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NO. 50567-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MIKE HAMILTON; HAMILTON CORNER I, LLC,

Appellants (Petitioners)

v.

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

Respondents

APPELLANTS' REPLY BRIEF

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1. Overview of Reply to Napavine and Ecology's Responses

After reviewing the response briefs, if there was doubt before, there is none now that Respondents have had every intention of putting into effect a scheme to take Appellants' water rights without due process or compensation. In their circumvention of Appellants' rights, however, Respondents committed error upon error in the processing of Napavine's applications. Respondents' briefs fail to explain or address the materially false information in Napavine's applications; the utter absence of review of impacts to any of Appellants' wells or other water rights; or why Respondents would omit due process notice to Appellants, who are the owners of the Certificate 1726 place-of-use land proposed for change.

Respondents are emphatic in claiming their right to finality (Ecy Br 2; Nap Br 13) of the application and Report of Examination¹ (which is an inchoate water right transfer approval that does not become final until a superseding certificate is issued, see AR 345 at Table I.f - App Br 10), but feign incomprehension of their deliberate actions to take Appellants' property without due process or compensation. Despite Respondents' numerous errors, they want this Court to rule that Appellants have no basis

¹ Ecology, for the first time in its briefing, has re-branded the 2012 Report of Examination, calling it an "Order" in its Response at 7, 9, *et seq.* There is nothing in the ROE (AR 56-73) to indicate that it is an order. Appellants will continue to refer to the document by its entitled name: "Report of Examination" or as abbreviated: "ROE".

to seek agency compliance with RCW 90.03.270 to require Ecology to return Napavine's defective application to the applicant for correction.

Because Appellants own land on which Certificates 1726 and 5605 are appurtenant, Appellants were required to be signatories to Napavine's applications to change those water rights, and at a minimum should have received direct notice from Napavine and Ecology of any actions that could take their property right (App Br 40-43). The applications and ROEs are also defective, and void, for additional significant application-processing errors which violate the requirements of the Water Code. Napavine's applications should be returned, per RCW 90.03.270.

The Pollution Control Hearings Board had authority to accept review of Appellants' appeal of Ecology's 2/5/16 decision because it "pertained to" the "issuance, modification ... of any permit, certificate, or license by the department" per RCW 43.21B.110(1) and WAC 508-12-400 (App Br 11, 16-17). While the PCHB could have reviewed Ecology's procedural defects in processing Napavine's application under an "as applied" challenge (App Br 18-19), ultimately, the PCHB would find it did not have authority, but not for the reason stated in its Order on Summary Judgment (CP 9-17); rather, it is because Napavine's application and ROE had already been rendered void due to application-processing errors and lack of due process to Appellants (App Br 29-30, 35, 38-40).

2. Appellants' Certificate 1726 Water Rights

Respondents assert that Appellants failed to prove they have water rights under the Certificate at issue (Ecy Br 32; Nap Br 8), but have offered nothing to show a relinquishment of any of Appellants' water rights. The documents Appellants put into the record provide prima facie evidence that Certificates 1726 and 5605 are appurtenant to their land.

2.1 Appellants Provided Prima Facie Evidence of their Certificate 1726 Water Rights

Respondents have not disputed the fact that Appellants own, and have continuously owned, the identified property on the east side of I-5² which is primarily in Section 14, T.13N, R.2W (Nap Br 8; also confirmed through assessor records, CP 154-158). All of Section 14 is on the east side of I-5. Petitioners provided the parties, the PCHB, and the Superior Court documentation from the original Certificate 1726 and other Ecology records and analyzed it to current assessor mapping:

Clerks Paper 152 is a map generated from Ecology's Water Resources Explorer depicting the geographical boundary of tax parcels that correspond to Certificate 1726,³ showing the appurtenant lands on both sides of I-5. The exact location of the place-of-use of the water is

² Indeed, the ownership and location of Appellants' land was referenced in the LID appeal heard by this Court in April 2017, No. 49507-4-II.

