

NO. 49806-5-II

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

KURT KANAM,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES;
OFFICE OF MELISSA FERRIS; and OFFICE OF STACY BIRK,

Respondents.

**RESPONSE BRIEF OF WASHINGTON STATE DEPARTMENT
OF NATURAL RESOURCES**

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I. INTRODUCTION

The questions at the heart of this matter are whether Appellant, Kurt Kanam, invoked the superior court's jurisdiction to hear his petition for judicial review of a final order issued by the Pollution Control Hearings Board (Board), and whether the superior court properly dismissed his request for the superior court to compel Respondents, Washington State Department of Natural Resources; Office of Melissa Ferris; and Office of Stacy Birk¹ (collectively, the Department), to issue him a mooring buoy license.

Kanam appears to dispute the superior court's dismissal of his petition for judicial review of the Board's final order in *Kurt Kanam v. Washington State Department of Natural Resources*, PCHB No. 16-063 (July 19, 2016) (*Kanam v. DNR* (PCHB)), which was dismissed for lack of service upon the Board. Br. of Appellant at 4; CP at 126-29. Kanam also appears to assign error to the superior court's dismissal of his request that the court compel the Department to issue him a mooring buoy license. *Id.*

¹ The State of Washington continues to deny that it has an Office of Melissa Ferris or an Office of Stacy Birk. Melissa Ferris is an employee of the State of Washington Department of Natural Resources and the Manager of the DNR's Derelict Vessel Removal Program. Stacy Birk was a temporary employee of the State who worked with mooring buoy permit applications. Ms. Birk left employment of the State in July 2016. See CP at 25-26, 48.

Resolution of these two issues requires only that this Court apply well-settled law. Because Kanam did not file his petition for judicial review with the Board, which is “the agency” whose final order is the subject of the petition, RCW 34.05.542(2) requires dismissal of his petition. Because Kanam has not submitted to the Department information vital to the evaluation of his mooring buoy application, the Department has not made a final decision on the application that would be subject to judicial review. Thus, the superior court properly dismissed Kanam’s claims as a matter of law. For this reason, the Department respectfully requests that this Court affirm the superior court’s order.

Kanam also appears to advance two additional arguments that were never presented to the superior court: (1) whether the State of Washington has jurisdiction over the navigable waters within its geographic borders and (2) whether the 1855 Treaty of Point Elliott² exempts from state law a vessel that is anchored without permission on state-owned aquatic lands if it is purportedly owned by the Kikiallus Indian Nation. Br. of Appellant at 4. As shown below, these two arguments should be disregarded based on RAP 2.5(a), and neither has any merit in the context of Kanam.

² Treaty of Point Elliott, January 22, 1855, 12 Stat. 927.

II. COUNTERSTATEMENT OF THE ISSUES

1. Was the superior court correct as a matter of law that it could not exercise appellate jurisdiction over Kanam's petition for judicial review because Kanam failed to serve the Board as required by RCW 34.05.542?

2. Was the superior court correct as a matter of law that Kanam's request that the court compel the Department to issue a mooring buoy license to Kanam was not ripe for judicial review?

3. Although the superior court was not presented with the issue, does the State of Washington have jurisdiction over the navigable waters within its geographic borders?

4. Although the superior court was not presented with the issue, does the 1855 Treaty of Point Elliott exempt from state law a vessel that is anchored without permission on state-owned aquatic lands if it is purportedly owned by the Kikiallus Indian Nation?

III. COUNTERSTATEMENT OF THE CASE

On April 29, 2016, the Department used its authority under RCW 79.100, the Derelict Vessels Act, to take custody of two vessels that were anchored without authorization on state-owned aquatic lands near Hunter's Point in Thurston County, Washington. CP at 11, 133. Kanam claimed to be the owner of the vessels. CP at 12. He appealed the Department's custody of the vessels to the Board, the administrative board

designated to hear appeals under the Derelict Vessels Act. CP at 12, 14; *see also* RCW 43.21B.110(1)(n); RCW 79.100.120(2)(a).

