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NO. 50567-3

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

MIKE HAMILTON; HAMILTON CORNER I, LLC,

Appellants,

v.

POLLUTION CONTROL HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; CITY OF
NAPAVINE,

Respondents.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
RESPONSE BRIEF**

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I. INTRODUCTION

This case involves a dispute over the ownership of water rights appurtenant to land in Napavine, Washington. Appellants Mike Hamilton and Hamilton Corner I, LLC assert they have an ownership interest in a water right that is now held by the City of Napavine. The Appellants complain that Betty Hamilton (Mr. Hamilton's aunt) wrongfully conveyed the water right to the City that the Appellants believe they partially own, and that the City's application to the Department of Ecology for change of the water right was therefore defective. But the Appellants are pursuing the wrong action and going after the wrong party in attempting to challenge Ecology's decision to approve the City's application many years after that decision was issued.

The Pollution Control Hearings Board's (PCHB) Order on Summary Judgment Motions (PCHB Order) dismissing the Appellants' appeal of the letter sent by Ecology in 2016 responding to inquiries on the water right (Ecology Letter) must be affirmed because the letter was not an appealable decision. The Appellants failed to timely appeal the actual decision they are now trying to contest, which was Ecology's decision in 2012 to approve the City's water right change application.

In addition to challenging the PCHB Order, pursuant to the Administrative Procedure Act (APA), the Appellants claim that Ecology

failed to take required action by not invalidating the water right change approval after the Appellants requested that Ecology correct alleged errors. This claim should also be dismissed because the Ecology Letter was not an “other agency action” that was subject to judicial review under the APA, and, even if it was, the claim was not timely brought. And, should the Court reach this claim, it should be denied because the Appellants cannot demonstrate that Ecology violated any legal requirements in its processing and approval of the City’s water right change application.

The finality of decisions on water right applications is important to water right holders because of their need for stability of expectations relating to their ability to exercise their water rights and use their property. Such stability would be upset if water rights approvals can be challenged years after their issuance in the manner being attempted here by the Appellants. Instead, the proper way for the Appellants to seek redress here would be to file a quiet title action.

II. RESTATEMENT OF THE ISSUES

Based on the Appellants’ assignments of error, Ecology reframes the issues as follows:

1. Under RCW 43.21B.110, a decision by Ecology on “the issuance, modification, or termination of any permit, certificate, or license” can be appealed to the PCHB. Does the statute allow appeal of a

letter that does not issue, modify, or terminate a permit, certificate, or license?

2. RCW 34.05.570(4) authorizes judicial review of “other agency action,” and provides that a person whose rights are violated by an agency’s failure to perform a legally-required duty may file a petition for review seeking an order requiring performance. Is a letter that explains that an order was issued three years ago an agency action subject to judicial review?

3. If the Ecology Letter does constitute an “other agency action” subject to judicial review, must the Appellants’ claim under RCW 34.05.570(4)(b) be dismissed for lack of jurisdiction because they failed to timely file a petition for review?

4. If the Court reaches the Appellants’ claim under RCW 34.05.570(4)(b), should the City’s water right change approval be upheld because Ecology followed all required procedures in processing the application?

III. COUNTER-STATEMENT OF FACTS

A. Factual History

In January 1954, Ecology issued Certificate of Groundwater Right No. 1726 to Frank B. and Edith Hamilton. This water right authorized the use of a maximum annual quantity of 114 acre-feet of groundwater per year for the irrigation of 57 acres, stock watering, and domestic use.

AR at 000052.¹ Ecology also issued Certificate of Surface Water Right No. 5605 to Frank B. Hamilton. This water right authorized the diversion of surface water from the Newaukum River for the irrigation of 70 acres.

¹ The Certified Record provided to the superior court by the PCHB will be referred to herein as the Administrative Record (AR).

AR at 000053–054. Subsequently, Betty Hamilton inherited these water rights.

1. The City’s Water Right Change Applications

In 2003, Ms. Hamilton and the City entered into an agreement for the City to purchase the water rights from Ms. Hamilton. AR at 000005. In November 2004, the City filed applications for changes of Groundwater Right No. 1726 and Surface Water Right No. 5605 with Ecology. The applications sought to change the purposes of use of the water rights to municipal supply purposes, and to change the place of use to the area served by the City’s public water system. Further, the application for change of Groundwater Right No. 1726 sought to change the location of the wells for pumping of the water, and the application for change of Surface Water Right No. 5605 sought to change the source of the water from the Newaukum River (surface water) to a well (groundwater). *See* AR at 000055–088.

After a water right application is filed with Ecology, RCW 90.03.280 requires publication of public notice of the application in the local newspaper. Beginning on December 14, 2007, and ending on December 21, 2007, the City published notice of the application for change of Groundwater Certificate No. 1726 in *The Chronicle*, which serves greater Lewis County. AR at 000006; AR at 000271. After notice

of the application was published, Ecology received five letters from area citizens stating concerns about the water right change application. AR at 000006;² AR at 000060. These five comment letters did not indicate any concerns about ownership of the water right. Ecology did not receive any comments on the application from the Appellants. *See* AR at 000006; AR at 000060.

2. The City's Preliminary Permit to conduct well testing

In reviewing an application for change of a water right, Ecology is required to determine that approval of the requested change will not cause impairment of other water rights. RCW 90.03.380(1) (application can be approved “if such change can be made without detriment or injury to existing rights”); RCW 90.44.100(2)(d). For the water rights acquired by the City, Ecology determined that it was necessary for the City to conduct well testing so that Ecology could ascertain whether changing the location of the wells would impair other water rights in the area by causing interference with wells associated with those rights.

Accordingly, on April 2, 2008, Ecology issued a “Preliminary Permit to Drill and Test a Well Under Application to Change Ground Water Certificate (GWC) 1726” to the City. AR at 000273–277. The

² In the Ecology Letter, there is a typographical error stating that Ecology received “six” letters of concern before the letter lists the five letters that it actually received.

Preliminary Permit authorized the City to drill a well and perform well testing for the purpose of collecting data for Ecology to consider in its evaluation of the application for change of the groundwater right: “As Ecology cannot evaluate availability [of water] and impairment [of other water rights] without more information, the purpose of this preliminary permit is [sic] allow Napavine to conduct field studies to refine its proposal and to provide additional hydrogeological information.” AR at 000273. On April 14, 2010, Karl Johnson of Gray & Osborne, Inc., the City’s engineering consultant, sent a letter to Ecology communicating that well testing under the Preliminary Permit was completed. AR at 000285–294. This letter also provided the results of the City’s well testing operations, and the hydrogeological information that was requested by Ecology for its use in evaluating the application. *Id.* This letter concludes by stating “[w]e trust that the foregoing adequately addresses all requirements of the Preliminary Permit.” AR at 000289. This indicated that the City had completed its well testing operations, gathered the necessary information, and, therefore, no longer needed the Preliminary Permit.

On May 20, 2011, Ecology sent a letter to the City stating the following:

This letter is to notify you that the Preliminary Permit issued to the City of Napavine expired on April 1, 2011 and has been cancelled.

Please cease using water under this Preliminary Permit. If additional time is needed to gather necessary data in regards to this application, they [sic] City must contact Ecology to request a new authorization for water withdrawals.

