

**FILED**

**SEP 28 2010**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 286941

IN THE COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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METHOW VALLEY IRRIGATION DISTRICT,

Petitioner/Appellant,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

and

OKANOGAN WILDERNESS LEAGUE,

Intervenor.

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OKANOGAN WILDERNESS LEAGUE'S RESPONDENT BRIEF

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## INTRODUCTION

Appellant Methow Valley Irrigation District (“MVID”) uses an outdated and inefficient water conveyance system to divert water from the Methow and Twisp Rivers and convey that water to its members. In 2002, Respondent Department of Ecology (“Ecology”) issued an order finding that MVID was wasting water in violation of RCW 90.03.005 and requiring MVID to reduce its wasteful water delivery practices. Clerk’s Papers (“CP”) 234-235 (“2002 Order”). In “*MVID I*,” the Pollution Control Hearings Board (“PCHB”) affirmed Ecology’s 2002 Order and directed Ecology to issue a “supplemental” order “adequate to address [MVID’s] excessive conveyance losses in light of any funding options available.” CP 272-273.<sup>1</sup> The Okanogan County Superior Court affirmed the PCHB’s decision in *MVID I*, CP 743-785, and MVID voluntarily dismissed its appeal to this Court.

The current appeal concerns the “supplemental order” issued by

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<sup>1</sup> The PCHB’s findings in *MVID I*, CP 237-274, are conclusive in this appeal under the doctrine of collateral estoppel. See *Thompson v. Dep’t of Licensing*, 138 Wn.2d 73, 794-99, 982 P.2d 601 (1999); *Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 449 (1998) (describing the elements of collateral estoppel); *Stevens v. Centralia*, 86 Wn. App. 145, 157 (1997) (holding that collateral estoppel applies to judgments rendered in quasi-judicial proceedings). The PCHB decision in *MVID I* was a final judgment on the merits against MVID following a three-day hearing in which MVID fully participated, numerous witnesses provided direct and cross-examination testimony, exhibits were offered and accepted, the issues were fully briefed, and the PCHB made extensive findings of fact and conclusions of law. The decision in *MVID I* was affirmed by the Okanogan County Superior Court in its entirety, CP 785, and the subsequent appeal to Division Three was dismissed pursuant to a stipulation of the parties.

Ecology in December 2003 pursuant to the PCHB's directive in *MVID I*. CP 80-83 ("2003 Supplemental Order"). Both the PCHB and the Okanogan County Superior Court have fully affirmed the 2003 Supplemental Order. Most of the issues raised by MVID in this appeal were either not properly raised below or are precluded by the decisions in *MVID I*. Any issues that do remain before the Court lack merit. Respondent-Intervenor Okanogan Wilderness League ("OWL") accordingly asks the Court to affirm the well-reasoned decisions below upholding the 2003 Supplemental Order and requiring MVID to reform its wasteful water delivery practices.<sup>2</sup>

### **COUNTER-STATEMENT OF ISSUES**

OWL adopts Ecology's counter-statement of issues.

### **COUNTER-STATEMENT OF THE CASE**

#### **I. BACKGROUND**

The Methow River and its tributaries, including the Twisp River, drain the east slope of the North Cascades and flow into the Columbia

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<sup>2</sup> OWL and its members have significant aesthetic and recreational interests in ensuring that MVID does not waste water. CP 260, 262. In addition, OWL's president Lee Bernheisel is injured by MVID's failure to comply with the 2003 Order because he holds interruptible water rights which are interrupted sooner and for longer periods due to MVID's unlawful and wasteful use of water. See CP 262. As the PCHB determined in *MVID I*, "OWL has established the criteria necessary for standing, and MVID's request for dismissal of OWL's case for lack of standing should be denied." CP 262. MVID is barred from re-arguing standing under the doctrine of collateral estoppel, as recognized by the PCHB in its *MVID II* ruling. CP 560; see also *supra* note 1.

River at Pateros. The Methow and Twisp Rivers provide important habitat for three species of salmonids that are protected under the federal Endangered Species Act—the Upper Columbia River spring-run Chinook, Upper Columbia River steelhead, and Columbia River bull trout. See CP 240, 271-272. These rivers also provide numerous recreational and aesthetic opportunities and supply Okanogan County residents with water for domestic consumption, irrigation, and other beneficial uses.

MVID diverts water from the Methow and Twisp Rivers and conveys that water to irrigators on both sides of the Methow River through two open, unlined canals that were constructed in the early 1900s. CP 238-239. MVID's "West Canal" is 12.5 miles long and diverts water from the Twisp River above the town of Twisp. CP 239. MVID's "East Canal" is 15.5 miles long and diverts water from the Methow River upstream of its confluence with the Twisp River. CP 239.

MVID's diversions from the Methow and Twisp Rivers adversely impact flows in those rivers, particularly during low-flow periods. CP 246. MVID's East Canal diverts approximately one-quarter of the natural flow of the Methow River during September low-flow conditions. CP 246. MVID's West Canal diverts approximately half of the natural flow of the Twisp River during September low-flow conditions. CP 246.

MVID's canal system conveys water less efficiently than other

irrigation systems in Okanogan County and in Washington State. CP 267. A 1975 report by the USDA Soil Conservation Service found that MVID's West Canal is "near failure," and its East Canal was built in "sandy areas where seepage is high and banks are unstable." CP 241. A 1990 engineering report prepared for MVID by Klohn Leonoff Consulting Engineers found that MVID's "system has deteriorated considerably and most of the canal structures are currently in poor condition" and that MVID's "canals have high seepage losses and many of the turnout structures leak when shut off." CP 243. A report issued by the Montgomery Water Group in 1996 for MVID and Ecology found that the overall conveyance efficiency for MVID's canal system was only 20 percent. CP 248.

In 1990, following issuance of the Klohn Leonoff Report, MVID adopted Resolution 90-2, which acknowledged that "the MVID delivery system is grossly inefficient and wasteful of state waters" and that the "inefficient surface diversion and wasteful delivery system is detrimental to MVID patrons, instream resources, fisheries, and hydroelectric power generation . . . ." CP 745. MVID resolved to "discontinue its wasteful practices and greatly improve the efficiency of its delivery system . . . ." CP 745.

