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WASHINGTON STATE COURT OF APPEALS
DIVISION II

No. 47543-0-II

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, and NORTH CASCADES CONSERVATION COUNCIL,

Appellants,

vs.

WASHINGTON DEPARTMENT OF ECOLOGY, PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, WASHINGTON, and WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD,

Respondents

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Center for Environmental Law & Policy, American Whitewater and North Cascades Conservation Council (collectively "Appellants") hereby submit their brief in reply to the response briefs filed by Respondents Washington Department of Ecology ("Ecology") and the Public Utility District Number 1 of Okanogan County ("PUD"). Washington has an extensive and integrated scheme of water law, which was developed to protect the precious instream water resources of this state while also allowing for other beneficial uses of water. As part of that statutory scheme, the Water Code[1] sets forth a "look before you leap" process to be followed by Ecology when issuing new water rights. Relevant to this case, Ecology must "investigate, determine and find whether the proposed development is likely to prove detrimental to the public interest" *before* issuing a permit. RCW 90.03.290(1). If a proposed use of water "threatens to prove detrimental to the public interest," the application must be denied. RCW 90.03.290(3). Here, Ecology and the PUD take the incorrect position that Ecology has the discretion to authorize a water right when, as the PUD concedes, "the

[1] For purposes of this appeal, the parties agree that the Water Code includes RCW 90.03, 90.22, and 90.54.

exact aesthetic effect may not be known . . . ."[2] For the reasons set forth herein, Appellants respectfully request that the Court reverse the Superior Court, set aside the PCHB's[3] decision and remand for further proceedings in compliance with all applicable law.

II. Response to Respondents' Statement of the Case.

While the parties agree that the material facts in this case are not in dispute, both Ecology and the PUD mischaracterize facts in the record and the history of this case, which demands correction.[4] The PUD contends that "[v]ery few people visit the Dam and the Falls." PUD Resp. Br. at 8. However, this misstates the facts in the record and disregards the PCHB's recognition that "[t]here is sufficient evidence that there are and will be people who observe the flows over the Dam and Falls, albeit the number of people is small. FERC's request that aesthetics be addressed regarding the infrastructure of the Project is also evidence that there is a critical population that would visit the site and will be potentially affected by the aesthetic views at the Project site." 401 Cert. Decision at 32:3-7.

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[2] Brief of Respondent Okanogan County PUD ("PUD Resp. Br.") at 37. As discussed below, "aesthetics" are an interest incorporated into the public interest element of a water right.

[3] *Center for Environmental Law & Policy, et al. v. Dep't of Ecology, et al.*, PCHB No. 13-117 (Order on Motions for Summary Judgment) (June 24, 2014).

[4] This is especially important given the PUD's unsupported claim that Appellants have not accurately described the facts in this case. PUD Resp. Br. at 7.

Ecology states that "[d]uring its review of the water permit, Ecology had access to the substantial depth and breadth of information that was provided in the PCHB's 401 Certification decision." Ecy. Resp. Br. at 16. However, as described below, Ecology's characterization of the evidence differs substantially from that of the PCHB. Moreover, Ecology erroneously states that "the 10/30 minimum bypass flow levels [were] repeatedly affirmed by Ecology and the PCHB." Ecy. Resp. Br. at 23. That is not true. Here is what the PCHB actually said about the evidence supporting the 10/30 flow requirement:

> [T]he evidence shows that the 10/30 cfs flows over the Falls with no flow over the Dam was initially selected as a minimum flow without first completing an analysis of whether the flows met the water quality standards for the aquatic and aesthetics designated uses.
>
> 401 Cert. Decision at 26:8-11.

> [Ecology's] analysis is from a baseline of the 10/30 flow regime over the Falls only, and the evidence shows it limited the opportunity to review alternative flows and Project impacts based [on] the diversion of water under existing conditions. Selection of a minimum flow in this manner results in Ecology considering the impact of the aesthetic flows on the operation of the Project, rather than considering the Project's impact on the aesthetic values of the flows. This is not the proper standard. The aesthetic flows must be determined independently of the operation of the Project, and thereafter integrated, as Ecology's Guidance provides, with needs for fish and other values.
>
> *Id.* at 27:8-15.