³ Certificate 1726, when it was a groundwater application used a different numbering system, but for ease of reference in briefing, the parties refer to it as 1726.

legally described on Certificate 1726 (CP 159), describing the place-of-use in both Sections 14 and 15, T.13N, R2W. Similarly, Napavine's Change Application (AR 126-128) also states the place-of-use is in both Sections 14 and 15, T.13N, R.2W. Because the place-of-use includes Section 14, Betty Hamilton was not the landowner of all of the places-of-use of Certificate 1726 as erroneously stated in Napavine's application (AR 128).

Clerks Paper 159 is Certificate 1726 which identifies three original wells within Sections 14 and 15, T.13N. R.2W. Clerks Paper 160 is a map from the 1952 application showing the locations of the three original wells (some notations have been added to the map to clarify current names of locational reference points, but the well demarcations are not altered from the record document). Using the reference points of Kirkland Road, Rush Road, and the railroad, and comparing this information to current assessor mapping (AR 155), the original Well 3 is on Appellants' land in Section 14; Well 2 is now covered over by Interstate-5, and Well 1 is the one and only original Certificate 1726 well on Betty Hamilton's land.

All of the references in Certificate 1726 to place-of-use and wells in Section 14, T.13N, R.2W, is a place-of-use and well on Appellants' property. Respondents have made erroneous statements that Certificate 1726 approved wells only on Betty Hamilton's property (Ecy Br 33; Nap Br 8). Through the examination of assessor mapping and comparison to

Ecology records, it is clearly evident that Certificate 1726 water rights are appurtenant to Appellants' land, both place-of-use and withdrawal point.

This is the type of record examination Ecology should have conducted, and when finding ownership discrepancies, Ecology is required to send the application back to get Napavine to correct it by requiring signatures from all landowners. The Department's Guidance protocols demand this (App Br 24-25 citing AR 90-91); as does WAC 508-12-130 (citing PCHB interpretation *Devine v. Ecology*, PCHB No. 09-075, 09-082 – App Br 29); as does the RCW 90.03.290(1) "duty to investigate" and requirement to also comply with the "rules of the department"; and to comply with RCW 90.03.270 to return a defective application.

2.2 Respondents Failed to Cite Authority or Data to Dispute Appellants' Prima Facie Evidence

In contrast to the information that Appellants' provided, Respondents simply allege, without any data, that Appellants do not have 1726 water rights, and provided nothing to support their conjectures.

2.2.1 Napavine, as the Applicant, was Required to Prove that Other Water Rights are Not Impaired

Respondents attempt to flip the applicant's burden by proffering that Appellants haven't proven that they do have 1726 rights (Ecy Br 32; Nap Br 8). This reversal of proof is a ploy. Napavine was the applicant requesting the change to the water right, and as such, the applicant must

prove its request will not harm other existing water rights, as required under RCW 90.44.100(2)(d). That duty is not fulfilled by suggesting a non-applicant needs to supply the applicant's proof.

2.2.2 *Respondents have No Basis to Exclude Appellants' Non-Irrigation Water Usage*

Respondents assert relinquishment of Appellants' 1726 water rights for anything other than irrigation (Ecy Br 33), but if that were true, then Ecology will need to retract the de facto rights it found for the Betty Hamilton irrigated properties which have been relied upon to transfer to Napavine. Since the time I-5 was built, the land on *both* sides have had commercial services. As stated in the Report of Examination (AR 64-65):

Determination of De Facto Change of GWC 1726

In some situations, changes to historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes.... Such unauthorized changes to existing water rights are commonly referred to as "*de facto*", or a change that has already occurred.

When evaluating unauthorized changes to water rights, Ecology generally considers beneficial use to be the measure of the right, even if some attributes of the right may not be consistent with the current authorization.

Use of water in a manner inconsistent with one's water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful.

Thus, if Respondents really mean to say that Appellants would have lost Certificate 1726 water rights due to changed use (and note that

Respondents provide no evidence of relinquishment), then this argument must apply equally to Napavine for the water rights it seeks west of I-5.