Pursuant to MVID's 1990 resolution, MVID and Ecology

contracted with the Montgomery Water Group to study MVID's canals and develop long-term alternatives for improving MVID's water delivery system. CP 245. In 1996, the Montgomery Water Group proffered four alternative plans for reducing MVID's waste of water. CP 249. The Montgomery Water Group's preferred alternative was for MVID to reduce its service area and replace its canal system with a pressurized piped system fed by groundwater wells (hereinafter "pressurized pipe plan"). CP 249.

In October 1998, MVID's Board approved implementation of the pressurized pipe plan recommended by the Montgomery Water Group. CP 251. The Bonneville Power Administration entered into a funding contract with Ecology in 1999 that committed approximately \$2.8 million to fund the plan, Ecology pledged to provide more than \$2 million for the plan, and the Washington Department of Fish and Wildlife promised to provide an additional \$275,000. CP 251-252. Despite the availability of public funding for the pressurized pipe plan, in July 2000, MVID withdrew its commitment to proceed with the plan. CP 254-255. Although MVID did reduce its service area, the rest of the pressurized pipe plan was never implemented. CP 254.

## **II. 2002 ORDER**

In December 2001, after it became clear that MVID would not

implement the pressurized pipe plan or take other steps to meaningfully reduce its wasteful water delivery practices, Ecology issued a notice of violation informing MVID that its conveyance system was wasting water in violation of the Water Code, which requires Ecology to reduce “wasteful” water delivery practices “to the maximum extent practicable . . . .” CP 256, *see also* CP 263. Thereafter, on April 29, 2002, Ecology issued an administrative order directing MVID to reduce its diversions. CP 234-235 (“2002 Order”). The 2002 Order required MVID to limit its diversion from the Twisp River to 29 cubic feet per second (“cfs”) and 7,367 acre-feet annually, and to limit its diversion from the Methow River to 24 cfs and 5,829 acre-feet annually.<sup>3</sup> CP 235.

MVID sought review of the 2002 Order by the PCHB on the ground that Ecology had improperly limited the full exercise of MVID’s water rights, illegally conducted an adjudication of MVID’s water rights, and violated its procedural and constitutional rights. CP 261.

Respondent-intervenor Okanogan Wilderness League (“OWL”) also sought review of the 2002 Order, arguing that Ecology had failed to fully meet its responsibility under RCW 90.03.005 to reduce MVID’s wasteful

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<sup>3</sup> Washington water rights are typically limited by both the rate at which water may be diverted or pumped (the instantaneous quantity, typically measured in “cubic feet per second” or “cfs”), and the total quantity of water used each year (the annual quantity, typically measured in “acre-feet”). *See, e.g.*, RCW 90.03.240.

water delivery practices to the “maximum extent practicable.” CP 271-273.

On August 20, 2003, after a three-day evidentiary hearing, the PCHB affirmed Ecology’s determination that MVID was wasting water in violation of RCW 90.03.005. CP 273. The PCHB concluded that the “MVID water distribution system is extremely inefficient,” MVID’s excessive diversions from the Methow and Twisp Rivers “are inconsistent with the requirement for reasonable efficiency,” and MVID’s “wasteful actions provide a legitimate basis for Ecology’s enforcement efforts.” CP 267, 270. However, while affirming Ecology’s waste violation finding, the PCHB agreed with OWL that the 2002 Order failed to reduce MVID’s waste of water to the “maximum extent practicable” as required by RCW 90.03.005. CP 271-273. The PCHB explained that, even if MVID were to comply with the limits in the 2002 Order, MVID’s system would still “lose approximately 70 percent of all the water it diverts during conveyance” and that “[t]his level of waste is not necessary when public funding for a conveyance system with no appreciable conveyance loss was, and may still be, available . . . .” CP 272. The PCHB accordingly instructed Ecology to issue a “supplemental” order “adequate to address [MVID’s] excessive conveyance losses in light of any funding options available.” CP 272-273.

MVID appealed the PCHB's decision on the 2002 Order to the Okanogan County Superior Court on procedural and substantive grounds. On May 20, 2005, the Superior Court issued a decision affirming the PCHB's decision in its entirety. CP 785. The Superior Court specifically held that Ecology has "authority to issue orders and institute administrative proceedings to prevent waste", CP 773, and that "[w]hen looking at the whole picture, only one conclusion is possible: MVID's water delivery system is grossly inefficient and wasteful of water", CP 780. The Superior Court rejected two arguments that were nearly identical to those MVID raises in the instant appeal. First, the Superior Court rejected MVID's claim that Ecology had violated RCW 90.03.605, finding instead that "Ecology's actions substantially compl[ied] with the procedure" required in that statute. CP 773. Second, the Superior Court rejected MVID's due process claims, holding that MVID "had a full opportunity to meet [the] accusation [of waste] in a fair hearing" and, accordingly, MVID's "due process rights have not been violated." CP 784. MVID appealed the decision to Division Three but then withdrew its appeal by stipulation on September 12, 2005.

### **III. 2003 SUPPLEMENTAL ORDER**

In remanding the 2002 Order, the PCHB directed Ecology to reexamine MVID's "system with the goal of issuing a supplemental order

adequate to address excessive conveyance losses in light of any funding options available.” CP 273. Ecology responded to these instructions by issuing a supplemental order to MVID on December 19, 2003. CP 80-83 (“2003 Supplemental Order”). The 2003 Supplemental Order, which was based in large measure on a professional engineering analysis conducted by Ecology engineer Daniel Haller, imposed the following requirements on MVID:

First, the 2003 Supplemental Order required MVID to install and maintain one or more measuring devices to allow determination of the quantity of water entering the MVID East Canal from the Barkley Ditch by April 1, 2004, and to report these measurements to Ecology on a monthly basis.<sup>4</sup> CP 81-82. Ecology prescribed this requirement to prevent double-dipping, *i.e.*, to ensure that any water being diverted by MVID for alleged use on Barkley Irrigation Company lands is not duplicative of water being diverted by Barkley for the same purpose. CP 558. Ecology estimated that the Barkley Ditch contribution to the MVID system was approximately 13.3 cfs. CP 558.