On July 19, 2016, the Board entered an Order Granting Motion for Summary Judgment to the Department in *Kanam v. DNR* (PCHB) (Final Order) and served the Final Order on all parties via U.S. Mail. CP at 126-29. The Final Order dismissed Kanam's appeal for lack of jurisdiction on the grounds that it was untimely filed and served. CP at 14-15. Jennifer E. Morey (Ms. Morey), Assistant Attorney General in the Natural Resources Division, represented the Department in *Kanam v. DNR* (PCHB). CP at 10.

On August 5, 2016, the Board and Ms. Morey each received a copy of a two-sentence letter from Kanam entitled "Notice of Appeal." CP at 46. The letter advised that Kanam was challenging the Final Order in federal district court on a jurisdictional basis. *Id.* It did not indicate that it was a petition for judicial review of a final agency order under the Administrative Procedure Act (APA), RCW 34.05, and there was no indication it had been filed with the superior court. *Id.*

In the summer of 2016, Kanam initiated the process for obtaining a mooring buoy license from the Department. CP at 48. In July 2016, the Department contacted Kanam by telephone to request the latitude and longitude of the proposed buoy location. *Id.* On August 29, 2016, the

Department notified Kanam by email that in order to complete his mooring buoy license application, he needed to file an “Attachment E” form. *Id.* In the same email, the Department notified Kanam that he needed to change design components of his buoy and update his application to reflect the changes before a license could issue. *Id.* On August 30, 2016, Kanam emailed an “Attachment E” form to the Department. *Id.* However, Kanam did not update his application to reflect the necessary changes to his buoy design and did not report to the Department the latitude and longitude for the location of the proposed buoy. *Id.* Without these elements, the Department could not move forward with its review of Kanam’s mooring buoy license application. *Id.* Therefore, the Department had not issued a final decision regarding Kanam’s application. *Id.*

On August 15, 2016, Kanam filed a pleading entitled “Original Complaint” with the superior court. CP at 8-19. The “Original Complaint” appeared to be a combined petition for judicial review of the Final Order; a complaint for declaratory relief; and a request for a court order to compel, on unidentified bases, the Department to issue Kanam a mooring buoy license. *Id.* The “Original Complaint” listed the parties as “Kurt Kanam” and the “Department of Natural Resources Office of Melisa [sic] ferris [sic] and Stacy Birk.” CP at 8. The record reflects that two summonses were filed with the court. CP at 6-7. Both list the defendant as “Office of Stacy Birk”

and list the mailing address for the Office of the Attorney General in Olympia, Washington. *Id.*

Neither the “Original Complaint” nor the summonses mention the Board as a party. CP at 6-9. Instead, a copy was delivered in person to the Office of the Attorney General on August 15, 2016, and Ms. Morey received it on the same day. CP at 45. Neither the “Original Complaint” nor any other version of a petition for judicial review of the Final Order was served on the Board. CP at 42.

Ms. Morey appeared in the superior court on behalf of the Department in the case that is the subject of this appeal. CP at 21-22. Ms. Morey did not represent the Board, which is an independent agency. *Id.*

The Department filed a motion for summary judgment. CP at 33-75. The motion argued that Kanam’s claims should be dismissed because (1) he failed to invoke the superior court’s appellate jurisdiction by failing to serve a petition for judicial review of the Final Order on the Board and (2) his request that the court compel the Department to issue him a mooring buoy license was premature, since the Department had not yet rendered a decision

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regarding his license application. *Id.* The superior court granted the Department's motion and dismissed all of Kanam's claims.³ CP at 126-29.

On December 16, 2016, Kanam filed a Notice of Appeal with this Court. CP at 130.

IV. STANDARD OF REVIEW

The appellate court reviews an order of summary judgment de novo. *Western Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* CR 56(c). A material fact is one that affects the outcome of the litigation under governing law, and "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Ruff v. King Cty.*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995) (internal citations omitted).

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³ The Department's motion also argued that Kanam's claims under the Uniform Declaratory Judgments Act, RCW 7.24, should be dismissed because they were reviewable under the Administrative Procedure Act (APA), RCW 34.05, and because Kanam failed to exhaust his administrative remedies. Kanam has not appealed the court's dismissal of these claims.