2.2.3 Appellants Use 1726 Water Rights for Irrigation

Respondents next erroneously claim that because Appellants have separate, additional commercial water rights, that means they've not been using the 1726 irrigation rights (Ecy Br 33, Nap 8-9). There has been no analysis of impacts to Appellants' water rights. It is unknown how usage is split between their various water certificates. However, it is a fact that Appellants are indeed beneficially using the Certificate 1726 water rights to irrigate their hayfields within Section 14, as has been stated to

Respondents (AR 9-11), plus it is an easily observable fact in the summer.

Ecology proposes that because Certificate 1726 grants rights to a maximum of 114 acre-feet-per-year, and found beneficial use by Betty Hamilton, et al., of 105 afy, then that proves Appellants are not using this water right (Ecy Br 34). No, that doesn't prove Appellants are not using their share of the 1726 water rights. Because Respondents failed, as part of their preliminary permit tasks, to analyze the impacts of Napavine's change application on Appellants' existing water rights (App Br 21, 32-33), Ecology does not have an accurate accounting of the water being used under Certificate 1726. It is quite possible that the ROE has now over-appropriated the water rights (but unlikely that over-appropriation is

currently occurring because Napavine is not yet using the full capacity of the water authorized through the ROE – see footnote 2: COA 49507-4-II).

2.2.4 Claimed Need for Water Adjudication is Baseless

Respondents are in error in Ecology's misstatement that Petitioners asked the PCHB to resolve a water right ownership dispute, and are also in error that Appellants would first need to undergo an adjudication proceeding against Betty Hamilton to determine their share of the Certificate 1726 water rights (Ecy Br 24-25), (previously responded to at CP 41 citing AR 108-109, 356-357, 403). There is nothing to suggest that Appellants and Betty Hamilton/Hamilton's Walnut Shade LLC would not be able to simply agree on a split, for example, each Family LLC could agree to share the Certificate 1726 water right 50-50. (Betty Hamilton has stated to Appellants she believed she was transferring only her portion of the water rights. She relied on Napavine to properly prepare the documents, and signed the papers that the City asked her to sign.) As discussed at CP 132-133, the newspaper publication (AR 271) identified the rights being transferred were comprised of 27 irrigated acres, and not the full 57 irrigated acres contained in Certificate 1726. Respondents are trying to claim without any factual foundation, that the Hamilton families would have to undergo a long legal battle against each other, instead of simply agreeing on how to divide the 1726 water right.

2.2.5 Napavine's Claim that Fractional Water Rights Do Not Run with the Land is Erroneous

Napavine appears to assert that water rights cannot fractionally run with the land, because if they did, then, for example, the Government would have a claim for its undivided share appurtenant to the land now covered by Interstate-5 (Nap Br 8, 10-11).

As Madison v. McNeal, 171 Wash. 669, 19 P.2d 97 (1933) explained (App Br 40), water rights are descendible by inheritance. Water rights, like other real property, can, and are often are inherited by multiple descendants who retain undivided ownership. When the Government obtained the Interstate-5 land, it did not acquire it by inheritance. The deed (or condemnation proceedings) would have needed to specifically include the water rights if those rights were being conveyed as part of the sale to the Government.

Napavine provided no documentation to show that any portion of the subject water rights were conveyed to the Government along with the right-of-way. As such, the water rights remained descendible by inheritance: from Frank Hamilton to Al Hamilton and now to Mike Hamilton and other family members operating as Hamilton Corner I LLC. Through the authority of RCW 90.03.380, certified water rights remain appurtenant until the water is no longer beneficially used.