The PCHB also repeatedly noted that there was insufficient evidence from which to determine what flows, whether 10/30 or otherwise, would adequately protect aesthetic values:

> However, with the manner in which Ecology selected the 10/30 flows, and the lack of evidence regarding how the 10/30 flow would appear aesthetically, the Board finds that in this case there is not a presumption the minimum flow for the fishery resources is also the protective flow for aesthetic purposes. There is little, if any, evidence of flows above the 10/30 flow regime that, as Ecology Guideline[s] provides, will optimize both designated uses.
>
> 401 Cert. Decision at 28:3-8.
>
> The record does not provide sufficient evidence to determine an instream flow level below existing conditions when water in the by-pass reach would increase beyond the 0.3°C water quality standards.
>
> *Id.* at 28:15-17.
>
> Deference to Ecology's technical determination would have been appropriate if Ecology's finding were based on evidence depicting the different possible flow regimes. In this case there simply was not the adequate evidence presented to make a finding.
>
> *Id.* at 31:9-12.
>
> Based on this record the Board finds that there is not sufficient evidence to make a finding that the 10/30 flows meet the water quality standards for aesthetic values even when balancing these with the protecting of the fisheries. The professional judgment on aesthetic flows should be based on evidence depicting flow levels, either actual or simulated.
>
> *Id.* at 31:15-19.

> The Board finds the Appellants met their burden that the aesthetic flow analysis was not sufficiently completed to make a final determination of the flows that will be protective of the aesthetic values. The evidence is not sufficient to make a finding as to the flows that would protect aesthetic values without impairing the quality of the water for the fishery resource, which the Board finds would occur if the Project caused shallow flows over the bedrock shelves.

Id. at 32:11-15.

Therefore, contrary to Ecology's statements, the PCHB found the evidence woefully inadequate to make a judgment as to what flows, whether 10/30 cfs or otherwise, would protect aesthetic values and comply with all other water quality standards.

III. The Standard of Review is *De Novo* & Ecology's Legal Interpretation Is Not Entitled to Deference.

Ecology and the Appellants agree that there are no material facts in dispute and that the *de novo* standard of review applies to this case. App. Op. Br. at 10-11; Ecy. Resp. Br. at 13. Respondent PUD, on the other hand, argues that the appropriate standard of review in this case is abuse of discretion, and that this court should provide deference to Ecology's decision. PUD Resp. Br. at 17. The cases cited by the PUD in support of its position are inapposite.

Both *Port of Seattle v. PCHB*, 151 Wn.2d 568, 593-4, 90 P.3d 659 (2004) and *State Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson*

Cnty., 121 Wn.2d 179, 200-01, 849 P.2d 646 (1993) *aff'd sub nom.*; *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) ("*Elkhorn I*") involved judicial review of PCHB decisions made after evidentiary hearings. Here, on the other hand, the parties agree that no genuine issues of material fact exist and the matter was decided by the PCHB on summary judgment. PCHB Order at 13. Therefore, this Court evaluates facts in the record *de novo* and the law under the error of law standard, also *de novo*. *Skagit County v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 317-18, 253 P.3d 1135 (2011) (citing *Verizon Northwest, Inc. v. Wash. Emp't Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008)).

The PUD's call for deference is misplaced because this case concerns questions of law. Courts "do not defer to an agency the power to determine the scope of its own authority." *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994). Absent ambiguity, the Court does not defer to an agency's interpretation of a statute. *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005). Because this case raises questions of Ecology's authority to approve a water right under the Water Code, deference is not appropriate. *Puget Soundkeeper Alliance, et al. v. WA Pollution Control Hearings Bd.*, No. 45609-5–II, slip. op. at 6 (Wash. Ct. App., filed July 28,

2015 (quoting *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007)). Finally, deference to an administrative agency "does not extend to agency actions that are arbitrary, capricious, and contrary to law." *Skokomish Indian Tribe v. Fitzsimmons,* 97 Wn. App. 84, 94, 982 P.2d 1179 (1999).