Second, the 2003 Supplemental Order established interim

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<sup>4</sup>MVID has an obligation to supply water to the Barkley Irrigation Company under a 1921 agreement in which MVID agreed to supply water to Barkley in exchange for permission to use an existing irrigation canal. CP 241. The Barkley lands are not located within MVID’s boundaries and are served by independent water rights. CP 241. Barkley also maintains a separate diversion structure on the Methow River which is not managed by MVID.

diversion limits for the period from April 1, 2004, until September 15, 2006. CP 82. During this interim period, MVID was prohibited from diverting more than 21 cfs and 5,161 acre-feet annually from the Twisp River. CP 82. Also during the interim period, MVID was prohibited from diverting more than 20 cfs and 4,909 acre-feet annually from the Methow River (including amounts entering MVID's East Canal from the Barkley Ditch). CP 82. Ecology intended that MVID would comply with these interim limits through sound management practices and without the need for capital improvements to its conveyance infrastructure. CP 545-546.

Third, the 2003 Supplemental Order prescribed final diversion limits effective after September 15, 2006. CP 82. The final limits for MVID's diversion from the Twisp River are 11 cfs and 2,716 acre-feet annually. CP 82. The final limits for MVID's diversion from the Methow River (including amounts entering MVID's East Canal from the Barkley Ditch) are 20 cfs and 4,909 acre-feet annually (the same as the interim limits). CP 82. In order to achieve these final diversion limits, Ecology determined that MVID would have to increase its overall conveyance efficiency to at least 54 percent. CP 571. Ecology believed this efficiency level could be achieved through sound management practices in combination with the targeted improvements to MVID's lower West Canal that were discussed in a report by Ecology's engineer, Mr. Haller

(“Haller Report”). CP 571-574.

The 2003 Supplemental Order provided the following clear instructions to MVID on how it could appeal the decision:

This Order may be appealed pursuant to RCW Chapter 43.21B. The person to whom this Order is issued, if he or she wishes to file an appeal, must file the appeal with the Pollution Control Hearings Board within thirty (30) days of receipt of this Order. Send the appeal to: Pollution Control Hearings Board, P.O. Box 40903, Olympia, Washington 98504 0903. At the same time, a copy of the appeal must be sent to: Department of Ecology, Water Resources Appeals Coordinator, P.O. Box 47600, Olympia, Washington 98504-7600.

CP 83. MVID followed these instructions and appealed the 2003 Supplemental Order to the PCHB. *See* Administrative Record (“AR”) Vol. 1, Doc. 63. MVID’s notice of appeal to the PCHB did not assert violations of RCW 90.03.605. *See* AR Vol. 1, Doc. 63. However, MVID did claim that Ecology’s issuance of the 2003 Supplemental Order deprived MVID of due process. AR Vol.1, Doc. 63, Pp. 11-12. MVID did not serve any timely discovery in preparation for the PCHB hearing, although it attempted to engage in discovery after the cut-off date established by the PCHB. AR Vol. 3, Doc. 29; *see also* AR Vol. 3, Doc. 28.

After filing its appeal with the PCHB, MVID moved to stay the 2003 Supplemental Order pending resolution of the PCHB’s review. AR

Vol. 1, Doc. 52. In response to MVID's stay motion, Ecology submitted to the PCHB and served on MVID a declaration from Mr. Haller that included the Haller Report. AR Vol. 1, Doc. 50 (Exhs. 1 & 2); AR Vol. 1, Doc. 50 (Certificate of Service); *see also* CP 32 ("There is no support in the record for MVID's claim that it did not receive Dan Haller's report in a timely manner."); *see also* Transcript of Proceedings ("TR") 50-51. The PCHB declined to stay the 2003 Supplemental Order. AR Vol. 2, Doc. 38, Pg. 10.

On November 16, 2004, the PCHB issued an Order on Collateral Estoppel. AR Vol. 3, Doc. 25. The PCHB determined that MVID was precluded from litigating several issues that were decided in *MVID I*, including whether the 2003 Supplemental Order was "an unlawful adjudication of MVID's water rights," whether "MVID's due process rights [were] violated by Ecology's actions," and whether the PCHB's decision in *MVID I* "improperly required Ecology to exercise a discretionary duty." AR Vol. 3, Doc. 25, Pp. 9-10.

Thereafter, on May 9, 2005, the PCHB affirmed the 2003 Supplemental Order in its entirety, reaffirming that MVID's existing system violates RCW 90.03.005 because it does not reduce waste to the maximum extent practicable. CP 571, 578. The PCHB expressly upheld the diversion limits and other measures prescribed in the 2003

Supplemental Order as consistent with the requirements of RCW 90.03.005 and the prohibition on waste articulated in *Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993). CP 571-577. In its ruling, the PCHB recognized that MVID was collaterally estopped from challenging the 2003 Supplemental Order on due process grounds, CP 560-561, and declined to consider whether Ecology had violated RCW 90.03.605 because “the legal issue addressing RCW 90.03.605 was not raised at the pre-hearing conference, during the collateral estoppel motion, or at any time prior to the hearing,” CP 562.

MVID submitted a timely petition to the Okanogan County Superior Court seeking review the PCHB’s decision affirming the 2003 Supplemental Order. CP 520-526. In a memorandum decision issued on July 13, 2007, Superior Court Judge Jack Burchard affirmed the PCHB’s decision upholding the 2003 Supplemental Order, specifically determining that the PCHB’s findings of fact were supported by substantial evidence in the record, and that the requirement that MVID measure water entering its East Canal from the Barkley Ditch was reasonable and feasible. CP 35. In so ruling, the Superior Court determined that the 2003 Supplemental Order did not require “Ecology to start all over or to ignore the history of MVID’s waste of water and failure with voluntary compliance” and that Ecology had “demonstrate[d] substantial compliance with RCW

90.03.605.” CP 30-31.

In November 2009, after settlement negotiations between Ecology and MVID collapsed, Ecology moved the Superior Court for entry of a final order and MVID moved for reconsideration. MVID argued that new evidence indicated that it would be more expensive and difficult for MVID to comply with the final diversion limits prescribed in the 2003 Supplemental Order than initially anticipated by Ecology, the PCHB, and the Court. CP 72-78. On December 14, 2009, the Court entered Ecology’s proposed order and denied MVID’s motion for reconsideration, concluding that MVID’s request was “not supported by fact or law . . . .” CP 149. MVID thereafter timely appealed to this Court. CP 147.