2.3 Because Certificate 1726 is Appurtenant to Appellants' Land, Respondents were Required to Obtain their Signatures on Napavine's Application and Provide Due Process Notice of Actions Affecting Appellants' Rights

As identified in the Department's Guidelines for processing water transfer applications, Respondents were required to obtain signatures on Napavine's application from all controlling-interest landowners. Without Appellants' signatures, Napavine's application is defective, cannot be processed, and must be returned to the applicant (App Br 23-26, 46, 48). Respondents also had an obligation, but failed to provide Appellants with due process notice of actions that could affect their water rights, which are property rights (App Br 28-30, 41-48). Respondents do not deny the Department's Guidelines, or the law, and instead make unsupported arguments that Appellants had no right to due process (see pp. 5-9 herein).

3. Duty to Investigate per RCW 90.03.290, and Obligation under RCW 90.03.270 to Require Correction to Defective Application

As Ecology has revealed, it never investigated the property ownership or even reviewed its own water records to confirm all of the water right holders, which information was blatantly misrepresented in Napavine's application. First, Ecology admits it accepted Napavine's application on "good faith" instead of the "duty to investigate" required by RCW 90.03.290 (Ecy Br 35) and then states that it would have conducted a review of Napavine's application IF Appellants had made them aware of

the errors within the 30-day protest/comment period (Ecy Br 35). Due to lack of due process notice to Appellants, that did not occur.

Appellants did, however, upon their later discovery, make both Napavine and Ecology aware of the serious errors with the application and ROE, after which Ecology issued its 2/5/16 letter-decision concluding there would be no corrections made. That is the decision Appellants have appealed, and that is Ecology's decision that "pertains to" the issuance or modification of a permit or certificate, which was appealed per RCW 43.21B.110(1)(d) (discussed herein at pp. 13-15). Although Respondents call it a belated appeal of the application, what Appellants are appealing is Ecology's refusal to perform a duty required by law to be performed, relayed through Ecology's 2/5/16 decision not to require correction to Napavine's defective application (CP 1-7; AR 1-11).

Under RCW 90.03.270, Ecology *shall* return a defective application back to the applicant. Inasmuch as Ecology failed its duty to investigate basic application information, it is not surprising there are errors. Ecology is asking to first be absolved of its duty to have investigated Napavine's application, and next excused from its obligation to return the City's defective application. The Department's own Guidelines anticipate that errors can get discovered after publication, yet the instructions are still to return the application (AR 331, App Br 24-25).

Ecology theorizes that the RCW 90.03.270 requirement to return an application cannot extend past the time a decision is made on the application (Ecy Br 21), but cites no authority. Ecology's theory runs counter to RCW 90.03.330(2) which accommodates the adjustment or revocation of changed/transferred water rights – even for municipal water, if the “certificate was issued with ministerial errors or was obtained through misrepresentation.” Inasmuch as Napavine does not yet have the superseding certificate, Appellants seek enforcement via RCW 90.03.270.

Ecology also theorizes that absent appeal of the application or ROE, there exists no authority to require compliance with RCW 90.03.270 (Ecy Br 21-22). Using that rationale, enforcement of the Water Code would disintegrate into a game of “catch me if you can” where, as here, Ecology and Napavine have counted on being immune from consequences (even throwing blame onto Betty Hamilton, AR 6). Ecology cited no authority that relieves it from the statutory requirement to return a defective application back to applicant for correction, especially, as in the instant case, where the errors violate Appellants' constitutional rights.

4. “Other Agency Action” under RCW 34.05.570(4)

Petitioners appealed the PCHB's Order dismissing their appeal of Ecology's 2/5/16 letter to Superior Court under both RCW 34.05.570(3) requesting reversal of the PCHB's Order on Summary Judgment, as well

as under RCW 34.05.570(4) which sought Superior Court review of “other agency action” appealing Ecology’s refusal to return Napavine’s defective application for correction, required by RCW 90.03.270 (CP 6-7; VR 7-9).

4.1 Initial Appeal to PCHB

Ecology’s 2/5/16 decision pertained to the modification of a water certificate, and thus by definition, was a decision that that the PCHB was authorized to hear under RCW 43.21B.110(1)(d), and as the PCHB has further confirmed WAC 508-12-400, is within its jurisdiction to decide (App Br 11, 16-17). The PCHB has also determined it may hear and decide matters regarding procedural defects under an “as applied” challenge (App. Br. at 18-19). By every legal interpretation, Appellants were required to first exhaust administrative remedies before the PCHB.