In arguing that deference is not appropriate here, Appellants do not ignore *Schuh v. State Dep't of Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983), which held that deference must be given to Ecology when the agency is using its specialized knowledge and expertise. This case is different because the issue here is purely a legal question: whether Ecology properly interpreted and applied RCW 90.03.290 to authorize a water right in the face of incomplete information. This is not a situation where Ecology exercised its expertise or technical knowledge; the data simply does not exist for Ecology to consider. This case raises a purely legal question as to whether Ecology can effectively defer the public interest determination until after it issues the water right. Therefore, *Schuh* does not dictate the standard of review to be applied in this case.

IV. Ecology Was Without Critical Information to Make The Public Interest Determination

The critical legal issue in this case concerns Ecology's statutory authority to issue a water right when it is admittedly without information

as to how the Project will ultimately affect certain aspects of the public interest. The parties do not dispute that aesthetic values are an integral component of the public interest inquiry. Ecy. Resp. Br. at 17; PUD Resp. Br. at 2. The parties also do not dispute that Ecology has a mandatory, statutory duty to investigate, determine and find whether the Project will affect the aesthetic and recreational values associated with Similkameen Falls as part of its public interest inquiry. Where the parties differ, however, is in Respondents' claim that Ecology may authorize a water right in the face of incomplete information. It is premature for Ecology to find that the proposed Project is not "likely to prove detrimental to the public interest, having in mind the highest feasible use of the waters belonging to the public" where the agency does not have information needed "to make a final determination of the flows that will be protective of the aesthetic values." RCW 90.03.290(1); 401 Cert. Decision at 32:11-13.

According to Ecology, Appellants "cannot dispute that a conclusion was made" as to detriment to the public welfare. Ecy. Resp. Br. at 18. That argument misses the point. Appellants agree that Ecology has *stated* that it found that "there was no basis on which to determine that this project will be detrimental to the public welfare." *Id.* at 10. However, under the four-part test of RCW 90.03.290, Ecology must actually

"*investigate,* determine and find" whether the Project is likely to be detrimental to the public interest, not merely state that it is not.[5] In this case, "there is no credible evidence how the 10/30 flow regime will appear aesthetically through the bypass reach," yet Ecology still finds that there is no risk the Project is likely to be detrimental to the public interest. 401 Certification Decision at 16:1-2. Ecology makes this conclusion in spite of the fact that the 10/30 flow requirement would almost completely dewater the Falls, clearly a threat of impairment by any stretch of the imagination.[6] Appellants' Op. Br. at 4.

The PUD argues that Ecology's "public interest decision was not based on an assumption, but rather relied, in part, on the PCHB's adjudication of the 401 Appeal." PUD Resp. Br. at 19. But the PCHB's 401 Certification decision held that Ecology's aesthetic flow analysis justifying the 10/30 flow requirement was insufficient and that a study of flows was required. 401 Cert. Decision at 32:11-15. Clearly, a decision based on an unverified assumption regarding what a future study *might*

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[5] RCW 90.03.290(1) (emphasis added). The fact that Ecology must base its investigation on data and factual information is underscored by the language of RCW 90.03.290(3) which commands that a permit be denied if water withdrawal "threatens" to prove detrimental to the public interest.

[6] Ecology erroneously claims "*nothing* in the record supports an affirmative conclusion that the exercise of the water right *will* result in harm to the public interest." Ecy. Resp. Br. at 18. However, the proposed Project will dewater Similkameen Falls by 90-99%, when comparing those flows to the existing natural flows in the Similkameen River. Because the PCHB has ruled that Similkameen Falls has aesthetic and recreational value deserving of protection under the law, Ecology's claim there is no risk of harm to the public interest with the exercise of this water right is belied by the record.

show is no "investigation" at all, and neither the PUD's nor Ecology's claim to the contrary can make it so.