AR at 000296. After this letter was issued, the City did not request any additional time to gather necessary data to support its application because, in the April 14, 2010 letter to Ecology, described above, the City's consultant had communicated that well testing had been completed.

3. Ecology's Order approving the City's Water Right Change Applications

In addition to ensuring that approval of a water right change application will not cause impairment of other water rights, Ecology is required to conduct a tentative determination of the validity and extent of the water right to determine whether it is eligible to be changed. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999). Generally, a water right is only valid for change to the extent it has been exercised by putting water to beneficial use. *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep't of Ecology*, 146 Wn.2d 778, 791, 51 P.3d 744 (2002).

During its evaluation of the applications, Ecology found that Betty Hamilton had put 105 acre-feet of groundwater per year (out of the 110

acre-feet stated on the certificate) under Groundwater Right No. 1726 to beneficial use on her property. As a result, Ecology found that 105 acre-feet per year of water was valid for change. AR at 000062–064; CP at 82–83.

Further, Ecology determined that approval of a change of the place of use to the City's service area for municipal water supply purposes, and the change of the point of withdrawal to the City's well location, would not cause impairment of other water rights. AR at 000065–069. To ascertain that impairment would not occur because the change in well location would not cause interference with other wells, Ecology utilized the well testing data supplied by the City under the Preliminary Permit. Ecology's decision on the application (Water Right Change Authorization No. CG2-GWC1726) includes discussion on the drilling and testing of the new well, and describes the results of the well pump testing. AR at 000065–066.

With respect to water rights ownership, the City communicated to Ecology that it had purchased the water right from Betty Hamilton, who had been the owner of the right. AR at 000005. And, Ecology's file for the water right includes no documentation indicating that the Appellants have any ownership interests in the right. AR at 000050. When Ecology receives a water right change application, Ecology considers the

information submitted by the applicant, including information on ownership of the water right proposed to be changed, as being submitted in good faith. AR at 000006. If comments or information are provided to Ecology by a party other than the applicant that communicate that the water rights are not owned by the applicant, Ecology will conduct review to attempt to ascertain ownership of the water rights. AR at 000050. However, Ecology lacks authority to make decisions in any disputes over ownership of water rights, and such disputes must be resolved through a quiet title action, or other appropriate action, in superior court. *See* Section IV.B.3, below.

On April 17, 2012, Ecology issued decisions approving both of the water right change applications, in the form of Reports of Examination. Water Right Change Authorization No. CG2-GWC1726 (the Ecology Order) authorizes the City to use a maximum annual quantity of 105 acre-feet of groundwater per year for municipal water supply purposes. AR at 000055. Water Right Change Authorization No. CS2-SWC5605 authorizes the City to use a maximum annual quantity of 69 acre-feet of groundwater per year for municipal water supply purposes. This decision

specifies that Water Right No. 5605 is “non-additive”³ to Groundwater Right No. 1726.⁴ AR at 000073.

After Ecology approved the City’s water right change application, the City formed a local improvement district to incorporate the new well into its water system and extend water and hydrant service to all of the Interstate 5/Rush Road interchange area. CP at 84.⁵

³ This water right is “non-additive” because it does not authorize use of any annual or instantaneous quantity of water above the figure authorized under the water right documented by Groundwater Certificate No. 1726, which is a maximum annual quantity of 105 acre-feet of groundwater per year.

⁴ Because notice of the application for change of Surface Water Certificate No. 5605 was never published in the newspaper, Ecology intends to exercise its discretion to voluntarily rescind Water Right Change Authorization No. CS2-SWC5605 after this litigation is concluded. Before the PCHB, Ecology conceded that it had erred by not providing public notice of the application to change Surface Water Right No. 5605 through publication in the newspaper. Public notice of water right applications is required under RCW 90.03.280, and Ecology acknowledged that the notice published in the *The Chronicle* provided notice of the application for change of Groundwater Right No. 1726, but did not include any notice of the application to change Surface Water Right No. 5605. AR at 000309. Notwithstanding Ecology’s concession, the PCHB ruled that it could not invalidate Water Right Change Authorization No. CS2-SWC5605 because it lacked jurisdiction over the appeal. AR at 000407. Based on the PCHB’s ruling, Ecology informed the superior court of its intention to rescind this water right. CP at 197–198 (“Based on errors in the notice that was given regarding the transfer of the Surface Water Right No 5605, [Ecology] has conceded its error and will be rescinding the transfer of that water right and Napavine has agreed to relinquish its interest in that water right after this matter is concluded. Accordingly, this opinion will deal solely with the issues surrounding [Groundwater Right No. 1726].”). For this reason, Ecology’s argument focuses on its approval of the application for change of Groundwater Right No. 1726.

⁵ In a separate case, the Appellants unsuccessfully challenged the City’s confirmation of the assessment for property owned by Hamilton Corner I, LLC in the LID. *Hamilton Corner I, LLC v. City of Napavine*, 200 Wn. App. 258, 402 P.3d 368 (2017). This Court’s opinion in that case provides an overview of the process relating to the formation of the LID to provide public water service in the area that is the subject of this case.

4. Ecology's letter responding to inquiries on the status of the water rights

On November 4, 2015, Doreen Milward, a paralegal in the law firm representing the Appellants, sent an email message to Ecology concerning the subject water rights. AR at 000011. That email message expressed concerns that portions of the water rights that had been acquired by the City from Betty Hamilton were actually owned by the Appellants. Subsequently, during the period between November 2015 and February 2016, additional email messages on this subject were exchanged between Ms. Milward and representatives of Ecology. AR at 000007–011. The email message sent by Ms. Milward on January 5, 2016, stated that “the water rights at issue . . . have been transferred in error to the City of Napavine,” and requested action to correct the alleged error. AR at 000008.

On February 5, 2016, Michael Gallagher of Ecology sent the Ecology Letter to Ms. Milward. AR at 000005–006. The Ecology Letter provided information on the status of the subject water rights based on the requests made by Ms. Milward in her exchange of email messages with Ecology representatives between November 2015 and February 2016. Additionally, the Ecology Letter communicated that the agency was not

going to take any action based on the Appellants' request for Ecology to correct alleged errors regarding the water rights.

B. Procedural History

On March 4, 2016, almost four years after the Ecology Order was issued, the Appellants filed an appeal of the Ecology Letter to the PCHB. Ecology and the Appellants filed motions for summary judgment, and, on July 21, 2016, the PCHB issued its Order on Summary Judgment Motions, which granted Ecology's motion for summary judgment, denied Appellants' cross-motion for summary judgment, and dismissed the case. AR at 000400–408. The PCHB ruled that it lacked jurisdiction to hear the appeal on grounds that the Ecology Letter was not an appealable agency decision, and that “even if the Board considered Hamilton’s appeal to relate to an appealable decision, the appeal was not timely filed” because the appealable decision was the Ecology Order issued on April 17, 2012 that approved the City’s application, and the deadline for appeal of that decision elapsed thirty days after that date. AR at 000406.