4.2 Definition and Interpretation of “Other Agency Action”

RCW 34.05.570(4) – Review of other agency action, provides:

(b) a person whose rights are being violated by an agency’s failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance....

Ecology argues that the definition of “other agency action” implicitly means it cannot include the absence of action “and must be tethered to an actual action of some type by an agency” (Ecy Br 26), yet cites no authority. Ecology’s interpretation is contrary to the holdings in

Muckleshoot in which the Court quotes from the Model State

Administrative Procedures Act:

“[A]gency action” includes everything and anything else that an agency does or does not do, whether its action or inaction is discretionary or otherwise ... The principal effect of the very broad definition of “agency action” is that everything an agency does or does not do is subject to judicial review.

Consistent with the legislature’s intent that the public have greater access to administrative decision making and its express direction that our decisions conform to those of the states and the model act, we will interpret the WAPA’s definition of “agency action” to apply broadly and construe narrowly any exclusions from it.

Muckleshoot Indian Tribe v. Ecology, 112 Wn. App. 712, 722, 50 P.3d 668 (2002) [citing to ULA ADMIN P § 1-102, Cmt.]

Based on the *Muckleshoot* holding, the scope of other agency “action” clearly encompasses agency *inaction*. In our case, Appellants appealed Ecology’s letter-decision refusing to require any correction to Napavine’s application. Appellants have shown Napavine’s application and Ecology’s processing of it to be defective for multiple reasons⁴, yet Ecology still refuses to comply with the RCW 90.03.270 directive to

⁴ Respondents must: (i) obtain appellants’ signatures on Napavine’s application; (ii) provide Appellants with direct, complete, and correct notice of agency actions that affect their property/water rights; (iii) investigate the application; (iv) republish public notice of the application (including correct legal descriptions and the amended withdrawal location to City Well 6); (v) require Napavine to reapply for a preliminary permit to complete all the conditions including performing the omitted analysis of impacts to Appellants’ wells and water rights; and (vi) reissue a new ROE if warranted. (App Br 6-10, 22-48.)

return Napavine’s defective application to correct its multiple errors. Without these necessary corrections to restore due process to Appellants, Respondents continue to violate Appellants’ constitutional rights, for which Appellants seek review under RCW 34.05.570(4)(b).

4.3 Exhaustion of Administrative Remedies

Ecology erroneously states that Appellants were required to file their APA appeal under RCW 34.05.570(4) directly to Superior Court within 30 days after the issuance of Ecology’s 2/5/16 letter (Ecy Br 7). Such an assertion contradicts RCW 34.05.534, which first requires exhaustion of administrative remedies:

A person may file a petition for judicial review under this chapter *only after* exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review...

RCW 34.05.534 (emphasis added).

The exceptions identified at RCW 34.05.534(1)-(3) do not apply. RCW 34.05.534(1) concerns judicial review of a rule, and is inapplicable. RCW 34.05.534(2) applies only if a “statute states that exhaustion is not required”, which our case, there is no other statute invoked to supersede the RCW 34.05.534 prerequisite (quoted above) to exhaust remedies.

RCW 34.05.534(3) states: “The Court may relieve a Petitioner of the requirement to exhaust any or all administrative remedies upon a

showing that ... (b) The exhaustion of remedies would be futile....” This does not require a Petitioner to first prove the exception to the rule, but rather enables the option of requesting to be excused from the requirement to exhaust administrative remedies. That was not an option here, however, since based on the PCHB’s own prior decisions in other matters, the PCHB had authority to hear and decide Petitioners’ appeal, both directly under RCW 43.21B.110(1)(d) and as “an applied” constitutional challenge to review procedural and due process defects (App Br 15-18). It was not a certainty that “exhaustion of remedies would be futile” before the PCHB.