Appellants do not contend that a water right can only issue when there will be no aesthetic impact. Ecy. Resp. Br. at 17. Nor do Appellants argue that a specific numeric flow be established before the public interest finding can be made. PUD Resp. Br. at 18. Rather, the aesthetic impacts of the proposed withdrawal must be understood and analyzed, i.e. investigated, in order for Ecology to fulfill its mandatory, statutory duty to "find whether the proposed development is likely to prove detrimental to the public interest."[7] RCW 90.03.290(1).

Contrary to the PUD's arguments, Appellants do not allege that aesthetic values may "override" other values that must be protected under the law. A balance must be struck to optimize all uses. 401 Cert. Decision at 25:14-17 ("In balancing instream flow requirements, the flows protective of aesthetic values must be balanced with the requirement to assure the Project does not operate in violation of the numeric water quality standards for the aquatic life use categories of salmonid spawning,

[7] Ecology appears confused by Appellants' use of the word "affirmative" when characterizing Ecology's statutory responsibility to make the four mandatory findings under RCW 90.03.290(1). Ecy. Resp. Br. at 18. Appellants are not using this term to create a new standard as Ecology suggests, rather the plain language of RCW 90.03.290 describes an affirmative act by directing Ecology to "investigate, determine and find" if the water right is likely to prove detrimental to the public interest. *See Black Star Ranch v. Ecology*, PCHB No. 87-197 (Final Findings of Fact, Conclusions of Law & Order) (Feb. 19, 1988) at 11 ("RCW 90.03.290 requires the issuance of a permit *only if DOE can answer affirmatively* concerning all the statutory criteria.") (emphasis added).

rearing, and migration.").[8] But a proper balance cannot be struck when Ecology is without information as to how the proposed withdrawal will affect all protected uses.

V. A Permit Condition May Not Substitute For a Finding in the Four-Part Test

Appellants agree that Ecology may place conditions on a water right to protect the water resource. Ecy. Resp. Br. at 19; *State Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 597, 957 P.2d 1241 (1998). Appellants also agree that Ecology may condition permits to require future studies or additional monitoring. PUD Resp. Br. at 25. But whether or not a water right may be conditioned is not the issue here. The question is whether Ecology may use an after-the-fact study to determine that the water right is not detrimental to the public interest. The answer to that question is no.

Respondents cite several PCHB cases for the proposition that a water right may be conditioned with "adaptive management as a means to prevent problems that may occur in the future."[9] Again, Appellants do not question

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[8] Ecology erroneously asserts that as part of the 401 Certification process, "aesthetic flows would be balanced with flows required for fisheries and hydropower." Ecy. Resp. Br. at 16. However, because "[h]ydroelectric power is not a designated or beneficial use protected by Washington's antidegradation policy," "the Board cannot recognize minimum flow impacts on the Project's hydropower use of water for the purposes of a §401 Certification." 401 Cert. Decision at 27:18-21.

[9] *Porter v. Dep't of Ecology*, PCHB No. 95-044 (Final Findings of Fact, Conclusions of Law and Order)(Mar. 19, 1996); *Citizens for Sensible Dev. v. Dep't of Ecology*, PCHB 90-134 (Final Findings of Fact, Conclusions of Law and Order)(May 22, 1991); *Bucklin*

that general principle. In each case cited by Ecology and the PUD, the water permit included a condition requiring monitoring for seawater intrusion. But none of these cases stand for the proposition that Ecology may authorize a water right when critical information is missing as to how the water right will affect the public interest.

Porter v. Dep't of Ecology[10] actually supports Appellants' position. In *Porter*, a significant amount of data was collected to undergird Ecology's finding that the proposed groundwater withdrawal would not cause seawater intrusion leading to the impairment of neighboring wells, and thus would not be detrimental to the public interest. *Id.* at 5, 8 (emphasis added) ("*the data proves* that the Wrights' well does not increase the risk of seawater intrusion – even during the summer – so that the application does not impair existing rights or run afoul of the public interest."). Unlike the situation here, where the Board has already held that there is a "lack of evidence regarding how the 10/30 flow would appear aesthetically,"[11] the *Porter* data was collected in advance and was used to justify Ecology's public interest determination. *Id.* at 7 ("Moreover, while DOE initially lacked any information on seasonal

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Hill Neighborhood Ass'n v. Dep't of Ecology, PCHB 88-177 (Final Findings of Fact, Conclusions of Law and Order)(June 16, 1989); *Wilbert v. Dep't of Ecology*, PCHB 82-193 (Final Findings of Fact, Conclusions of Law and Order)(Aug. 4, 1983).