#### **STANDARD OF REVIEW**

MVID alleges that the PCHB erred by affirming 2003 Supplemental Order because Ecology issued that Order in violation of the procedures in RCW 90.03.605 and without providing MVID due process of law. MVID Br. at 22-35. Because these challenges were brought under Washington Administrative Procedure Act (“APA”), chapter 34.05 RCW, this Court “sits in the same position as the superior court and applies the standards of review in RCW 34.05.570 directly to the agency record.” *Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998) (citing *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d

494 (1993)). The Court's review under the APA is limited to the administrative record before the PCHB at the time it made its decision. RCW 34.05.558.

MVID also challenges the Superior Court's denial of its motion for reconsideration. MVID Br. at 35-38. The Court should review this challenge for an abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). Under the abuse of discretion standard, this Court should affirm the lower court decision unless the appellant demonstrates that it was "manifestly unreasonable, based on untenable grounds, or granted for untenable reasons." *In re Marriage of Schumacher*, 100 Wn. App. 208, 211, 997 P.2d 399 (2000).

### **SUMMARY OF ARGUMENT**

Most of MVID's arguments are not properly before the Court, either because they were not raised below, or because they relate to issues previously decided in *MVID I*. The remaining issues that are before the Court lack merit.

Issues concerning Ecology's compliance with RCW 90.03.605 are not before the Court because they were not properly or timely raised by MVID before the PCHB. Under the APA, this Court may only consider issues that were properly raised before the agency. Even if properly

before the Court, MVID's arguments lack merit given the determination in *MVID I* that Ecology substantially complied with RCW 90.03.605 when issuing the 2002 Order. The 2003 Supplemental Order was a supplement to the 2002 Order which merely adjusted the remedy for violations that were addressed in the 2002 Order and were fully and finally adjudicated in *MVID I*. Accordingly, there was no need for Ecology to once again explore the voluntary compliance option in RCW 90.03.605 when issuing the 2003 Supplemental Order.

Issues concerning procedural due process are not before the Court because they were not properly raised before the Superior Court. MVID's Petition for Review does not contain a due process claim, and its briefs before the Superior Court contain only two passing references to due process, without citations to authority or legal argument. If these issues are properly before the Court, MVID's arguments lack merit because the claim that Ecology "withheld" the Haller Report is factually baseless – Ecology in fact served MVID with the report seven months before the hearing. Additionally, MVID is collaterally estopped from asserting that it was entitled to notice and an opportunity for a hearing before Ecology issued the 2003 Supplemental Order because the same issue was actually litigated and decided against MVID in *MVID I*.

The Superior Court did not abuse its discretion in denying MVID's

motion for reconsideration. The motion was based on new evidence that was not part of the administrative record and thus not properly before the Superior Court. MVID failed to show that any of the exceptions set forth in RCW 34.05.562(1) allowed consideration of this evidence.

Furthermore, even if the Superior Court had considered the new evidence, it was not sufficient to establish that any of the PCHB's findings were not supported by substantial evidence.<sup>5</sup>

## **ARGUMENT**

### **I. ECOLOGY DID NOT ISSUE THE 2003 SUPPLEMENTAL ORDER IN VIOLATION OF RCW 90.03.605.**

MVID contends that Ecology violated RCW 90.03.605 in issuing the 2003 Supplemental Order because Ecology allegedly did not “work with the water user, as a cooperative arm of the government, to ensure that citizens’ water rights are fully protected.” MVID Br. at 29. Particularly, MVID appears to believe that Ecology violated RCW 90.03.605 because it did not issue a “Notice of Violation in accordance with RCW 43.27A.190,” MVID Br. at 30, and because it allegedly withheld the Haller Report, which contained “critical information [that] was held and undisclosed to MVID,” MVID Br. at 33.

At the outset, the Court should note that this argument is based on

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<sup>5</sup> OWL adopts Ecology's response to MVID's lengthy arguments that the PCHB's findings are not supported by substantial evidence.

a faulty factual premise—Ecology did in fact provide the Haller Report to MVID well before the PCHB hearing on the 2003 Supplemental Order. Specifically, the record shows that Ecology submitted Mr. Haller’s analysis to the PCHB and served it on MVID on May 3, 2004, in connection with MVID’s motion for a stay of Ecology’s order. AR Vol. 1, Doc. 50 (Exhs. 1 & 2); AR Vol. 1, Doc. 50 (Certificate of Service); *see also* CP 32 (“There is no support in the record for MVID’s claim that it did not receive Dan Haller’s report in a timely manner.”). The PCHB evidentiary hearing did not take place until December 6, 2004, which was more than seven months after MVID was provided with Mr. Haller’s analysis. *See* CP 534. The record also indicates that Ecology identified the Haller Report in an exhibit list provided to MVID on February 2, 2004, over ten months before the hearing. AR Vol. 1, Doc. 60.

Accordingly, the record conclusively demonstrates that MVID had ample opportunity to prepare its response to the Haller Report—any blame for MVID’s failure to adequately prepare a response cannot be attributed to Ecology, but must rather be the responsibility of those who failed to diligently review Ecology’s disclosures and attachments and prepare their response to such records. However, even if it were true that Ecology withheld the Haller Report, the Court should reject MVID’s claims that Ecology issued the 2003 Supplemental Order in violation of RCW

90.03.605.

**a. MVID Has Waived Its Right to Assert Violations of RCW 90.03.605.**

As a threshold matter, MVID waived its right to assert violations of RCW 90.03.605 by not properly raising the issue before the PCHB in its appeal of the 2003 Supplemental Order. Indeed, the PCHB's presiding officer ruled that MVID's challenge to Ecology's adherence to the procedures of RCW 90.03.605 was beyond the scope of this proceeding because MVID failed to put the other parties on notice of this issue prior to the hearing on the 2003 Supplemental Order. In its Final Order, the PCHB explained:

MVID raised a legal issue for the first time at the hearing, relating to whether Ecology's actions complied with RCW 90.03.605. Although MVID was represented by counsel throughout the pre hearing process for this case, the legal issue addressing RCW 90.03.605 was not raised at the pre-hearing conference, during the collateral estoppel motion, or at any time prior to the hearing. Allowing a new legal issue and theory to be interjected for the first time at the hearing, without any notice to the other parties to prepare evidence and argument on that issue, would have prejudiced the parties. Accordingly, the issue was not included in the hearing and is not addressed in this decision.