Ecology (Br at 28) also cites, but misses the point in *Muckleshoot Indian Tribe v. Ecology*, 112 Wn. App. 712, 50 P.3d 668 (2002) in describing why Muckleshoot’s Petition to Superior Court was dismissed. The dismissal was not because Petitioner filed it too late while waiting to first exhaust administrative remedies, but rather because Petitioner failed to *serve* its petition on all necessary parties (*Id.*, at 728). Petitioner’s failure to serve all parties is why the Superior Court lacked jurisdiction. In our case, Respondents have not disputed that Appellants both filed and properly served all parties with their Petition.

Respondents’ reliance on *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App 84, 982 P.2d 1179 (1999) (Ecology Br 28) is also misplaced because in that action the Court distinguished that the issue on appeal was

derived from an action made by a federal agency, not from an action made by a State agency (Department of Ecology - “DOE”) and for that reason the Pollution Control Hearings Board had no review authority; hence, no administrative remedy to exhaust. In that situation Appellant Tribe had properly brought its APA Petition directly to the Superior Court:

The normal route of appeal from certain DOE decisions is through the Pollution Control Hearings Board (PCHB)..... DOE argues that its letter encompasses an action reviewable under this provision [RCW 43.21B.110(1)]. The plain language of section (c)⁵ makes clear that it applies only to the “issuance, modification, or termination of any permit, certificate, or license *by the department....*” (Emphasis added.) The “permit, certificate, or license” at issue here is one issued by FERC, not by DOE.

Skokomish Indian Tribe v. Fitzsimmons, Id., at 95-96 (emphasis in original).

If Hamilton Petitioners had tried to file a RCW 34.05.570(4) Administrative Procedures Act Petition to Superior Court without having first gone before the PCHB, Respondents would have instead sought dismissal for failure to exhaust administrative remedies. Even though the PCHB declined to address any of their issues on the merits (App Br 15-19), Appellants still were required to first make the administrative appeal, to exhaust administrative remedies, before bringing the RCW 34.05.570(4) issues to Superior Court. The time for seeking judicial

⁵ Section (c) of RCW 43.21.B.110(1) has since been re-codified as Section (d).

review is tolled. There is no other way to reconcile the 30-day appeal period with the RCW 34.05.534 requirement to “petition for judicial review under this chapter *only after* exhausting all administrative remedies” except to first go through an administrative appeal, even if in the resulting decision, the administrative board declines its jurisdiction.

5. Preliminary Permit Expired Before Conditions were Complete

Ecology’s Response on the expired preliminary permit issue is an exercise in sleight of hand in its attempt to make real facts disappear while diverting attention to an illusion. Ecology agrees that RCW 90.44.100 requires an applicant to prove its proposal to transfer a water right will not impair existing water rights (Ecy Br 4). Obviously, Respondents conducted no analysis of the impacts to Appellants from the City taking their water rights under Certificate 1726, but Appellants also have commercial water rights and wells at Certificates G2-26648, G2-266356, and G2-24573 that no one disputes (Nap Br 8). Yet even for these undisputed rights, Respondents still cannot cite to any analysis having been conducted to determine the impacts of Napavine’s change application upon these Certificates, as required by RCW 90.44.100.

In Respondents’ briefing on the preliminary plat issue, they cannot cite to a single fact that shows there was any review of impacts to any of Appellants’ wells and water rights. If such review of impacts had been

done, then the ROE would have summarized the information, just like it summarized the review conducted of impacts to other water right holders (AR 68-69) and note the reference to “Hamilton” in the ROE is to Betty Hamilton, et al.). Instead, the ROE omits all consideration of Appellants’ water rights and water usage.

Respondents cannot provide proof of completion of preliminary permit conditions for the simple reason that all of the required tasks were not completed (or even conducted in the first place). The illusion Respondents are trying to materialize is that the Department’s 5/20/11 letter (AR 296 – quoted at App Br 34) stating the permit was canceled, somehow served to document completion of the preliminary permit tasks.