V. ARGUMENT

A. **The Superior Court Correctly Dismissed All of Kanam's Claims as a Matter of Law.**

Once a summary judgment motion is properly made and the moving party has met its initial burden of establishing the absence of genuine issues of material fact and its right to judgment as a matter of law, the burden shifts to the non-moving party to set forth specific facts that demonstrate the existence of a genuine issue of material fact. *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); *Iwai v. State*, 129 Wn.2d 84, 95-96, 915 P.2d 1089 (1996); CR 56(e) (“an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial”). “If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” CR 56(e).

The Department met its burden under CR 56 by making and supporting its motion for summary judgment with proper evidence. CP at 37-75. This included the declarations of the legal assistant to the Board, Rebecca Gogan; Department Environmental Planner, Angela M. Hong; and Ms. Morey, as counsel for the Department, and the exhibits attached thereto. CP at 41-48. Kanam presented no competent

evidence to refute any of the Department's summary judgment claims or to raise a genuine issue of material fact in the case. CP at 101-05; CP at 118-22. Thus, the superior court was correct in granting the Department's motion for summary judgment and dismissing Kanam's "Original Complaint" in its entirety.

B. The Superior Court Was Correct as a Matter of Law That It Could Not Exercise Appellate Jurisdiction Over Kanam's Petition for Judicial Review Because Kanam Failed to Serve the Board as Required by RCW 34.05.542.

"[B]efore a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal." *Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011) (citing *Conom v. Snohomish Cty.*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005); *Crosby v. Cty. of Spokane*, 137 Wn.2d 296, 300-01, 971 P.2d 32 (1999)).

The APA governs appeals of decisions made by the Board, and delineates the procedural requirements that must be satisfied in order to invoke the superior court's jurisdiction. *See* RCW 43.21B.180; RCW 34.05.542. Specifically, the APA provides that, "[a] petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." RCW 34.05.542(2). "The agency" referred to in RCW 34.05.542(2) is the decision-making body

whose final order is subject to the petition for judicial review. See RCW 34.05.010(2) (defining “agency” to include “any state board . . . authorized . . . to conduct adjudicative proceedings); *Sprint Spectrum, LP v. Dep’t of Rev.*, 156 Wn. App. 949, 955, 235 P.3d 849 (2010).

This case is identical to *Sprint Spectrum*, in which the petitioner sought review of a decision by the Board of Tax Appeals but failed to serve that board. *Id.* at 952. The *Sprint Spectrum* court held that RCW 34.05.542(2) “is not ambiguous and that the failure to comply with its terms for service of a copy of the petition required dismissal of the petition.” *Id.* at 953. Like the petitioners in *Sprint Spectrum*, Kanam did not file his petition with “the agency” whose final order is the subject of the petition. Failure to comply with RCW 34.05.542(2) requires dismissal. *Id.*; accord, *Banner Realty, Inc. v. Dep’t of Rev.*, 48 Wn. App. 274, 738 P.2d 279 (1987) (court dismissed petition for judicial review for failure to serve the Board of Tax Appeals within 30-day time period); *City of Seattle v. Public Emp’t Relations Comm’n*, 116 Wn.2d 923, 809 P.2d 1377 (1991) (court dismissed petition for review when a party was served three days late).

Kanam appears to contend that service upon the Washington Attorney General’s Office constituted service upon both the Department and the Board. Br. of Appellant at 6. However, service of a petition for

judicial review upon the Department and its assistant attorney general is a separate and distinct requirement from service upon the Board. The Board is the agency whose final order was the subject of the petition, and as the agency that made the decision, it was critical to serve it. *See* RCW 34.05.542(2); *Sprint Spectrum*, 156 Wn. App. at 955. Ms. Morey, who received the summonses and “Original Complaint,” was the Department’s attorney of record in *Kanam v. DNR* (PCHB), not an attorney for the Board.⁴ In fact, the Board had no attorney of record in this matter that could have been served on its behalf.