CP 562; *see also* TR 623 (noting that RCW 90.03.605 "falls outside the issues that were identified in advance of the hearing as required by the Board's process.").

This decision is consistent with PCHB rules, which require a notice of appeal to contain a “clear, separate, and concise statement of every error alleged to have been committed.” RCW 43.21B.310(4)(d); *see also* WAC 371-08-340(4) (requiring a “short and plain statement showing the grounds upon which the appealing party considers such order or decision to be unjust or unlawful.”). MVID cannot deny that its notice of appeal to the PCHB failed to assert a claim or issue under RCW 90.03.605 or that that MVID failed to raise this procedural issue until the evidentiary hearing. Given that PCHB rules require that issues be raised in the Notice of Appeal, the PCHB correctly concluded that the issue was not properly before it and correctly declined to consider the issue, as was recognized by the Superior Court in the subsequent appeal. CP 32 (“MVID failed to timely raise this issue before the PCHB.”).

Because the issue was not properly raised before the PCHB, this Court should decline to hear it on appeal. *See* RCW 34.05.554(1) (Except in limited circumstances not applicable here, “[i]ssues not raised before the agency may not be raised on appeal . . . .”); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 75, 110 P.3d 812 (2005) (Plaintiff “could not raise its equitable estoppel claim for the first time before the superior court” because the claim was not first raised before the PCHB.); *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 597, 13 P.3d 1076

(2000) (“RCW 34.05.554 precludes appellate review of issues not raised below.”).

**b. Ecology Did Not Violate RCW 90.03.605 In Issuing The 2003 Supplemental Order.**

If the Court nonetheless reaches the issue, it should reject MVID’s claim that Ecology failed to follow the procedures set forth in RCW 90.03.605. Simply put, MVID’s arguments are based on an incomplete reading of the statute and an analysis that is far removed from the facts of this case.

RCW 90.03.605, in its entirety, provides as follows:

(1) The department shall, through a network of water masters appointed under this chapter, stream patrollers appointed under chapter 90.08 RCW, and other assigned compliance staff to the extent such a network is funded, achieve compliance with the water laws and rules of the state of Washington in the following sequence:

(a) The department shall prepare and distribute technical and educational information to the general public to assist the public in complying with the requirements of their water rights and applicable water laws;

(b) When the department determines that a violation has occurred or is about to occur, it shall first attempt to achieve voluntary compliance. As part of this first response, the department shall offer information and technical assistance to the person in writing identifying one or more means to accomplish the person's purposes within the framework of the law; and

(c) If education and technical assistance do not achieve compliance the department shall issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess penalties under RCW 90.03.600 unless the noncompliance is corrected expeditiously or the department determines no impairment or harm.

(2) Nothing in the section is intended to prevent the department of ecology from taking immediate action to cause a violation to be ceased immediately if in the opinion of the department the nature of the violation is causing harm to other water rights or to public resources.

(3) The department of ecology shall to the extent practicable station its compliance personnel within the watershed communities they serve. To the extent practicable, compliance personnel shall be distributed evenly among the regions of the state.

(emphasis added). Even a cursory reading of this statute demonstrates, as the Superior Court concluded, that there are “several reasons” why the Court should reject MVID’s argument that Ecology violated RCW 90.03.605 in issuing the 2003 Supplemental Order. *See* CP 31-32.

For example, MVID argues that in issuing the 2003 Supplemental Order, Ecology violated RCW 90.03.605(1)(b) because it failed to “provide[] ‘in writing’ any ‘information and technical assistance’ ‘identifying one or more means to accomplish [MVID’s] purpose within the framework of the law’ before the [2003] Order issued.” MVID Br. at 34. However, MVID’s argument fails to appreciate the first clause of RCW 90.03.605(1)(b), which requires Ecology to offer such information

and technical assistance only “[w]hen the department determines that a violation has occurred or is about to occur . . . .” RCW 90.03.605(1)(b) (emphasis added).

In the instant case, Ecology determined that the violation occurred when it issued the 2002 Order, not when it issued the 2003 Supplemental Order in response to the PCHB’s remand. The 2003 Supplemental Order is exactly what its title connotes – it supplements the previous order with additional remedies for violations of the Water Code that were fully and finally adjudicated in *MVID I*. Indeed, in *MVID I*, the PCHB not only affirmed Ecology’s conclusion that MVID’s existing delivery system violated the Water Code’s prohibition against waste, it also required Ecology to “re-examine the MVID diversion and distribution system with the goal of issuing a further or supplemental order adequate to address excessive conveyance losses in light of any funding options that may be available.” CP 272-273. That directive was based on the PCHB’s conclusion that the “water duties allowed under the [2002] order and the anticipated conveyance losses are much greater than can be justified under the *Grimes* case, standards in the industry, or the Board’s prior decisions” and because “[s]ignificant public funding is still available to upgrade the system.” CP 272.

Thus, the procedures Ecology followed in issuing the 2003

Supplemental Order should not be viewed in isolation, but should be considered along with the procedures followed in issuing the 2002 Order, which the Superior Court determined “substantially compl[ied]” with RCW 90.03.605. In the *MVID I* appeal, Judge Burchard explained that Ecology had complied with RCW 90.03.605 because:

(a) Ecology has provided significant quantities of technical and educational material to MVID and its members over a period of about 30 years in order to assist them in compliance.

(b) The Department for years has attempted to achieve voluntary compliance. The Department has funded numerous studies and reports. It participated in assembling funding contacts with a value of over \$5 million for rehabilitation of MVID’s system. It assisted in the exclusion of about 115 irrigators and separately funded rehabilitation of laterals. It continued to work with MVID, even when the reconstituted Board rejected a preferred alternative that had been funded and accepted for many years.

(c) When education and technical assistance did not achieve compliance and the District maintained the claimed right to divert 24,922 acre-feet per year, Ecology issued a “formal administrative order under RCW 43.27A.190.

CP 773-774; *see also* CP 31 (“[T]he PCHB Order did not direct Ecology to start all over or to ignore the history of MVID’s waste of water and failure with voluntary compliance.”).<sup>6</sup> Accordingly, when viewed in

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<sup>6</sup> To the extent MVID is arguing that the PCHB lacked authority when it issued the 2002 Order to require Ecology to issue a “supplemental order” rather than a completely new order, *see* MVID Br. at 29, MVID is barred by *res judicata* from raising that argument now because it could have been raised in MVID’s direct appeal of the 2002 Order. *See*

historical context, it is clear that Ecology worked diligently to achieve MVID's voluntary compliance and discharged its obligations under RCW 90.03.605(1)(b) despite MVID's continued recalcitrance.