The Parties’ variation of interpretation appears to be with the words: “If additional time is needed to gather necessary data...” wherein Respondents assert they didn’t need additional time because, as they now purport, Napavine had completed the requirements (Ecy Br 37). But the preliminary permit tasks were not complete; Respondents have provided no evidence that all conditions were completed; and there is no confirmation from the Department confirming completion.

In particular, *no* data was gathered regarding Appellants’ wells and usage of water rights. The City Engineer proffered in his 4/14/10 letter referencing the testing of Appellants’ wells (AR 285) that: “it would not

be necessary...” (App Br 33). Ecology also cites to this same letter (AR 285) as supposed proof of completion (Ecy Br 6), but in the letter the Engineer admits to having not conducted any analysis of Appellants’ wells (App Br 33 referencing AR 293). There is no corroborating statement from the Department agreeing to omit the analysis of Appellants’ wells, which would be a violation of RCW 90.44.100 if there were, or concurring completion of any of the preliminary permit conditions.

Thus, reviewed *in context*, with the absence of any proof that the preliminary permit tasks were complete, and all the necessary data for review of Appellants’ wells specifically having not been gathered, the Department’s 5/20/11 letter (AR 296) shows beyond a doubt that the preliminary permit expired the year before the ROE was issued, which would render the April 2012 ROE void.

6. Due Process

6.1 Prima Facie Evidence of Appellants’ Water Rights

As analyzed in *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933), water rights can be inherited like real property (App Br 40). Appellants are direct descendants, in an uninterrupted and short chain of title, of the procurer of Certificates 1726 and 5605, and are the current landowners of places-of-use and withdrawal points described on these original Certificates. Appellants inherited these undivided water rights

which remain appurtenant to the land, per RCW 90.03.380. Ecology has failed to identify any fact that shows Appellants have in any manner relinquished their undivided share of these water rights.

6.2 Respondents Failed to Provide Direct or Correct Notice

Respondents do not deny they failed to provide due process notice to Appellants of actions concerning the change of Certificates 1726, and do not deny that the published notice for the application and web-posted ROE contained errors in the legal descriptions.

Respondents argue (Ecy Br 46) that “no court has ever found [notice by publication] to violate the right to due process” and “RCW 90.03.280 requires public notice by newspaper publication....” Appellants agree that newspaper publication is required by the statute, and published public notice *if in addition* to direct notice, would not violate due process. However, as explained in *Sheep Mountain Cattle Co. v. Dep’t of Ecology*, 45 Wn. App. 427, 726 P.2d 55 (1986), due process notice is required to be sent to property owners having a vested interest in the water right (App Br 41-42), and as further explained in *Dep’t of Ecology v. Aquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983), due process notice is defined as mailed or other direct notice (App Br 43).

In responding to the legal description errors, Respondents attempt to distinguish *Pierce County v. Evans*, 17 Wn. App. 201, 563 P.2d 1263

(1977) and *Asotin County Port Dist. v. Clarkston Cmty. Corp.*, 1 Wn. App. 1007, 472 P.2d 554 (1970), as applicable only to tax foreclosures, but the holdings are transferrable. Failure to respond to a tax foreclosure notice can result in the forfeiture of the described property. Respondents have been banking that Appellants will forfeit their water/property rights because they did not protest a newspaper notice or a random website posting of the ROE. The Courts however, have applied due process standards to legal notices for actions that have the potential to result in deprivation of property, wherein the description must be complete and correct. Legal description errors alone can void the action that is the subject of the notice *Pierce County, Id., Asotin, Id.*, (App Br 38-40).

Respondents point to five citizen comment letters received, to demonstrate that the published notice was adequate to apprise some members of the public of the application (Ecy Br 42-43; Nap Br 5), but neglect to tell the whole story about that too: The citizens' letters, wherein they complained they had not previously known about the change application, were submitted in 2010; thus, in fact, they had not responded to the 2007 newspaper notice. Ecology informed these citizens that they were years too late to file a protest (AR 69-70, 106, 112, 279-283).