[10] PCHB No. 95-044 (March 19, 1996)

[11] 401 Cert. Decision at 28.

fluctuations of chloride levels in the Wrights' well, the Wrights cured that deficiency [before issuance of the ROE] by submitting chloride readings.").

The second case cited by both Ecology and the PUD, *Bucklin Hill Neighborhood Ass'n v. Dep't of Ecology*,[12] similarly supports Appellants. In *Bucklin Hill*, Ecology undertook an investigation of a proposed groundwater withdrawal that was "unusually thorough," including the collection of data from existing well logs, groundwater data, logs and pump test reports prepared for the proposed wells, and water use data. *Id.* at 20, 6-7. Ecology imposed numerous permit conditions but, contrary to Ecology's description of the case, these conditions were not the basis for the Board's holding that the public interest test was satisfied. *Id.* at 11. Instead, "the monitoring conditions of the permit provide a mechanism for detection and correction." *Id.* at 19. Ecology's public interest finding was deemed adequate because "[p]resently available data does not indicate a problem with sea water intrusion on Bainbridge Island" and no "data developed to date demonstrate a likelihood that the [] groundwater development, as approved, will induce sea water intrusion." *Id.* Here, on the other hand, there is no data as to how the Project will affect aesthetic flows because the study is yet to be done, other than the fact that it will reduce existing flows

[12] PCHB No. 88-177

by 90-99 percent,[13] to serve as a basis for Ecology's public interest determination.[14]

In *Citizens for Sensible Development*[15] the PCHB included specific findings, based on actual evidence, that the proposed withdrawals would not be detrimental to existing users. Of note here, the permit in that case was issued only *after* the applicants amended the application based on a *completed* study showing that the withdrawal as initially proposed might not be sustainable. *Id.* at 5. This approach strongly contrasts to Ecology's "permit now, ask questions later" approach to the Enloe water permit.

Finally, *Wilbert v. State of Washington*[16] provides no support for the use of "adaptive management" as a means to justify Ecology's public interest determination. In *Wilbert*, the PCHB added conditions requiring chloride monitoring and potential limits on groundwater withdrawal intended to protect against seawater intrusion into the aquifer. *Id.* at 5. As in *Bucklin Hill*, these conditions protected against a future event, and just as in *Bucklin Hill*, the conditions regarding chloride monitoring in no way

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[13] Ecology repeatedly claims there is no risk of detriment to the public interest in this case and attempts to distinguish *Bucklin Hill* on those grounds. Ecy. Resp. Br. at 21. However, dewatering a waterfall by such significant amounts clearly constitutes a threat of impairment.

[14] The PUD also cites *Concerned Morningside Citizens v. Ecology, et al.*, PCHB No. 03-016 (Order Granting Summary Judgment) (Oct. 31, 2003), in support of its argument. This case is irrelevant to the issues raised herein, and merely stands for the unremarkable, and undisputed, proposition that there are multiple factors that must be analyzed as part of Ecology's public interest determination.

[15] PCHB No. 90-134 (1991 at 4-6.

[16] PCHB No. 82-193 (1983).

made the *extent* of the permissible water use uncertain at the time of permit issuance. Rather than reflecting a concern over the day-to-day operations under the permit, the conditions placed on withdrawals in *Bucklin Hill*, *Citizens for Sensible Development*, and *Wilbert* reflect a prudent approach to address a future issue; not a means to show no compliance with one of the four-part tests.[17]

Ecology and the PUD are unable to meaningfully distinguish two other PCHB decisions that are more relevant in this case. Ecology's discussion of *Black Star Ranch*[18] makes it clear that this case is squarely on point: "Granting a permit without adequate hydrological information – without even knowing *what water* would be withdrawn from a well – means that impairment and availability cannot be assessed whatsoever." Ecy. Resp. Br. at 20-21. Similarly here, Ecology is without information as to how much water will be required to flow over Similkameen Falls and thus the agency cannot meaningfully assess impairment to the public interest.[19]

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[17] Indeed, in *Bucklin Hill* the PCHB noted that "presently available data" did not indicate a problem with seawater intrusion, or that the proposed withdrawal was likely to induce seawater intrusion. *Bucklin Hill* at 11.

[18] PCHB No. 87-19 (1988).

[19] That *Black Star Ranch* involved two different components of the four-part test than are at issue here is irrelevant. PUD Resp. Br. at 35-36. Ecology must have adequate information to make affirmative findings on each of the four components of the test, not just the public interest inquiry. The PUD also claims that Appellants "misrepresent the facts and the holding" in the case, but fails to identify any misrepresentations. *Id.* at 35. Its argument should be disregarded.

VI. Ecology Fails to Respond to Appellants' Arguments Regarding a Preliminary Permit.

As discussed in Appellant's Opening Brief,[20] when Ecology lacks adequate information to make findings on the four-part test it has two options: deny the permit outright or issue a preliminary permit and "require the applicant to make such surveys, investigations, studies, and progress reports, as in the opinion of the department may be necessary." RCW 90.03.290(2)(a).[21] The aesthetic study ordered by the PCHB fits squarely into the category of "surveys, investigations, and studies" contemplated by the preliminary permit statute. *Id.*

In response, Ecology does not address the merits of Appellants' arguments that, when a water right application fails to provide sufficient information to allow affirmative findings on the four tests, Ecology may only deny or defer the application, or issue a preliminary permit. RCW 90.03.290(2)(a); *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68,110-122, 11 P.3d 726 (2000); *Squaxin Island Tribe v. Dep't of Ecology*, PCHB No. 05-137 (Modified Findings of Fact, Conclusions of Law, and Order) (November 20, 2006) at 55-6.

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[20] Appellants' Op. Br. at 28-30.

[21] Ecology's power to prioritize processing of water rights applications also effectively allows it to defer action on a permit. *See Hillis v. State Dep't of Ecology*, 131 Wn.2d 373, 390-91, 932 P.2d 139 (1997).

The PUD simply assumes that Ecology had sufficient information to make a public interest finding. PUD Resp. Br. at 42. The PUD attempts to distinguish the *Squaxin Island* case on the grounds that Ecology had information showing a risk of impairment. PUD Resp. Br. at 36-37. But, the situation is no different here. Appellants do not dispute that issuance of a preliminary permit is within Ecology's discretion. However, under the unique circumstances of this case, given that information was lacking to make a lawful public interest finding, issuance of a preliminary permit was the only option available to Ecology, other than denial or deferral of the permit application.

VII. Respondents' Interpretation of the Similkameen Instream Flow Rule Is Not Supported By the Record and Conflicts with RCW 90.54.020.

In an attempt to invoke the exception[22] to the mandatory instream flows set forth in WAC 173-549-020(5), Ecology contends that the"10/30 flows are specifically tailored for the bypass reach." Ecy. Resp. Br. at 24. As discussed above, the PCHB held that evidence was insufficient to demonstrate that the 10/30 flows protect aesthetic values.[23] 401 Cert.

[22] The PUD makes the nonsensical (and incorrect) argument that subsection (5) is not an exception to the minimum flows set by rule. PUD Resp. Br. at 46.