MVID also appears to believe that Ecology violated RCW 90.03.605(1)(c) because it did not issue a notice of violation prior to issuing the 2003 Supplemental Order. MVID Br. at 30. This argument plainly disregards the language in paragraph (1)(c) of the statute, which authorizes Ecology to "issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess penalties under RCW 90.03.600" unless the noncompliance is corrected expeditiously. RCW 90.03.605(1)(c) (emphasis added). As demonstrated by the legislature's use of the disjunctive "or," the statute authorizes Ecology to issue a notice of violation in lieu of an administrative enforcement order, but it does not make issuance of a notice of violation a condition precedent for an enforcement order. MVID's argument to the contrary is incompatible with the plain statutory language.

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AR Vol. 3, Doc. 25, Pg. 10 (PCHB Order on Collateral Estoppel) (review of the issue is precluded because "[t]his issue would properly be included in the appeal of the Board's decision in MVID I"); *see also Mellor v. Chamberlin*, 100 Wn.2d 643, 646, 673 P.2d 610 (1983) ("A final judgment on the merits bars parties or their privies from relitigating issues that were or could have been raised in that action.") (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)).

MVID also argues that Ecology's failure to disclose the Haller Report with the 2003 Supplemental Order was a statutory violation. MVID Br. at 33-35. However, nothing in RCW 90.03.605 requires Ecology to include the methodologies and reports supporting its decision with an administrative order issued under that provision. Rather, under RCW 43.27A.190, which governs issuance of administrative orders under RCW 90.03.605, Ecology is only required to:

specify the provision of the statute, rule, regulation, directive or order alleged to be or about to be violated, and the facts upon which the conclusion of violating or potential violation is based . . . .

RCW 42.27A.190. This provision did not require Ecology to include in the 2003 Supplemental Order the methodology or studies that served as the basis for the Order, such as the Haller Report. Rather, it merely required Ecology to disclose sufficient information to MVID "to ensure parties subject to legal requirements have the information necessary to voluntarily comply." *MVID v. Ecology*, No. 04-165, 2010 WL 1045687, \*7 (PCHB Mar. 18, 2010); *see also Nisqually Delta Ass'n v. City of Dupont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985) ("The purpose of notice statutes is to apprise fairly and sufficiently those who may be affected of the nature and character of an action so they may intelligently prepare for the hearing."). Ecology thus included all that was required in

the 2003 Supplemental Order, which cited to RCW 90.03.005 as the basis for the Order and provided a summary of the facts supporting the Order and the diversion limits MVID would have to satisfy for voluntary compliance. *See* CP 80-82.<sup>7</sup>

Finally, MVID's argument that Ecology issued the 2003 Supplemental Order in violation of RCW 90.03.605 ignores RCW 90.03.605(2), which makes it clear that the statute should not be read to frustrate Ecology's ability to take "immediate action to cause a violation to be ceased immediately if in the opinion of the department the nature of the violation is causing harm to other water rights or to public resources." *See also* Senate Bill Rep. for H.B. 2993 (Mar. 13, 2002) ("If other water rights or public resources are being harmed, the department [of Ecology] can take action to stop a violation immediately." (emphasis added)).

As the PCHB recognized in *MVID I*, MVID's East Canal diverts approximately one-quarter of the natural flow of the Methow River during September low-flow conditions, while the West Canal diverts approximately half of the natural flow of the Twisp River during September low-flow conditions. CP 246. These substantial diversions, as the PCHB recognized, have impacts on the ESA-listed salmonids in the

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<sup>7</sup> Of course, MVID certainly had the opportunity to obtain additional information from Ecology on the reasoning supporting the 2003 Supplemental Order through the Public Records Act or discovery, but MVID declined to engage in discovery in a timely manner. *See supra* at 11.

Methow and Twisp Rivers, water quality in the Rivers, and other water rights in the Basin. *See* CP 271-272. Accordingly, the Board directed Ecology to issue a supplemental order “adequate to address excessive conveyance losses in light of any funding options available.” CP 272-273. In light of the Board’s findings and directives, RCW 90.03.605 cannot be read to bar Ecology from taking “immediate action” to address MVID’s wasteful water conveyance practices.

## **II. ECOLOGY PROVIDED MVID WITH DUE PROCESS OF LAW.**

MVID proffers several half-baked due process theories. First, MVID appears to believe that Ecology’s failure to disclose the Haller Report with the 2003 Supplemental Order deprived MVID’s experts of the “opportunity . . . to have focused their hearing preparation analysis and testimony on the credibility of the [Haller Report].” MVID Br. at 27. Second, MVID contends that the 2003 Supplemental Order should be void because it was “based on a hearing for which there was no adequate notice.” MVID Br. at 28. Third, MVID argues that Ecology acted “unscrupulously” by withholding the Haller Report. MVID Br. at 28. Finally, MVID apparently asserts that Ecology was constitutionally required to provide MVID with notice and an opportunity for a hearing *before* issuing the 2003 Supplemental Order. MVID Br. at 22 (citing

*Sheep Mountain Cattle Co. v. Ecology*, 45 Wn. App. 427, 430-31, 726 P.2d 55 (1986)). If the Court reaches any of these theories—which it need not because they were not adequately raised in proceedings before the Superior Court—it should hold that none are persuasive.

As discussed above, Ecology complied with applicable procedural requirements when it issued the 2003 Supplemental Order. *Supra* at 17-28. Accordingly, the Court should construe MVID’s due process theories as applied challenges to the constitutionality of the statutory procedures themselves. *See Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn. App. 411, 425, 12 P.3d 1022 (2000), *abrogated on other grounds, Fisk v. City of Kirkland*, 164 Wn.2d 891, 894, 194 P.3d 984 (2008). Because statutes are presumed constitutional, a party seeking to overcome that presumption has a heavy burden to prove the statute’s unconstitutionality beyond a reasonable doubt. *E.g., Washington Fed’n of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995) (applying reasonable doubt standard to an argument that an administrative procedure lacked due process, and holding that plaintiffs failed to meet their heavy burden).