Because the Report of Examination authorizes Napavine to commence using all the water rights that were determined to be available

from Certificate 1726, that means Respondents have also commenced taking Appellants' water rights, without compensation and without having afforded Appellants due process. This violates Amendments V and XIV, Sec. 1 of the United States Constitution and Article I, §3 and §16 of the Washington State Constitution. The due process violation could have been entirely avoided if Respondents had adhered to the Department's application-processing Guidelines or applied the PCHB's holdings in *Devine v. Ecology*, PCHB Nos. 09-075 and 09-082 (App Br 28-29) by obtaining signatures on Napavine's application from the Appellants.

6.3 Res Judicata is Not Applicable

Respondents assert that because Appellants did not appeal Ecology's 4/17/12 decision rendered through its ROE (which is not an "Order" – see Footnote 1 herein), they cannot "re-litigate" a claim that could have been litigated in a prior action (Ecy Br 23), citing *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) and *Spokane Research & Def Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) as authority. Ecology's argument is flawed at every level.

By definition, res judicata (translated: "a thing adjudged") assumes there has been a judgment. There has been no prior judgment that Appellants could have appealed; therefore, Appellants are not re-litigating. In *Spokane, supra.*, at 106, the Court determined that the Court of Appeals

“erred by denying Connor review on the merits of his claim...” and thus res judicata did not apply. In *Loveridge supra*, at 768-769, the Court determined that the consent decree at issue in the prior federal litigation “bypassed” Loveridge’s interests and “she cannot be precluded by res judicata from pursuing a separate claim.” As has been discussed in our case, Napavine’s application and Ecology’s ROE bypassed all consideration of Appellants rights to Certificate 1726. Correlating the situation here with the consent decree in *Loveridge*, Appellants did not sign Napavine’s application and received no benefit from the ROE.

Respondents do not dispute there was no notice to the public that the ROE was available for viewing on Ecology’s website and no direct notice of it was sent to Appellants. Appellants had no due process notice of the ROE which authorizes Napavine to commence taking Appellants’ water rights. Under the holdings at *In Re Marriage of Swanson*, 88 Wn. App. 128, 143, 944 P.2d 6 (1997): “[C]onstitutional due process interest ... takes precedence over common-law defenses such as res judicata and collateral estoppel, and over a statutory defense such as untimeliness.”

7. Conclusion

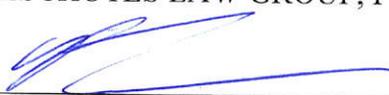
Napavine’s discussion of how its needs (Nap Br 13-15) should override Appellants’ rights almost seems to be a confession. Appellants have no doubt that Napavine’s administration and attorneys were fully

aware of Appellants' water rights in Certificates 1726 and 5605 when they prepared the error-filled applications for Betty Hamilton to sign. They devised a plan to defraud Appellants and take their water rights without notice, consent, or compensation. The Water Code, however, has specific procedures to process applications, and the Department has an entire set of Guidelines for checks and balances to prevent exactly what has happened here. Ecology's failure to adhere to these requirements is inexplicable, and Ecology's continued refusal to correct its errors or return the applications back to Napavine for correction is inexcusable.

Appellants ask this Court to conclude that Napavine's applications to transfer Certificates 1726 and 5605 are void for lack of due process, misrepresented facts, failure to contain Appellants' signatures, and noncompliance with Department and statutory requirements; to conclude Ecology's issued Reports of Examination pertaining to Certificates 1726 and 5605 are invalid; to order Ecology to return Napavine's applications to the City for a complete resubmittal in full compliance with Department and statutory requirements; and award Appellants their attorneys' fees.

SUBMITTED this 14th day of December, 2017.

DESCHUTES LAW GROUP, PLLC


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Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on the date signed below, I e-filed the foregoing document with this Court, and e-served it upon Respondents' attorneys.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 14th day of December, 2017, in Olympia, Washington.



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