[23] The PUD contends that Appellants are collaterally estopped from arguing that the Project should be subject to the flows established in the instream flow rule. PUD Resp. Br. at 45. However, the law requires that the instream flows adopted into the rule are the default flows, and have a priority date that pre-dates issuance of the water right. *Swinomish Indian Tribal Cmty v. Dept. of Ecology*, 178 Wn.2d 571, 596-97, 311 P.3d 6 (2013). The only means by which Ecology may deviate from imposing these mandatory

Decision at 31:15-19. Ecology erroneously states that "[t]he tailoring of these bypass flows is borne out by the record, which shows the evolution of minimum flows as the project progresses." Ecy. Resp. Br. at 25. On the contrary, the record reveals that the 10/30 flow requirement was selected early on, and for that reason constrained Ecology's ability to evaluate the Project's aesthetic impacts as well as alternative instream flows. *See* section II, *supra*. In addition, the record shows that Ecology never looked at flows above 100 cfs because "Ecology considered the economics of the Project and concluded that at an instream flow of 100 cfs or more the Project would be economically challenged." *Id.* at 27:1-3. There was no "evolution of minimum flows" for the Project to support Ecology's claim that the 10/30 flows are "specifically tailored" for the bypass reach.

Ecology also makes the novel argument that RCW 90.54.020, the statutory basis for the instream flow rule, is not relevant in this case. Ecy. Resp. Br. at 26. However, Ecology's interpretation and application of the instream flow rule must be informed and constrained by the plain language of RCW 90.54.020. *Mun. of Metro. Seattle v. Pub. Emp't Relations Comm'n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992) (Ecology only has the authority conferred upon it by the Legislature, and any

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instream flows as a condition of the permit is by lawfully invoking the exception in subsection (5), which can only occur upon completion of the aesthetic flow study.

powers necessarily implied therefrom). In setting the instream flows for the Similkameen River, Ecology necessarily found that those flows are "necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a). Once adopted into rule, these flows function as senior appropriations to which all subsequently issued water rights, including the water right at issue in this case, are subordinate. RCW 90.03.345; 90.03.247.

Only one exception is available to the requirement that a new water right be conditioned to protect senior instream flows: "Withdrawals of water which would conflict [with an adopted instream flow] shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served." RCW 90.54.020(3)(a). This "OCPI" exception is to be narrowly construed and "requires extraordinary circumstances before the minimum flow water right can be impaired." *Swinomish Indian Tribal Cmty*, 178 Wn.2d at 576. When Ecology invokes the exception set forth in WAC 173-549-020(5), which authorizes a deviation from the instream flows set by rule, it must do so in a manner that complies with the requirements of RCW 90.54.020(3)(a). *See Foster v. WA State Dep't of Ecology*, ___ Wn.2d ___, ___ P.3d ____, 2015 WL 5916933 at *2 (WA Supreme Court) (Oct.

8, 2015) ("'withdrawals of water' that would impair a minimum flow *are* permitted, but only under the narrow OCPI exception.").[24, 25]

In this case, Ecology failed to comply with RCW 90.54.020 by "specifically tailoring" flows for the Project. The flow conditions contained in the water right at issue are neither final nor informed by any evidence regarding how the bypass flows will impact aesthetic and recreational values. This is a violation of the law. *See Foster* at *3 (In *Swinomish*, "Ecology's use of the [OCPI] exception was an end-run around the normal appropriation process, conflicting with both the prior appropriation doctrine and Washington's comprehensive water statutes.")

VIII. There Is No Collateral Estoppel Here.

In an attempt to concoct a "collateral estoppel argument," the PUD asserts that Appellants seek to "re-litigate" the quantity of instream flows that are appropriate in the bypass reach for the Enloe Hydroelectric

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[24] Foster also expressly holds that the OCPI exception does not allow for the permanent impairment of minimum flows. *Foster,* 2015 WL 5916933 at *4 ("the plain language of the [OCPI] exception does not authorize Ecology to approve Yelm's permit, which, like the reservations in *Swinomish*, are permanent legal rights that will impair established minimum flows indefinitely.") The water right that Ecology has authorized here is permanent and will impair the instream flows adopted in the Similkameen Instream Flow Rule. Such permanent impairment of an instream flow under the guise of an "exception" that is not compliant with RCW 90.54.020 is precisely what *Foster* forbids, and approval of this water right is therefore unlawful.

[25] The *Foster* decision was issued after Appellants filed their Opening Brief in this case. Respondents Department of Ecology and City of Yelm have moved for reconsideration of *Foster*.

Project.[26] With no citation to the record or further explanation, the PUD contends that Appellants have had a "reversal of position." PUD Resp. Br. at 40. The PUD's argument is nonsensical. Appellants do not challenge the sufficiency of the aesthetic flow-setting program required by the amended 401 Certification. It is preposterous for the PUD to claim Appellants are litigating the same finding and the same legal standard that was resolved in the 401 Appeal. The cases involved appeals of different final agency decisions, under different standards of review, and for vastly different legal reasons. Appellants have not changed their position on the 401 Certification. Indeed, Appellants are litigating this appeal to uphold, not undercut, the PCHB's ruling in the 401 Certification Decision that a flow study is required in order to ascertain the aesthetic impacts of the Project.

The PUD asserts that the PCHB's 401 Certification Decision addressed Ecology's legal obligations "to satisfy the Water Code's public interest standard." PUD Resp. Br. at 20. That is untrue. The issue of the

[26] It is not without irony that the PUD raises a collateral estoppel argument in this case as it is the PUD, not Appellants, who now question the efficacy of the aesthetic flow study that was ordered by the PCHB. In direct contravention of the PCHB's ruling in the 401 Certification appeal that aesthetics can and must be studied, the PUD contends that "the aesthetics of the Bypass are subjective and dynamic" and there is an "absence of quantitative aesthetic standards in Washington law." PUD Resp. Br. at 29. The PCHB clearly found otherwise, so the PUD's post-facto attempt to question the ability of the aesthetic flow study to assess and determine a flow that is protective of aesthetic values and compliant with all other water quality standards should be disregarded.

validity of the water right was never before the PCHB in the 401 Certification appeal.

Collateral estoppel, or issue preclusion, is a bar to action on a claim that depends on issues that were determined in a prior action. Application of the doctrine requires (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Arlington v. Central Puget Sound Growth Mgmt Hr'gs Bd.,* 164 Wn.2d 768, 792, 193 P.3d 1077 (2008). Also, the issue to be precluded must have been "actually litigated and necessarily determined in the prior action." *Id.*

Here, the issues are not identical. The 401 appeal and the appeal of the Board's decision on Ecology's water right approval involve decisions made under different statutes (indeed, statutes enacted by different sovereigns) with different purposes and different requirements, and require that different legal standards bfe met. Whether or not both section 401 of the Clean Water Act[27] and 90.54.020 "require the exercise of discretion by Ecology" is not determinative as to whether the issues are

[27] 33 U.S.C. § 1341(a).

identical, as the PUD suggests.[28] PUD Resp. Br. at 39. Because the required identity of issues is not present here, collateral estoppel does not bar CELP's claim.

IX. Request for Relief and Conclusion

Appellants are entitled to relief in this matter pursuant to RCW 34.05.570(3) because the PCHB's Order on Summary Judgment erroneously interpreted and applied the law and is arbitrary, capricious and otherwise contrary to law. Appellants respectfully request that the Court reverse the Superior Court's Order affirming the PCHB's decision, vacate and set aside the PCHB's Order on Motions for Summary Judgment and remand the matter for further proceedings consistent with all applicable law. In addition, Appellants respectfully request that the Court grant such other relief as this Court deems appropriate. RCW 34.05.574. Finally, Appellants request that fees and costs be awarded pursuant to RCW 4.84.350 and other applicable law.

Respectfully submitted this 12th day of November, 2015.

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[28] The PUD also appears to concede that there is a difference between the "reasonable assurance" standard used in the 401 Certification context and the "detrimental to the public interest" standard of RCW 90.03.290. PUD's Brief at 40. The PUD attempts to construct an argument that the "reasonable assurance" standard is actually the more stringent. However, this is neither here nor there in the collateral estoppel context; in terms of establishing non-identity of issues, it matters not which standard is the more stringent.

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DECLARATION OF SERVICE

I, Dan Von Seggern, hereby declare that on this day I caused this Opening Brief to be served on the Appellees via electronic mail in accordance with the parties' electronic service agreement.

Stated under oath this 12th day of November, 2015, in Seattle Washington.

s/ Dan Von Seggern
Dan Von Seggern
Attorney for Appellants