On August 17, 2016, the Appellants filed a petition for judicial review of the PCHB’s decision in Lewis County Superior Court, which asked the superior court to reverse the PCHB’s dismissal order. Additionally, the Appellants asserted a claim pursuant to the APA contending that their rights were violated by Ecology’s “failure to perform

a duty that is required by law to be performed” under RCW 34.05.570(4)(b) because the agency allegedly had committed procedural violations when it processed the water right change application. CP at 2. Before the superior court, Ecology requested dismissal of the claim under RCW 34.05.570(4)(b) for lack of jurisdiction. CP at 112–114.

On June 16, 2017, the superior court issued its Order on Petition for Review that affirmed the PCHB’s dismissal order, and denied the Appellants’ claim that Ecology failed to perform a required duty under RCW 34.05.570(4)(b).⁶ This order attaches and incorporates the superior court’s Ruling on Appeal from Pollution Control Hearings Board, which is a memorandum opinion that was issued prior to entry of the Order on Petition for Review. CP at 197–203.

In its order, the superior court did not make any ruling on Ecology’s argument that the court lacked jurisdiction to hear the RCW 34.05.570(4)(b) claim. Rather, in the Ruling on Appeal from Pollution Control Hearings Board, the court reasoned that “[E]ven if the appeal was determined to have been timely filed, Petitioner has failed to meet its burden of proof to establish that Ecology acted improperly in processing the application and granting the 2012 permit.” CP at 203.

⁶ The Order on Petition for Review from the superior court was not designated by the Appellants for inclusion in the clerk’s papers, but was filed in this case on June 16, 2017, which triggered this Court’s perfection letter, dated June 16, 2017.

Subsequently, the Appellants appealed the superior court's Order on Petition for Review to this Court.

IV. ARGUMENT

A. Standard of Review

The Appellants' Petition for Review asserts two claims under the APA, RCW 34.05. First, the Petition for Review seeks judicial review of the PCHB Order pursuant to RCW 34.05.570(3), which governs "[r]eview of agency orders in adjudicative proceedings." Second, pursuant to RCW 34.05.570(4), the Petition for Review seeks "[r]eview of other agency action" and requests an order requiring Ecology "to perform a duty that is required by law to be performed." The APA provides that "[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a). Thus, the Appellants carry the burden in this case on both of their claims.

In reviewing the PCHB Order, this Court "sits in the same position as the superior court," and applies the standards of review set forth in the APA. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000); *Fort v. Dep't of Ecology*, 133 Wn. App. 90, 95, 135 P.3d 515 (2006). The standards for review of "agency orders in adjudicative proceedings," including the PCHB Order in this case, are prescribed in RCW 34.05.570(3). "Agency action may be reversed where the agency

has erroneously interpreted or applied the law, the agency's order is not supported by substantial evidence, or the agency's decision is arbitrary and capricious." *Postema*, 142 Wn.2d at 77; *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998).

The standards for review for "other agency action" are set forth in RCW 34.05.570(4), which provides that relief for a person aggrieved by an agency's alleged failure to perform a legally-required duty can be granted only if a court "determines that the action is: (i) Unconstitutional; (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law; (iii) Arbitrary or capricious; or (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action." RCW 34.05.570(4)(c).

B. The PCHB Properly Dismissed the Appellants' Attempt to Appeal the Ecology Letter (Issue No. 1)

The PCHB Order dismissed the Appellants' administrative appeal for lack of jurisdiction, and the superior court affirmed this dismissal. The Appellants contend that the PCHB erred in dismissing the appeal. Appellants' Opening Br. 15-19. This argument fails because the PCHB correctly ruled that the Ecology Letter was not an agency action that could be appealed to the PCHB under the APA and the PCHB's enabling statute, RCW 43.21B.

1. The Ecology Letter was not an agency decision that could be appealed to the PCHB

This Court should affirm because the PCHB properly interpreted its enabling statute in concluding that it did not have jurisdiction to hear an appeal of the Ecology Letter. Ruling in favor of the Appellants would create an “end-run” around the specific time limit for filing appeals, which would mean that there never could be any finality to Ecology’s decisions. Under the Appellants’ theory, parties like the Appellants who did not appeal an Ecology decision within the statutory time limit could create a new appealable decision by writing to Ecology about an earlier decision and then claim that the agency’s response to such inquiry is a new decision that is subject to a new appeal period.

The PCHB, as an administrative agency, has only those powers expressly granted to it by the Legislature, or necessarily implied therefrom. *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). The PCHB’s jurisdiction is prescribed in RCW 43.21B.110.

In the context of water rights, RCW 43.21B.110 authorizes the PCHB to hear and decide appeals of decisions by Ecology on water right applications, and on civil penalties, water right relinquishment orders, and regulatory orders issued by Ecology. RCW 43.21B.110(1)(d) authorizes

the PCHB to hear appeals relating to the “issuance, modification, or termination of any permit, certificate, or license by the department.” RCW 43.21B.110(1)(a) authorizes the PCHB to hear appeals of civil penalties issued under the Water Code pursuant to RCW 90.03.600. RCW 43.21B.110(1)(b) authorizes the PCHB to hear appeals of water right relinquishment orders issued by Ecology pursuant to RCW 90.14.130. In addition, under RCW 43.21B.110(1)(i), the PCHB has jurisdiction to hear appeals related to “[a]ny other decision by the department . . . which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW [the APA].”

With respect to RCW 43.21B.110(1)(d), the Ecology Letter which Appellants attempted to appeal to the PCHB did not constitute an Ecology *decision* on a water right application. While the Ecology Letter responded to requests for information on the status of certain water rights that were the subjects of earlier change application decisions, and to the request for Ecology to correct alleged errors in those decisions, it did not communicate any decision on the “issuance, modification, or termination of any permit, certificate, or license.” Further, under RCW 43.21B.110(1)(a) and (b), the Ecology Letter is plainly not a civil penalty, regulatory order, or water right relinquishment order. And, under

RCW 43.21B.110(1)(i), the Ecology Letter was not the result of any adjudicatory proceeding.

The Appellants contend that the Ecology Letter is an appealable decision on “the issuance, modification, or termination of any permit, certificate, or license” because a rule provision, WAC 508-12-400, includes the words “pertaining to permits, regulatory orders, and related decisions” in describing types of water right-related decisions that can be appealed to the PCHB. Appellants also base this contention on the PCHB’s analysis in its decision in *Steensma v. Department of Ecology*, PCHB No. 11-053 (Sept. 8, 2011) (Order Granting Summary Judgment to Ecology), that RCW 43.21B.110(1)(d) authorizes the PCHB to hear appeals “relating to the issuance, modification, or termination of any permit, certificate, or license.” Appellants’ Opening Br. 16–17.

This argument fails because it attempts to make far too much of the words “relating to” and “pertaining to” in attempting to broaden RCW43.21B.110(1)(d) to allow the appeal of a letter which did not render any substantive decision on the water rights, but, rather, provided information on their status and communicated that Ecology was not going to correct any alleged errors in them. RCW 43.21B.110(1) states that “[t]he hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department.” And

RCW 43.21B.110(1)(d) follows by stating “the issuance, modification, or termination of any permit, certificate, or license by the department.”

Under the statute’s express language, Appellants’ argument fails because the Ecology Letter did not communicate the “issuance, modification, or termination” of any water right “permit, certificate, or license.”