In general, MVID fails to meet its heavy burden of proving that the procedures provided to it under the law are unconstitutional beyond a reasonable doubt. Accordingly, if the Court reaches the issue, it should

reject MVID's arguments on the merits.

**a. MVID Waived Its Due Process Claims by Not Adequately Raising them before the Superior Court.**

Generally, "appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995)). Here, MVID's petition for Superior Court review of the PCHB's decision in *MVID II* makes no specific reference to due process. *See* CP 520-526. Furthermore, MVID's Superior Court briefing in its appeal of *MVID II* only contained two passing one-sentence references to due process that were unaccompanied by any citation to authority or argument. CP 188, 189. These passing references are insufficient to preserve MVID's due process claim for appeal. *See, e.g., State v. Gamble*, 168 Wn.2d 161, 180-81, 225 P.3d 973 (2010) (declining to consider issue that was not properly briefed); *Saldin Secs., Inc. v. Snohomish County*, 134 Wn.2d 288, 297 n.4, 949 P.2d 370 (1998) (same); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 492 n. 2, 933 P.2d 1036 (1997) (same); RAP 10.3(a)(5) (brief must include argument in support of issues presented for review as well as citation to authority).

MVID may attempt to argue that, despite the general prohibition

on raising issues for the first time on appeal, the Court should consider its due process claims because they are “constitutional.” However, even constitutional claims are subject to the limitation in RAP 2.5(a) unless the alleged error is “‘manifest’ and truly of constitutional dimension.”

*Kirkman*, 159 Wn.2d at 926 (citing RAP 2.5(a)(3); *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). The *Kirkman* Court explained that, in order to establish a manifest constitutional error that is subject to review under RAP 2.5(a)(3), the defendant “must . . . show how the alleged error actually affected the defendant’s rights at trial” and that “[i]t is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *Id.* at 926-27 (citing *McFarland*, 127 Wn.2d at 333; *Scott*, 110 Wn.2d at 688).

Here, MVID was provided with a full evidentiary proceeding before the PCHB in which it was represented by counsel, permitted to fully respond to the 2003 Supplemental Order, provided with the Haller Report at least seven months before the hearing, and given the opportunity to engage in discovery prior to the hearing. In light of these facts, any procedural defects leading up to the hearing were not prejudicial to MVID and were not manifest constitutional error. Thus, the Court should decline to consider MVID’s due process theories pursuant to RAP 2.5(a).

**b. Due Process Did Not Require Ecology to Disclose the Haller Report Prior to the *MVID II* Hearing.**

MVID argues that Ecology's failure to provide it with the Haller Report before the hearing in *MVID II* deprived MVID of due process of law because its experts were not able to adequately review and respond to the Report. MVID Br. at 3, 22-29. This claim is baseless—MVID in fact received the Haller Report at least seven months before the PCHB hearing on the 2003 Supplemental Order, *supra* at 12, and MVID's experts had ample time to review the Report and prepare their response. Furthermore, the PCHB provided MVID with the opportunity to request the Report and other supporting documentation through discovery, but MVID failed to submit a timely discovery request. *See* AR Vol. 3, Doc. 29; *see also* AR Vol. 3, Doc. 28. MVID has not met its burden of proof on this issue because it has provided no factual basis to support the contention that Ecology withheld the Haller Report and prevented MVID from adequately preparing for the PCHB hearing.

**c. Ecology Provided MVID with Adequate Notice of the PCHB Hearing on the 2003 Supplemental Order.**

To the extent that MVID is arguing that Ecology deprived it of due process by providing inadequate notice of the 2003 Supplemental Order or the PCHB hearing, *see* MVID Br. at 28, such a contention is also meritless. MVID was provided explicit notice of the findings in the 2003

Supplemental Order, the new diversion limits, and the process for appealing the 2003 Supplemental Order to the PCHB for a full evidentiary hearing. CP 82-83. This was sufficient to satisfy constitutional due process notice requirement that notice be “‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”

*Kustura v. Dep’t of Labor and Indus.*, 142 Wn. App. 655, 676, 175 P.3d 1117 (2008) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

Furthermore, the long history of this case demonstrates that MVID had actual notice of the violation and its opportunity for a PCHB hearing. Ecology issued a “notice of violation” pursuant to RCW 90.03.605(2) when it issued the 2002 Order, and the 2003 Supplemental Order was simply a supplement to the 2002 Order adjusting the remedy for violations of the Water Code that were fully and finally adjudicated in *MVID I*. CP 773-774; *see also* CP 31 (“[T]he PCHB Order did not direct Ecology to start all over or to ignore the history of MVID’s waste of water and failure with voluntary compliance.”). Thus, any deficiency in the notice provided to MVID with the 2003 Supplemental Order was nonprejudicial. *See Duskin v. Carlson*, 136 Wn.2d 550, 965 P.2d 611 (1998) (cited in MVID’s brief at 23) (Even technically inadequate notice is constitutionally

sufficient “in the absence of actual prejudice.”) (citing *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997)).

**d. Ecology Did Not Violate Any Principle of “Scrupulous Dealing.”**

MVID also argues that Ecology’s alleged failure to provide the Haller Report violated “[a] corollary to due process . . . that the State and its agencies must deal scrupulously with its citizens.” MVID Br. at 28 (citing *Shafer v. State*, 83 Wn.2d 618, 624, 521 P.2d 736 (1974)). As with MVID’s other due process theories, this claim is based on neither facts nor law.

The case MVID cites for support of its scrupulous dealing theory, *Shafer*, is taken out of context. In *Shafer*, the Supreme Court determined that the State should be equitably estopped from asserting a timeliness defense to a tort claim because the plaintiff “was led to believe by agents and a legal representative of the state that her claim was known to the state and would be recognized when all of her medical expenses were incurred.” 83 Wn.2d at 624. The Court reasoned:

The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of pertinent facts, has made a commitment and the party to who it was made acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment.

*Id.* (emphasis added); *see also State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143, 401 P.2d 635 (1965) (applying the scrupulous dealing standard in the context of doctrine of “equitable estoppel” and a “good faith in reliance upon a solemn written commitment” made by government agents).

Unlike the plaintiff in *Shafer*, MVID has failed to identify any commitment that Ecology made to MVID that Ecology violated, and has not shown that MVID relied on a commitment made by Ecology to its detriment. Accordingly, even if the facts MVID proffers to support its allegations of misconduct were true (which they are not), the scrupulous dealing principle that MVID seeks apply in this procedural due process context is simply inapplicable.

Furthermore, although MVID alleges that Ecology unscrupulously withheld the Haller Report or other information only to “spring[] it on MVID during the hearing,” MVID Br. at 28, MVID points to no evidence in the record supporting this allegation or contradicting the evidence in the record that Ecology in fact provided MVID with the Haller Report over seven months prior to the hearing. Indeed, if any party has acted unscrupulously in this case, it is MVID, which was afforded the opportunity to review the Haller Report engage in discovery of additional materials, but now disingenuously complains that its experts were

prevented from preparing an adequate defense because these materials were withheld.

**e. MVID Is Precluded From Arguing That It Was Entitled to a Hearing Before Issuance of the 2003 Supplemental Order.**

MVID cites to *Sheep Mountain*, see MVID Br. at 22, which it has unsuccessfully relied on in the past to support the argument that Ecology was required to provide MVID with notice and an opportunity for a hearing before issuing the 2003 Supplemental Order. Not only has MVID waived this argument by not raising it before the Superior Court, *supra* at 30-31, but MVID is also precluded by collateral estoppel from raising this argument here because the identical issue was raised and rejected in *MVID I*, as the PCHB correctly held in its *MVID II* collateral estoppel decision.

Specifically, in *MVID I*, the PCHB found that “*Sheep Mountain* is distinguishable” because “[i]t involved the relinquishment of a water right, not an enforcement action against waste or pollution” and “unlike the relinquishment situation, [MVID] has no vested right to waste water.” *MVID I*, No. 02-071, 02-074, 2003 WL 724314, \*8 (PCHB Feb. 27, 2003) (attached to Ecology’s brief). The PCHB subsequently explained that MVID did not have a vested right to waste water because “[b]eneficial use is a basic requirement of Washington water law” and “[n]o water right authorizes water beyond the quantity necessary to accomplish the purpose

of that right.” *Id.* (citing *Grimes*, 121 Wn.2d 468).

MVID raised the same argument in *MVID I* on appeal to the Superior Court. *MVID I*, MVID’s Opposition to OWL’s Motion for Partial Summary Judgment and Dismissal of Certain Causes of Action, at 56 (July 14, 2004) (“Ecology should have provided MVID with a hearing before issuing an order curtailing water rights.”) (excerpt attached as Exh. A). The Superior Court rejected MVID’s due process claim, holding that “[MVID’s] due process rights have not been violated” and “[a]ny other constitutional arguments are not persuasive.” CP 784. Subsequently, in *MVID II*, the PCHB determined MVID was estopped from rearguing the “pre-deprivation” hearing issue. AR Vol. 3, Doc. 25, Pg. 9 (MVID is estopped from arguing that “MVID’s due process rights have been violated by Ecology’s actions.”).

MVID did not pursue an appeal of the rulings in *MVID I* rejecting its pre-deprivation hearing claim or the PCHB’s collateral estoppel decision in *MVID II*. Accordingly, these decisions are final for purposes of collateral estoppel, and MVID is precluded from relitigating issues that were decided in those proceedings, including the issue of whether Ecology was required to provide notice and an opportunity for a hearing before issuing an order under RCW 90.03.005 requiring abatement of waste. *See supra* note 1; *Reninger*, 134 Wn.2d at 449 (collateral estoppel prevents a

party from relitigating issues that have been raised and litigated by the party in a prior action).

**III. THE SUPERIOR COURT CORRECTLY DENIED MVID'S MOTION FOR RECONSIDERATION.**

In 2009, following the failure of settlement negotiations between MVID and Ecology, MVID moved the Okanogan County Superior Court to consider new evidence and reconsider its decision affirming the PCHB's decision in *MVID II*. The Superior Court denied this motion, holding as follows:

MVID has not made a showing that it meets the statutory requirements of RCW 34.05.562(1) to allow the Court to accept new evidence in this APA review, that MVID does not meet the requirements of RCW 34.05.562(2)(b) for remanding this matter to the Pollution Control Hearings Board, and that MVID's request for reconsideration and relief from judgment is not supported by fact or law . . . .

CP 432. MVID now asks this Court to reverse the Superior Court's denial of reconsideration, claiming that new evidence obtained "after *MVID 2*" proves that the limitations in Ecology's 2003 Supplemental Order "cannot be met." MVID Br. at 36.

MVID has failed to demonstrate that the Superior Court abused its discretion in denying MVID's motion for reconsideration.<sup>8</sup> Rather, as

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<sup>8</sup> The Superior Court struck from the record declarations submitted by MVID in support of its motion for reconsideration on the ground that MVID failed to establish that the new evidence met the requirements of RCW 34.05.562(1) and was subject to review under the APA and also struck MVID's reply brief in support of its motion for reconsideration. CP

described in more detail below, the Superior Court correctly denied reconsideration because (1) the request was based on evidence outside of the administrative record and not subject to any exception to the APA requirement of record review, (2) MVID's purported new evidence does not establish any basis for reconsidering the Superior Court's decision, and (3) the Superior Court lacked the authority to grant MVID a remand. Accordingly, this Court should affirm the Superior Court's denial of the motion for reconsideration.

**a. The Superior Court Correctly Declined to Consider the New Evidence Offered by MVID.**

In its motion for reconsideration, MVID cited CR 59(a)(4) and 60(b)(3) to argue that "new evidence not previously available supports reconsideration." CP 77. This case, however, involves judicial review of an administrative order and is thus governed not by the Civil Rules but by the Washington APA.

The APA limits judicial review to the agency record, RCW 34.05.558, and sets out very narrow standards for consideration of evidence outside the record:

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621-622; *see also* CP 431-433; Verbatim Report of Proceedings ("VRP") 17-19 (Dec. 4, 2009). MVID did not appeal the orders striking these materials, but nonetheless included the stricken records in the Clerk's Papers it designated for review in this appeal, CP 37-42, 43-44, 45-50, 51-67, 504-09, and has referenced some of the stricken materials in its opening brief to this Court, *e.g.*, MVID Br. at 4-5, 19-20, 23-24, 35-36.

The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;

(b) