 82.32.060 (refunds of tax overpayments) and RCW 82.32.350 (closing agreements). Because this action does not involve a claim for

“money damages or compensation” and because Wells Fargo’s entitlement to statutory interest is an issue the Department has authority to determine, the exception provided by RCW 34.05.510(1) does not apply.

E. The APA Provides An Adequate Legal Remedy For Disputes Arising From A Statutory Closing Agreement

Wells Fargo asserts that the APA is not suitable for reviewing a contract action in view of the standard of review for “other agency action” provided by RCW 34.05.570(4). Resp. Br. to Cross-App. at 7. As explained earlier, Wells Fargo’s action is in essence a mandamus action, and is foreclosed by the availability of an APA remedy.

Even if this action were aptly characterized as a “contract dispute,” there is no basis for Wells Fargo’s assertion that the standards applicable to judicial review of “other agency action” are “ill-suited” to resolve the dispute. To the extent this case presented issues of material fact, the court was free to consider new evidence under the APA’s judicial review procedures. The APA allows the superior court to admit new evidence in disputes for which there is an inadequate agency record. RCW 34.05.562(1)(c) (permitting court to take new evidence when necessary to decide disputed issues of material fact where disputed agency action is not required to be determined on the agency record).

The Department is bound by the finality mandate of RCW 82.32.360, which requires the Department to give “final and conclusive”

effect to a statutory closing agreement. Thus, if a court were to conclude that a closing agreement included a promise to pay statutory interest on the stated settlement amount (under the de novo standard of review applicable to both contract and statutory interpretation), it could set aside the Department's refusal to pay interest as arbitrary and capricious and/or outside the Department's statutory authority and enter an order requiring the Department to pay statutory interest. RCW 34.05.574(1). This was precisely the relief Wells Fargo sought when it filed its petition for judicial review. CP 5.

Because the APA provides adequate legal remedies (including all the relief sought in Wells Fargo's complaint), there is no basis for the court's exercise of jurisdiction in contravention of the specific statutory procedures provided by the Legislature.

F. Wells Fargo's Petition For Judicial Review was Untimely

The 30-day period for seeking judicial review of "other agency action" may be extended if the petitioner did not know the agency action had sufficient effect to confer standing. RCW 34.05.542(3). Here, the challenged agency action occurred on April 1, 2008, when the Department paid the stated settlement amount without an additional amount for refund interest, as Wells Fargo acknowledged in its petition for judicial review. CP 4, ¶ 11. The subsequent communications from the Department in

April 2008 confirmed that the challenged agency action was intentional, not inadvertent, and explained the reasons for the Department's action. CP 965, 972-73. Thus, the 30-day period for seeking judicial review began no later than April 15, 2008. Wells Fargo's failure to file a timely petition for judicial review precludes it from invoking this Court's subject matter jurisdiction.

1. The April 15, 2008 letter clearly signaled the finality of the agency action.

There is no "magic words" requirement to render an agency decision "final." *See Bock v. State*, 91 Wn.2d 94, 99-100, 586 P.2d 1173 (1978). An agency letter provides adequate notice of finality when a reasonable person would interpret it as a denial of a right or the fixing of a legal relationship. *Id.* at 99.⁷

Here, the Department's April 15, 2008 letter clearly conveyed the finality of the agency's decision. The letter was signed by an Assistant Director and indicated Wells Fargo's request had been considered by the agency's senior management. CP 972-73. The letter confirmed the ALJ's

⁷ *See Wells v. Olsten Corp.*, 104 Wn. App. 135, 145-46, 15 P.3d 652 (2001) (BIIA's denial of a motion to extend the time for seeking reconsideration of the agency's decision deemed a "final order" because it "effectively closed all avenues" to further administrative review); *Lewis County v. PERC*, 31 Wn. App. 853, 862-83, 644 P.2d 1231 (1982) (certification of election results constituted a "final" agency decision because it was not a mere "preliminary step," but rather consummated the administrative process to form a collective bargaining unit); *Student Loan Marketing Assn. v. Riley*, 104 F.3d 397, 405-06 (D.C. Cir. 1997) (letter constituted final agency action where letter was sent on behalf of agency head, reflected consideration of applicant's position, and unequivocally expressed agency's position).

statement that the refund check “constituted the total payment” Wells Fargo was entitled to receive under the closing agreement. CP 973. Moreover, the letter clarified the Department’s position that the closing agreement finally resolved Wells Fargo’s refund requests, including any interest owed on its tax payments. The letter left no doubt the Department’s refusal to pay interest on the settlement amount was both intentional and final.

Wells Fargo argues the Department’s April 15, 2008 letter lacked adequate indicia of finality because it concluded with the following:

I hope this clarifies why the payment made constitutes the total settlement amount. Please contact me at 360-570-6156 if you require additional information.

CP 973.

The Department’s offer to provide additional information in no way suggested the Department would reconsider its decision. At most, it expressed the Assistant Director’s willingness to further explain orally why “the payment made constituted the total settlement amount.”⁸

⁸ The cases Wells Fargo cites in support of a contrary conclusion are inapposite. *Harrington v. Spokane County*, 128 Wn. App. 202, 212-13, 114 P.3d 1233 (2005) involved an agency letter notifying an applicant of the partial denial of a permit application. The agency subsequently issued a permit on the same application granting partial approval. The court concluded the interim letter announcing the partial denial was not a “final order” for purposes of triggering the time for seeking judicial review because it obviously did not represent a final resolution of the permit application. In contrast, the Department’s issuance of the refund check on April 1, 2008, concluded the administrative process relating to Wells Fargo’s refund requests, as confirmed in the letter dated April 15, 2008.

Wells Fargo glosses over the fact that it did not accept the Assistant Director's offer for further explanation or make any attempt to communicate with the Department until more than five months later. CP 207, 989. The demand letter Wells Fargo sent in September 2008 demonstrates that Wells Fargo understood the April 15, 2008 letter was a rejection of its demand for interest. CP 992 (referring to "a letter from Assistant Director Mary Barrett to Mr. Gardner of April 15, 2008, rejecting the interest claim") (emphasis added). Andrew Gardner confirmed in deposition that when he read the letter, he understood the Department did not intend to take any further action on the matter. CP 206-07.

2. The Department's responses to Wells Fargo's September 2008 demand letter did not restart the time for judicial review.

Wells Fargo relies on settlement discussions that occurred more than five months after it received the April 15, 2008 letter as evidence that it "did not know" and "could not reasonably have discovered," RCW 34.05.542(3), that it had standing to obtain judicial review of the Department's refusal to pay interest on the settlement amount.

In *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 680, 86 P.3d 1169 (2004), a letter denying a business license was not a final decision because it lacked a mandatory notice of appeal rights and the following day the agency indicated the application was subject to further administrative review. The Department is not obligated to notify any taxpayer of any appeal rights. The statutes themselves impart notice of a taxpayer's appeal rights.

The Department's offer to settle the controversy did not give rise to a new time limit for seeking judicial review and is wholly irrelevant. A party may not evade the APA's strict time-for-filing requirement by sending a demand letter after the time period for seeking review is passed and then appealing from the agency's response.

The Department's attempt to settle this dispute was aimed at averting prospective litigation, not correcting a previous administrative decision, and was neither an admission of error nor a reconsideration of the Department's decision. To hold otherwise would undermine the policy favoring settlements reflected in RCW 34.05.060 and ER 408.

3. Wells Fargo cannot have detrimentally relied on the Department's responses to a demand letter sent after its right to judicial review was time-barred.

Wells Fargo asserts the Department is equitably estopped from claiming "a statute of limitations defense" because its responses to the demand letter "had the effect of discouraging Wells Fargo from filing an action." Resp. Br. to Cross-App. at 15. First, Wells Fargo could not have detrimentally relied on anything the Department said or did after Wells Fargo had already forfeited its right to seek judicial review by taking no action in response to the April 15, 2008 letter for more than five months.⁹

⁹ Moreover, the Department asserts lack of jurisdiction, not a "statute of limitations defense." See *Leson v. Dep't of Ecology*, 59 Wn. App. 407, 409-10, 799 P.2d 268 (1990) (failure to strictly comply with APA's strict service and filing requirements

4. There is no genuine issue of material fact pertaining to the Department's jurisdictional defense.

Contrary to Wells Fargo's assertion, there are no material issues of fact concerning the timeliness of its petition for judicial review. It is undisputed that the challenged agency action occurred in April 2008, when the Department paid the stated settlement amount without an additional payment of interest. The question whether the April 15, 2008 letter contains sufficient indicia of finality to notify Wells Fargo it could seek immediate judicial review of the challenged agency action should be decided by this court as a matter of law from the contents of the declarations and exhibits before it. A demand letter threatening litigation is an implicit admission a party understood it had a cause of action. *Bock*, 91 Wn.2d at 99-100. The demand letter in this case expressly admits as much. CP 999. Wells Fargo admitted in discovery that it had no communication with the Department for more than five months after it received the April 15, 2008 letter. CP 989. In deposition testimony, Andrew Gardner testified that he understood the Department intended to take no further action on Wells Fargo's demand for interest when he received the April 15, 2008 letter. CP 206-07.

precludes court from exercising jurisdiction over a disputed agency action). Estoppel cannot be the basis for conferring subject matter jurisdiction upon a court. *See Jones v. Dep't of Corrections*, 46 Wn. App. 275, 279, 730 P.2d 112 (1986) (agency not estopped from asserting jurisdictional defense by its failure to notify employee of a defect in service).

These facts are dispositive of the Department's motion to dismiss. Any communications responding to Wells Fargo's September 22, 2008 demand letter could not possibly have caused any detrimental reliance since Wells Fargo's right to judicial review of the Department's refusal to pay any additional amount was forfeited no later than May 15, 2008.

III. CONCLUSION

This Court should affirm the summary judgment order entered by the superior court on the alternative ground that it lacked subject matter jurisdiction to consider Wells Fargo's complaint.

RESPECTFULLY SUBMITTED this 11th day of March, 2011.

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