The Department demonstrated that Kanam failed to serve the Board with his petition for judicial review. Thus, the superior court properly dismissed Kanam’s petition under RCW 34.05.542(2) and *Sprint Spectrum*. This Court should affirm.

C. The Superior Court Was Correct as a Matter of Law That Kanam’s Request That the Court Compel the Department to Issue Him a Mooring Buoy License Was Not Ripe for judicial Review.

Judicial review of an agency decision is not ripe until the agency issues a final decision. The Department did not issue a final decision regarding Kanam’s mooring buoy application, as Kanam failed to update his application with information vital to its continued review. CP at 48.

⁴ The Department did not argue in the superior court that service upon the Department was defective.

Kanam presented no argument or evidence to the superior court to call into question the evidence presented by the Department on this issue. Instead, Kanam now relies upon an email, allegedly sent by the Department, referring to Kanam's mooring buoy application. CP at 17. The email in question is unauthenticated, was objected to by the Department, and was never admitted into evidence. *See* CP at 26. Furthermore, the email does not state that Kanam's mooring buoy application was adequate or complete. *See* CP at 17.

As such, the record is undisputed that no decision had been made to grant or deny Kanam's application. Essentially, Kanam is requesting this Court to rule upon an administrative matter on which no decision has been made due to Kanam's own lack of action. But only final agency actions are subject to judicial review under the APA. *Wells Fargo Bank, N.A. v. Dep't of Rev.*, 166 Wn. App. 342, 355-56, 271 P.3d 268 (2012). An administrative action is final when it creates a legal obligation, denies a legal right, or fixes a legal relationship as a consummation of the administrative process. *See, e.g., Wells Fargo*, 166 Wn. App. at 356; *Brinnon Grp. v. Jefferson Cty.*, 159 Wn. App. 446, 486, 245 P.3d 789 (2011); *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn. App. 616, 626, 246 P.3d 822 (2011); *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Under those circumstances, a case can be considered ripe for judicial review.

Dep't of Ecology v. City of Kirkland, 84 Wn.2d 25, 30, 523 P.2d 1181 (1974) (Shoreline Hearings Board decision “fixed a legal relationship between the parties, thus rendering that decision ‘ripe for review’ and . . . a ‘final decision’”).

As a matter of law, Kanam shows no factual or legal basis for asking this Court to compel the Department to issue a mooring buoy license. As the application never contained adequate information and was still under review by the Department, there is no final agency action to review. Kanam offers no showing of any other legal basis to compel the action. More importantly, the record demonstrates that the superior court properly dismissed Kanam’s mooring buoy license claim. This Court should affirm that decision because, as a matter of law, the issue as to the mooring buoy license was not and is not ripe for judicial review.

D. The State of Washington Has Jurisdiction Over the Navigable Waters Within Its Geographic Borders.

Kanam requests this Court to clarify “(W)ether [sic] the State of Washington owns the ocean?” This issue was not raised in the proceedings below, and therefore has been waived. RAP 2.5(a). However, even if the Court chooses to consider the issue, it is frivolous on its face. *See Kanam v. Dep't of Nat. Res.*, No. C16-5702-RBL, 2016 WL 4611544 at 1 (Sept. 6, 2016). While the State of Washington does not have jurisdiction over all

of the waters of the United States, “it is ‘extraordinarily well-settled’ that the State *does* have jurisdiction over navigable waters within its geographic boundaries.” *Id.* at 2 (emphasis in original). *See also In re Tortorelli*, 149 Wn.2d 82, 90-91, 66 P.3d 606 (2003); Const. art. XVII, § 1; *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 10 L. Ed. 997 (1842); *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224, 11 L. Ed. 565 (1845); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436, 18 L. Ed. 756 (1867); *Oregon State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977); *Eisenbach v. Hatfield*, 2 Wash. 236, 240-41, 26 P. 539 (1891); 43 U.S.C. § 1311(a).

E. The 1855 Treaty of Point Elliott Does Not Exempt From State Law a Vessel Purportedly Owned by the Kikiallus Indian Nation That Is Anchored Without Permission on State-Owned Aquatic Lands.

Kanam appears to claim that the Treaty of Point Elliott protects vessels that are allegedly owned by an entity he calls the Kikiallus Indian Nation (Kikiallus). This issue also was not raised in the proceedings below, and therefore has been waived. RAP 2.5(a). However, even if the Court chooses to consider the issue, it is neither relevant nor applicable to the matter before the Court.

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Kanam appears to claim that the Kikiallus owned one of the vessels taken into the Department's custody in April 2016,⁵ and claims certain protections for the vessel under the Treaty of Point Elliott. However, the entity Kikiallus is not a federally recognized tribe, *See* 81 Fed. Reg. 26826-02 (May 4, 2016), and has never established treaty rights under the Treaty of Point Elliott. *See generally, Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 714, n.1 (9th Cir. 2002) (identifying tribes associated with several Stevens Treaties, including the Treaty of Point Elliott); *see also United States v. Washington*, 20 F. Supp. 3d 828, 847 (2007).⁶ Indeed, nothing in the record suggests the entity Kikiallus involves anyone besides Kanam.

Even if the Kikiallus were an organized tribe that existed today, and even if it had established treaty rights, the record is still devoid of any evidence that would support a conclusion that moorage of the vessel at issue was somehow related to a treaty right. A party asserting a treaty right has the burden of proving that the party is entitled to exercise the treaty right. *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981). Here, it

⁵ There is no evidence in the record demonstrating that the Kikiallus held title to the vessel.

⁶ The Washington State Department of Fish and Wildlife also maintains a list of the Tribes with off-reservation treaty rights in Washington. *See* http://wdfw.wa.gov/hunting/tribal/treaty_history.html (last visited May 11, 2017). The Kikiallus Indian Nation is not among the tribes listed.

is undisputed that the lands at issue were state-owned submerged lands in Thurston County. Accordingly, state law is presumed to apply. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996).

Kanam has presented no evidence that the entity Kikiallus is entitled to exercise treaty rights under the Treaty of Point Elliott. Nothing suggests he was exercising that group's rights when mooring the vessel over state-owned aquatic lands in Thurston County. As a result, his reliance on the Treaty of Point Elliott is specious and does not provide a basis for reversing the decision of the superior court.⁷

VI. CONCLUSION

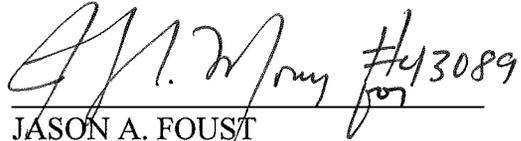
For the foregoing reasons, the Department respectfully requests that this Court affirm the superior court's order granting summary judgment to the Department. Where Kanam seeks review of the Board's Final Order, his action was properly dismissed because he failed to serve the Board with a petition for judicial review of the Final Order. Where Kanam requests the

⁷ Indeed, treaty rights under the Treaty of Point Elliott do not appear relevant in any way. No tribe has established off-reservation treaty rights in Thurston County under the Treaty of Point Elliott. The Treaty of Point Elliott was between tribes in the northern Puget Sound and the United States. *See United States v. Washington*, 459 F. Supp. 1020, 1049, 1068 (W.D. Wash. 1978) (discussing usual and accustomed fishing areas of various tribes). The southern Puget Sound waters in Thurston County were fished by tribes associated with the Treaty of Medicine Creek. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132. *United States v. Washington*, 626 F. Supp. 1405, 1441 (W.D. Wash. 1985).

court to compel the Department to issue him a mooring buoy license, his action was properly dismissed because the case was and continues to be unripe.

RESPECTFULLY SUBMITTED this 17th day of May, 2017.

ROBERT W. FERGUSON
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Handwritten signature of Jason A. Foust in black ink, written over a horizontal line. The signature includes the initials "J.A. Foust" and the number "#43089" written to the right of the line.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on May 17, 2017, as follows:

Kurt Kanam 2103 Harrison #143 Olympia, WA 98502 <i>Appellant</i>	<input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email
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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 17th day of May, 2017, at Olympia, Washington.



CASEY D. MILLER
Legal Assistant
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ATTORNEY GENERAL'S OFFICE - NATURAL RESOURCES DIVISION

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