Despite Appellants’ protestations, the Ecology Letter contains none of the indicia of an appealable order. RCW 43.21B.310(4) states that “[a]n appealable decision or order shall be identified as such and shall contain a conspicuous notice to the recipient that it may be appealed only by filing an appeal with the hearings board.” Two factors considered by the PCHB in determining that the Ecology Letter is not appealable were that it is not identified as an “order,” and does not contain any language indicating that it is an appealable decision. AR at 000406. The PCHB correctly notes that “although the lack of appeal language is not determinative of whether the Board has jurisdiction, the lack of such language can be indicative of the nature of the communication.” *Id.*⁷ Ecology does not contend that the lack of notice of the right to appeal in

⁷ See also *Sylvia Ridge Developers, LLC v. Dep’t of Ecology*, PCHB No. 07-139 (Mar. 14, 2008) (Order Granting Summary Judgment to Ecology) (noting that the failure to include “appeal language” is an indicator that a document is not an appealable order); *BNSF Ry. Co. v. Dep’t of Ecology*, PCHB No. 11-152 (Oct. 24, 2012) (Order Granting Summary Judgment to Puget Soundkeeper Alliance and Ecology) (a letter from Ecology was not an appealable decision because it was not identified as an order, contained no appeal language, and was written to answer questions posed by an attorney’s staff member).

an Ecology document automatically makes it not subject to appeal, but only that the absence of such language can indicate that it does not constitute an appealable action. If an Ecology action falls under one of the categories of appealable actions under RCW 43.21B.110, then it can be appealed irrespective of whether the action contains appeal notice language. But the action at issue in this case plainly does not fit under any such category.

The Appellants wrongly contend that the PCHB's decision conflicts with its decision in *Hagman v. Department of Ecology*, PCHB No. 14-016c (Dec. 3, 2014) (Order on Motions). *Hagman*, which involved an appeal of Ecology's denial of a request for termination of coverage under a general permit allowing the discharge of stormwater, is distinguishable from this case. The PCHB ruled in *Hagman* that Ecology made an appealable decision to deny the request for termination of coverage, which required the appellant's construction activity, and its stormwater discharges, to continue to be governed by the terms of the permit. Thus, in *Hagman*, there was a tangible decision on a request relating to a permit from the person holding the permit, who no longer wanted to be bound by its terms. In contrast, in this case, the Appellants requested information on the status of water rights and requested the agency to rescind earlier decisions that were made on applications for

changes of the water rights that had been filed by other parties. The Ecology Letter simply responded to this request and explained that the agency could not rescind its earlier decision. That in and of itself was not a substantive decision relating to any permit that bound the Appellants, as was the case in *Hagman*.

The Appellants also incorrectly assert that they could appeal the Ecology Letter because “Ecology has been processing Napavine’s application,” and somehow did not make a final decision on the water right change application in 2012. Appellants’ Opening Br. 17. To the contrary, Ecology completed its processing of the applications when it made decisions on them and approved the requested changes to the water right in 2012. Similarly, the Appellants are mistaken in contending that RCW 90.03.270 somehow created an unending period during which the 2012 decision is subject to appeal based on allegations of procedural defects because it imposes “no tolling limit.” *Id.* at 17–18.

RCW 90.03.270, which governs the receipt of a water right application by Ecology, provides that “[i]f upon examination, the application is found to be defective, it shall be returned to the applicant for correction or completion. . . .” However, if, as occurred in this case, Ecology processes and makes a decision on an application, after finding it complete and not returning it to the applicant for correction, such decision must be appealed

to the PCHB within the 30-day appeal period specified under RCW 43.21B.230(1).

The Appellants are also wrong in contending that the PCHB erred in dismissing the case because it has jurisdiction to address “as applied” constitutional claims. *Id.* at 18–19. The Appellants are correct that the PCHB is authorized to consider “as applied” constitutional issues, including claims of procedural due process violations, in appeals that are brought before the PCHB. But the PCHB can only consider such claims if it has jurisdiction over an appeal. The Appellants’ reliance on *Rasmussen v. Puget Sound Clean Air Agency*, PCHB No. 12-091 (Jan. 14, 2013) (Order on Motions), is misplaced because that is a case where the PCHB’s jurisdiction to hear the appeal was not contested. In this case, for the reasons discussed above, the PCHB lacks jurisdiction because the Ecology Letter was not an appealable decision. An administrative body does not gain jurisdiction to address a constitutional claim when it does not have jurisdiction over the appeal in the first place.

2. Res judicata precluded appeal of the Ecology Letter because the Appellants failed to timely appeal Ecology’s 2012 Order

The Appellants neglect to address the second reason why the PCHB dismissed the case, which was their failure to timely appeal the

actual water right change decision, which was the Ecology Order that approved the City's water right change application:

Moreover, even if the Board considered Hamilton's appeal to relate to an appealable decision, the appeal was not timely filed. The appealable decisions by Ecology in this matter, the Water Rights Change Authorizations, were issued on April 17, 2012. The deadline to appeal these decisions was 30 days after April 17, 2012. However, Hamilton did not file the present appeal until March 4, 2016, almost four years later.

AR at 000406 (citations omitted). The doctrine of res judicata precludes a challenge to the 2012 decision because the Appellants failed to timely file an appeal of Ecology's decision that approved the City's application.

Res judicata, or claim preclusion, is an affirmative defense that bars re-litigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The purpose of this doctrine is "to prevent piecemeal litigation and ensure the finality of judgments." *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).

To invoke the PCHB's jurisdiction, an appeal must be filed within 30 days of receipt of the agency action that is subject to appeal.

RCW 43.21B.230(1). The Ecology Order was issued on April 17, 2012, and was not timely appealed, so it cannot be challenged now through an

attempt to appeal the later-sent Ecology Letter explaining the status and implications of the earlier decision.⁸

3. The PCHB lacks authority to resolve Appellants' claim that they partially own the water right

Another grounds for dismissal that was not discussed in the PCHB Order was the PCHB's lack of jurisdiction to resolve disputes over ownership of water rights. This case essentially involves such an ownership dispute. The Appellants are contending that the Ecology Order was unlawfully issued in 2012 because they partially own the water right and never consented to Betty Hamilton's transfer of the right to the City. But Ecology, and, by extension, the PCHB, do not have authority to resolve disputes relating to water rights ownership. AR at 000092.

However, while the PCHB, and, by extension, this Court in its judicial review capacity, do not have jurisdiction to resolve water rights ownership disputes, a lawsuit to quiet title to water rights may be pursued in superior court. *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933)

⁸ Res judicata applies to claims that have been or should have been litigated as long as the parties have had an opportunity to litigate. *See Neilson v. Spanaway Gen. Medical Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). This doctrine applies in the administrative setting. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994).

In this case, the City published notice of the water right change applications in accordance with RCW 90.03.280, and several area citizens filed letters with Ecology stating their concerns over the applications. The Appellants had the opportunity to communicate concerns over the applications, and to appeal the change approvals, but failed to do so.

(citing *Miller v. Lake Irrig. Co.*, 27 Wash. 447, 67 P. 996 (1902)). Thus, while the PCHB's dismissal of Appellants' administrative appeal must be affirmed, they can pursue a quiet title lawsuit (or other appropriate action) in superior court. In other words, the Appellants are not without an avenue to seek resolution of their property ownership dispute. They have, however, misplaced their sights here on Ecology, rather than Betty Hamilton.

In sum, the PCHB correctly interpreted RCW 43.21B.110 in ruling on summary judgment that it lacked jurisdiction to hear the administrative appeal. The Ecology Letter was not an agency action that could be appealed to the PCHB, and the Appellants failed to timely appeal the water right change approval in 2012. Accordingly, Ecology requests the Court to rule in its favor on Issue No. 1 and affirm the PCHB Order.⁹

C. The Appellants' Claim Under RCW 34.05.570(4)(b) Should Be Dismissed for Lack of Jurisdiction

1. The Ecology Letter was not "other agency action" subject to judicial review (Issue No. 2)

In addition to challenging the PCHB's dismissal order, the Appellants seek judicial review of "other agency action" relating to "an

⁹ If the Court rules that the PCHB violated the law by dismissing the Appellants' administrative appeal, then the proper remedy would be to remand the case to the PCHB so that it can hear and rule on the substantive issues relating to Appellants' claims that requested the PCHB to declare the water right change approval null and void.

agency's failure to perform a duty required by law to be performed" pursuant to RCW 34.05.570(4)(b). At the threshold, this claim should be dismissed because the Ecology Letter was not an "other agency action" subject to judicial review under RCW 34.05.570(4).¹⁰

RCW 34.05.570(4)(a) authorizes review of "[a]ll agency action not reviewable under subsection (2) or (3) of this section," meaning an agency action other than the adoption of a rule (RCW 34.05.570(2)) or an agency order in an adjudicative proceeding (RCW 34.05.570(3)). In turn, RCW 34.05.570(4)(b) provides, in relevant part, that "[a] person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review . . . seeking an order pursuant to this subsection requiring performance."

Under these APA provisions, an "other agency *action*" relating to a "failure to perform a duty that is required by law to be performed" that can be challenged through a petition for review cannot be floating and amorphous, and must be tethered to an actual action of some type by an agency. Here, for the reasons discussed in Section IV.B.1, above, the

¹⁰ Notwithstanding Ecology's argument to the superior court that this claim should have been dismissed for lack of jurisdiction, the superior court considered the claim and denied it. When conducting judicial review of an administrative decision, an appellate court can affirm a trial court's decision on any grounds supported by the pleadings. See *Muckleshoot Indian Tribe v. Dep't of Ecology*, 112 Wn. App. 712, 50 P.3d 668 (2002); *Wendle v. Farrow*, 102 Wn.2d 380, 686 P.2d 480 (1984).

Ecology Letter was not an “agency action” of any kind. It was a courtesy response to an inquiry about water rights, which provided information on their status and communicated that the agency did not find any errors requiring their rescission. Accordingly, the Court should rule in Ecology’s favor on Issue No. 2.

2. Even if the Ecology Letter was “agency action” subject to judicial review, the petition for review was not timely filed (Issue No. 3)

If the Court deems that the Ecology Letter did constitute agency action, the claim under RCW 34.05.570(4) still must be dismissed for lack of jurisdiction because the Appellants’ petition for review with respect to this claim was not timely filed. Under the APA, a petition for review must be filed in court within 30 days after the agency action being challenged is received. The Ecology Letter was sent on February 5, 2016, and Appellants filed their Petition for Review on August 17, 2016, which was over 30 days after the filing deadline.

RCW 34.05.542(3) provides that:

A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record *within thirty days after the agency action*, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing

upon the petitioner to obtain judicial review under this chapter.

(Emphasis added.) In *Muckleshoot Indian Tribe v. Department of Ecology*, 112 Wn. App. 712, 724, 50 P.3d 668 (2002), the Court of Appeals held that failure to timely file a petition for review in superior court is grounds for dismissal:

The WAPA authorizes the superior court to act in a limited appellate capacity to review certain agency actions. In order for the court's appellate jurisdiction to be properly invoked, parties must abide by all the procedural requirements of the act. The act obliges a party appealing an agency action to file a petition for review in the superior court and to serve the petition "on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action. . . ." Failure to comply with these requirements bars the superior court from accepting appellate review for lack of subject matter jurisdiction.

The alleged agency action that is the basis of Appellants' claim that Ecology failed to take a legally-required action is the Ecology Letter, which informed the Appellants that Ecology was not going to perform any action to modify or rescind its earlier decisions to approve the City's water right change applications. *See Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 92–93, 982 P.2d 1179 (1999) (letter sent by Ecology that declined to take a specific action that had been requested by the Skokomish Indian Tribe was deemed to be an agency action that was subject to judicial review under the APA). The email message sent by

Ms. Milward on January 5, 2016, communicated Appellants' position that "the water rights at issue . . . have been transferred in error to the City," and requested Ecology to take action to correct the alleged error:

[Betty Hamilton] is not the sole owner of these water rights as erroneously stated on the transfer application. This error should have been caught, by both Napavine and Ecology If not corrected in Ecology's records, this would seem to leave Mike Hamilton without any irrigation rights for his hayfields.

AR at 000008. In response, the Ecology Letter stated that:

When Ecology receives an application, we consider the information submitted by the applicant as being submitted in good faith. The consultant represented that Betty Hamilton and Napavine reached an agreement to purchase water rights. They also submitted information showing the water rights were in good standing. No conflicting information was presented to Ecology's attention as a result of the public notice or the posting of the draft ROEs. No appeals were filed so Ecology's decision is final and can no longer be appealed.

[RCW] 90.03.280 and RCW 43.21B provided your client opportunity to bring his concerns to our attention. Since he did not, *Ecology's decision stands. At this point, your client's dispute is a civil matter between your client and Betty Hamilton.*

AR at 000006 (emphasis added). The Ecology Letter informed the Appellants that Ecology was not going to take any action in response to the request for Ecology to "correct" the water right change approval.

The Appellants concede for the purposes of this claim that "[t]he 'other agency action' on appeal was Ecology's decision, rendered through

its February 5, 2016 letter, that no corrections to Napavine's application and subsequent Report of Examination would be made." Appellants' Opening Br. 13. Thus, if the Ecology Letter was actually an "other agency action," the Appellants were required to file a petition for judicial review to challenge Ecology's refusal to take any action "within thirty days" after the date of the Ecology Letter. And because the Appellants indisputably failed to file their petition for review within 30 days after February 5, 2016, their claim under RCW 34.05.570(4)(b) must be dismissed for lack of jurisdiction.

Ecology anticipates that the Appellants may assert in their reply brief that they timely brought their RCW 34.05.570(4)(b) claim because RCW 34.05.542(3) provides an extension for filing a petition "during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter." This argument would fail because the Ecology Letter plainly communicated that the agency was not going to take any action to modify, rescind, or otherwise "correct" the water right change approvals based on the Appellants' request. Further, the Appellants have conceded that the letter comprised an "agency action" for the purpose of RCW 34.05.570(4).

Thus, to the extent that the letter was an “other agency action,” it was clear that the letter was subject to challenge through a petition for review.

Further, any counter-argument based on RCW 34.05.534, which requires exhaustion of administrative remedies before judicial review can be sought, would be unpersuasive. If the Appellants were unsure about whether the Ecology Letter was appealable to the PCHB, or constituted “other agency action” subject to judicial review, they could have filed an appeal to the PCHB and a petition for judicial review in superior court and had the latter action stayed until a determination was made by the PCHB as to whether it had jurisdiction to hear the appeal. Thus, there was no “stay” of the period for filing a petition for judicial review of the Ecology Letter until the date when the PCHB issued its dismissal decision. Thus, the Court should rule in Ecology’s favor on Issue No. 3.

D. If the RCW 34.05.570(4) Claim Is Not Dismissed, It Fails Because Ecology Followed Required Procedures in Processing the City’s Application (Issue No. 4)

If Appellants’ claim under RCW 34.05.570(4)(b) is dismissed, then the Court does not have to reach the merits of the claim that the City’s water rights change approval should be invalidated because Ecology failed to follow required procedures. However, if the Court determines that it has jurisdiction to hear this claim, the Superior Court should be affirmed and the claim denied because Ecology met its

requirements in processing the application, and there was no violation of Appellants' constitutional right to due process nor any taking of their property.

The fundamental flaw in Appellants' challenge under RCW 34.05.570(4)(b), including their allegation that their due process has been violated, is their presupposition that they own part of the subject water right. The Appellants assert that they own a portion of the water right based on ownership of land in Section 14 and a small part of Section 15, T13N, R2W. CP at 39. But to resolve the ownership issue, they would need to bring a quiet title action against Betty Hamilton and the City, which could consider evidence relating to the chain of title for the property that was formerly owned by Frank and Edith Hamilton and transferred to various members of the Hamilton Family, particularly with respect to the area in Sections 14 and 15 that was specified as part of the place of use for the water rights before the City's water right change application was approved.¹¹

¹¹ In a quiet title case, it would also be appropriate for the parties to present evidence concerning the knowledge of various members of the Hamilton Family related to transfers and divisions of the property, and the appurtenance of the water rights to various portions of the property, and what was known by them during the time that the City acquired the water right, and the time that Ecology evaluated the City's application for change of the water right.

The property owned by Frank Hamilton and then passed down to members of his family was bisected by Interstate 5 in the vicinity of Exit 72, and Betty Hamilton now owns land on the west side of Interstate 5, while the Appellants own land on the east side. CP at 39. And it is uncertain whether any well located at any of the three points of withdrawal that were authorized under Groundwater Right No. 1726 prior to approval of the change application could be utilized on the east side after the property was bisected by the freeway. CP at 88. Further, the character of land use on the east side of Interstate 5 changed from agricultural to commercial after the property was bisected. CP at 87. As a result, it is highly unlikely that the Appellants have any ownership interest in the water right, which was specified for irrigation, stock water, and domestic supply purposes, and not commercial use, before the City's change application was approved. Indeed, based on its investigation of the City's water right change application, Ecology found that Betty Hamilton had historically used 105 acre-feet per year of water that was authorized for use under this water right on her property. AR at 000062-064; CP at 82-83.

1. Ecology complied with statutory requirements in processing the City's water right change application

The Appellants wrongfully contend that Ecology erred by failing to adequately investigate the City's application for change of Groundwater Right No. 1726. Appellants' Opening Br. 24–28. Similarly, the Appellants erroneously argue that Ecology erred by failing to confirm the identification of the parties having controlling interests in the water right, and not requiring the City to obtain the Appellants' signatures on the water right change application. *Id.* at 28–30. These arguments should be rejected because they are based on the false premise that Appellants irrefutably own part of the water right. Further, Ecology's review of the application was appropriate because the file for the water right included no indication that the Appellants were part owners of the water right, and the Appellants never protested or provided comments on the application to inform Ecology that they had ownership interests. Further, through its investigation, Ecology found that 105 acre-feet of water per year was being used by Betty Hamilton, which demonstrated that the water right was only being exercised by her to irrigate land that she owned on the west side of Interstate 5. AR at 000062–064.

The statutory provisions governing Ecology's evaluation of water right change applications do not require Ecology to take steps to determine

the ownership status of water rights. *See* RCW 90.03.380; RCW 90.44.100. Ecology is not obligated to conduct a title search before it issues a water right decision. *Lake Entiat Lodge Associated v. Dep't of Ecology*, PCHB No. 00-127, at 4 (Dec. 13, 2000). Moreover, Ecology has adopted a policy statement which recognizes that it is not authorized to resolve disputes between parties over the ownership of water rights. Water Resources Program Guidance 2040, entitled "Ensuring Proper Signature on Applications and Forms" states: "Be aware that problems can arise when there is an ownership dispute; Ecology has no authority to resolve ownership disputes." AR at 000092.

When Ecology receives a water right change application, Ecology considers the information submitted by the applicant, including information on ownership of the water right proposed to be changed, as being submitted in good faith. AR at 000006. The City and its consultant communicated to Ecology that the City had purchased the water right from Betty Hamilton, who had been the owner of the right. Further, the City provided evidence showing that Ms. Hamilton had exercised the water right on her property. If comments or information are provided to Ecology by a party other than the applicant that communicate that the water rights are not owned by the applicant, then Ecology will conduct review to attempt to ascertain ownership of the water rights. AR at 000050. But,

after providing notice of the application, Ecology never received any comments concerning ownership that would have caused it to conduct any further inquiry. The five owners of neighboring property that filed comments on the application did not state any concerns over ownership of the water right, and the Appellants did not submit any comments at all.

Appellants' reliance on the PCHB's decision in *Devine v. Department of Ecology*, PCHB Nos. 09-075 & 09-082 (Apr. 9, 2010) (Order Granting Summary Judgment), in support of its argument that Appellants' signatures on the application were required, is misplaced. In *Devine*, an applicant for a water permit sought to develop a hydroelectric project on land owned by the United States Forest Service (USFS), and Ecology denied the application because the application was not signed by USFS. Unlike in this case where it is highly uncertain that the Appellants have ownership interests in the water right, in *Devine*, Ecology had information indicating that the USFS owned the land where the applicant wanted to use water for hydropower generation.

The Appellants also mistakenly rely on *Lauer v. Pierce County*, 173 Wn.2d 242, 263, 267 P.3d 988 (2011), in arguing that the City's application was null and void because the City allegedly misrepresented facts it knew concerning the Appellants' ownership. In *Lauer*, the Supreme Court held that a building permit was invalid because the

applicant misrepresented and omitted material facts on the application. In contrast, in this case the City indicated that the person it obtained the water right from, Betty Hamilton, owned the water right in its entirety because she had historically exercised it to irrigate property she owned. And the City's information on Ms. Hamilton's historical water use was verified by Ecology during its evaluation of the application. In *Lauer*, the building permit applicant failed to meet statutory requirements relating to the application process. In contrast, in this case, all statutory requirements relating to the water right change application process were followed.

2. Expiration of the Preliminary Permit did not make the application defective because the City had completed well testing and no longer needed the Preliminary Permit

The Appellants erroneously contend that the water right change approval should be invalidated because Ecology lacked authority to continue to process the water right change application after the Preliminary Permit had expired. Appellants' Opening Br. 30–35. This argument is a red herring, and it fails because the expiration of the Preliminary Permit had absolutely no effect on Ecology's ability to continue to process the City's application.

In evaluating the application, Ecology needed hydrogeological information so that it could determine if changing the well location where water would be withdrawn to the City's new Well No. 6 could cause

impairment of other water rights by interfering with wells associated with those rights. The Preliminary Permit was issued in 2008 to authorize the City to drill a well and perform well testing for the purpose of collecting data for Ecology to consider in its evaluation of the application. AR at 000273–277.

In April 2010, the City’s engineering consultant sent a letter to Ecology communicating that well testing under the Preliminary Permit was completed. AR at 000285–289. That letter also provided the results of the City’s well testing operations, and the information requested by Ecology to enable it to evaluate the change application and consider whether other water rights would be impaired. *Id.* And it is plainly evident from the Ecology Order that Ecology carefully considered and utilized the information that was collected by the City through its exercise of the Preliminary Permit:

A Preliminary Permit was issued to the City of Napavine on April 2, 2008 requiring drilling and testing of a new production well. . . .

. . . .

Drilling Napavine Well #6 began on November 10, 2009 and the well was completed on March 4, 2010. . . .

. . . .

When the Newaukum artesian aquifer was penetrated, the water level rose and stabilized at about 19 feet below the top of the casing (Gray and Osborne, 2010). Based on the

depth of the well and the elevation of the static water level, Well #6 is completed in the non-marine deposits of the Newaukum artesian aquifer.

Pump testing began on February 24 and ended February 26, 2010. The well was pumped at 270 gpm for 24 hours. At about 1,000 minutes (16.67 hours) into the test, the drawdown curve flattened out indicating a recharge boundary at distance. The estimated transmissivity of the aquifer, using early data is calculated at 7,425 gallons per day per foot of aquifer (gpd/ft) and 11,140 gpd/ft using data after 1,000 minutes of pumping (Gray and Osborne, 2010).

AR at 000065–066.

Thus, the City completed its well testing, provided all the hydrogeological information that Ecology requested, and did not even need the Preliminary Permit anymore prior to May 20, 2011, when Ecology sent the letter communicating that the Preliminary Permit had expired. This letter states “[i]f additional time is needed to gather necessary data in regards to this application, they [sic] City must contact Ecology to request a new authorization for water withdrawals.” AR at 000296. The letter did not purport to cancel the underlying water right change application. The superior court correctly notes that “[t]he [cancellation] letter itself presumes that the application is still active and ongoing because it directs the City to contact Ecology if additional water withdrawal was needed, and to request a new authorization.” CP at 201. The City did not request any additional time to gather necessary data to support its application because it had previously communicated that it had

completed well testing in the April 14, 2010, letter from the City's engineering consultant to Ecology.

Then, the Ecology Order shows that in 2012, Ecology utilized the well testing data that was provided by the City in 2010 to evaluate the hydrogeological impacts of the City's proposal to change the locations where wells could be pumped, and found the data to be adequate to support its decision to approve the change application. Thus, Ecology's determination that the City had met the terms of the Preliminary Permit by providing adequate data to allow Ecology to evaluate the application is implicit in the Ecology Order.

The Appellants also erroneously assert that the data collected by the City through its exercise of the Preliminary Permit was flawed because the well testing did not consider whether pumping at the proposed new well location would impair water rights held by the Appellants.

Appellants' Opening Br. 32-34. This argument fails because, again, it is based on the false premise that it is a verity that Appellants actually own a portion of Groundwater Right No. 1726. Further, it was reasonable for the City to not conduct testing to ascertain potential impacts on wells that would be decommissioned because they provide water to local businesses that will eventually be served with water from the City. AR at 000285.

The City provided extensive information from its well testing operations.

See AR at 000285–289. And, based on information furnished by the City, the Ecology Order included substantial analysis on the potential for impairment of other water rights and found that changing the water right acquired by the City would not cause any interference with other wells in the area. AR at 000065–069.

3. Public notice of the application complied with all legal requirements

Appellants’ argument that public notice of the application for change of Groundwater Right No. 1726 was defective is also meritless.

See Appellants’ Opening Br. 35–40. RCW 90.03.280 provides, in relevant part, that:

Upon receipt of a proper application, the department shall instruct the applicant to publish notice thereof in a form and within a time prescribed by the department in a newspaper of general circulation published in the county or counties in which the storage, diversion, and use is to be made, and in such other newspapers as the department may direct, once a week for two consecutive weeks.

See also WAC 508-12-150. The public notice published in *The Chronicle* on both December 14 and 21, 2007, complied with the requirements of RCW 90.03.280. The Appellants try to make far too much of the number of irrigated acres, and legal description for the proposed new points of withdrawal, that were stated in the notice. The notice must be sufficient to apprise the public of the proposal, and the notice provided sufficient

information to enable members of the public to ascertain whether the proposal related to water rights in an area they were interested in and whether the proposed changes could affect their interests. The public notice stated:

That said Certificate issued to Frank Hamilton and authorizes the withdrawal of 420 gallons per minute and up to 114 acre feet per year for the irrigation of 27 acres, and stock and domestic supply. The authorized wells are located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14 and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, T. 13 N., R.2 W.W.M.

That the application requests: a change in purpose of use from irrigation, stock, and domestic supply to municipal water supply; a change in points of withdrawal to the South $\frac{1}{2}$ of Section 14, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 23, and a change in the place of use to the water service area of the City of Napavine.

Protests or objections to approval of this application must include a detailed statement of the basis of objections and are subject to public disclosure. Protest must be accompanied by a \$50.00 fee and filed with the Department of Ecology at PO Box 47775, Olympia, WA 98504-7775 within 30 days from December 21, 2007. L#1233 Dec 14 & 21 2007

AR at 000271. Notwithstanding that the notice mistakenly stated that the certificate authorized the irrigation of 27 rather than 57 acres, the notice stated that the certificate had been issued to Frank Hamilton and that authorized wells were located in Sections 14 and 15, including land owned by Appellants. The notice did not indicate that the acreage at issue was only the acreage owned by Betty Hamilton. The description was sufficient to apprise the public of the proposal, as demonstrated by the fact that, after

notice of the application was published, Ecology received five letters from area citizens stating concerns about the water right change application.

Further, the notice was not defective because of the omission of the township and range from the description of the area where the proposed points of withdrawal would be located. Since the township and range were stated in the preceding paragraph concerning the present well locations, and the township and range for the proposed well location¹² was the same, it was unnecessary to reiterate the township and range in the following paragraph.

The Appellants' reliance on *Pierce County v. Evans*, 17 Wn. App. 201, 204, 563 P.2d 1263 (1977), and *Asotin County Port District v. Clarkston Community Corp.*, 2 Wn. App. 1007, 1010–1011, 472 P.2d 554 (1970), is misplaced because those cases involved the notice that must be provided to a property owner in a tax foreclosure action, and, again, the Appellants mistakenly presuppose that they have a “vested water right

¹² The Appellants err in asserting that the public notice failed to apprise the public of the actual new well location proposed by the City. Appellants' Opening Br. 36. While the City's application originally proposed to add its existing Well Nos. 2, 4, and 5 as proposed new points of withdrawal, the City amended the application to propose Well No. 6 as the new point of withdrawal. AR at 000062. Further, Well No. 6 is located within the area described in the public notice. AR at 000271.

Similarly, the Appellants' contention that the ROE fails to describe the location of the new point of withdrawal is not entirely accurate. Appellant's Opening Br. 37. While the description of the location of the well in the text of the ROE is incorrect (apparently as the result of a typographical or ministerial error), the map included in the ROE as Attachment 1 correctly shows Well No. 6's location in Section 23. AR at 000072.

interest” when their ownership relating to the status of the water right at issue is by no means certain. Further, in contrast to the scenario in *Evans*, the “letter and spirit of statutory requirements,” which are set forth in RCW 90.03.280 for notice of water right applications, was met in this case. The notice stated that the water right that the City wanted to change had originally been issued to a member of the Hamilton Family and that it was associated with real property that included land owned by the Appellants. Also, *Asotin County Port District* is inapposite to this case because that case involved a notice with a legal description that was plainly inadequate, while, as explained above, the legal description was fully adequate in the notice at issue in this case.

4. There was no violation of the Appellants’ due process rights

The Appellants erroneously contend that their constitutional right to due process was violated because publication of the notice of the application in the newspaper, and the availability of the decision on Ecology’s website, provided them inadequate notice. *See* Appellants’ Opening Br. 41–46. This argument also suffers from a fundamental flaw in that it presupposes that the Appellants have a property interest in Groundwater Right No. 1726 that entitled them to special notice beyond that which the Legislature has required for water right applications under

RCW 90.03.280. Thus, Appellants are wrong in arguing that they were entitled to special notice of the application, and of the issuance of the Ecology Order that approved the application, because they have an ownership interest in the water right and are not members of the “public at large.”

A vested water right is a property interest that is entitled to due process protection. *Sheep Mountain Cattle Co. v. Dep’t of Ecology*, 45 Wn. App. 427, 430–431, 726 P.2d 55 (1986). But, here, it is entirely uncertain whether the Appellants have a vested ownership interest in Groundwater Right No. 1726, and it would be necessary for title to be quieted in their favor before they can be considered to actually have a property right that would be entitled to special notice by mail or other appropriate means.

The Appellants’ reliance on *Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983) (*Acquavella I*) in support of their position is misplaced for several reasons. First, that case was a general adjudication of water rights, which is a form of quiet title action brought in a superior court to determine who holds water rights, and the scope and extent of such rights, in a specific part of the state. *Dep’t of Ecology v. Grimes*, 121 Wn.2d 459, 466–467, 852 P.2d 1044 (1993). In *Acquavella I*, the Supreme Court held that constitutional due process requirements were

met for individual landowners who received water service from irrigation districts by serving the summons on the irrigation districts rather than the individual landowners. *Acquavella I*, 100 Wn.2d at 659. In contrast, this case does not involve any type of judicial quiet title action. Second, whereas, under RCW 90.03.130, the Legislature prescribed that notice be provided by summons for water rights adjudications through personal service or by certified mail, under RCW 90.03.280, it prescribed notice by publication for water right applications, which involve an administrative process.

And notice by publication of water right applications is reasonably calculated to provide notice of such applications to the public. RCW 90.03.280 has been the law since enactment of the water code in 1917 and no court has ever found it to violate the right to due process. The adequacy of the notice in this case is demonstrated by the fact that several owners of neighboring properties filed comments on the application, and were, thus, adequately apprised.

Appellants' contention that their due process rights were violated because the Ecology Order was not published in the newspaper, but was only posted on Ecology's website, also fails. Appellants' Opening Br. 42. RCW 90.03.280 requires public notice by newspaper publication of water right applications, but does not require publication of Ecology's decisions

on such applications. Initially, the Appellants had the opportunity to file a protest or objections to the application with Ecology to report any concerns they had about ownership of the water right and make objections about the proposed change. WAC 508-12-160, -170. If they had filed a protest, they would have received a copy of the Ecology Order approving the application when it was issued. AR at 000325–345. But they failed to avail themselves of that opportunity.¹³

5. Ecology was not required to return the application to the City for correction

The Appellants close their argument by providing a litany of unpersuasive reasons why they believe this Court should rescind Ecology’s approval of the water right change, return the application to the City, and require the City to obtain the Appellants’ signatures before it could be processed anew. Appellants’ Opening Br. 47–48.

This argument fails at the outset because it, again, presupposes that the Appellants have ownership interests in the water right, which requires their consent before it could be transferred to the City. Further, as

¹³ Ecology went above and beyond what it was statutorily required to do by posting both the draft and final versions of the Ecology Order on its website. Ecology posted a draft version on its website from March 15, 2012, to April 14, 2012, and provided the opportunity for the applicant and members of the public to submit comments to Ecology for its consideration before it finalized the Ecology Order and approved the water right change application. AR at 000320; *see also* AR at 000322. Subsequently, the final version of the Ecology Order was posted on the agency’s website from April 19, 2012, to June 18, 2012. AR at 000320.

discussed in Section IV.B.1, above, the Appellants are mistaken in contending that RCW 90.03.270 imposes no time limit on Ecology's authority to return an application to an applicant. After Ecology finds that the application is complete, and makes a decision on it, this statute does not allow Ecology to return the application and start the process all over again.

The Appellants also are wrong in contending that return of the application is warranted here because the City's water right is "still an inchoate right." The City has made considerable investment in acquiring the water right, establishing the LID, and developing the infrastructure to exercise the water right to provide public water service in the LID area.

In sum, if the Court reaches the merits of Appellants' claim under RCW 34.05.570(b)(4), it should rule in favor of Ecology on Issue No. 4.

V. CONCLUSION

The Appellants' true grievance is with Betty Hamilton, who they believe wrongly sold the water right to the City without Appellants' consent. But instead of bringing a quiet title action against her to attempt to gain some of the proceeds from her sale of the water right, Appellants want the City to bear all the costs or lose the water right. The Court should not allow such an unfair result.

Under RCW 34.05.570(3), Ecology respectfully requests the Court to affirm the PCHB Order on Summary Judgment Motions. Further, the Court should deny the Appellants' RCW 34.05.570(4)(b) claim alleging that Ecology failed to perform a required agency duty. At the outset, this claim should be dismissed because Ecology communication in its letter that it was not going to rescind the water right was not an agency action—and, even if it was, Appellants' petition for judicial review was not timely filed to challenge the letter. Moreover, if the Court deems that a proper claim was timely filed, it should be rejected because the Appellants have not met their burden to prove that Ecology acted in a fashion that was

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inconsistent with the law governing the processing of water right change applications.¹⁴

RESPECTFULLY SUBMITTED this 22nd day of November 2017.

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¹⁴ The Court should deny the Appellants' request for an award of attorneys' fees. With respect to the request for fees pursuant to RCW 4.84.350, even if the Court rules in favor of the Appellants, the Court should find "that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). Further, the Appellants cannot qualify for fees under RCW 64.40.020 and 42 U.S.C. § 1983 because those provisions allow fee awards in successful actions for damages resulting from agency actions to deny applications seeking approval necessary for the use of property. This case plainly does not involve the denial of any application filed by the Appellants. In contrast, the Appellants are contesting Ecology's approval of an application filed by the City.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on November 22, 2017, I caused to be served a copy of State of Washington, Department of Ecology's Response Brief in the above-captioned matter upon the parties herein via the Appellant Court Portal Filing system, which will send electronic notifications of such filing to the following:

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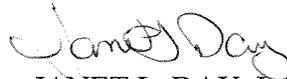
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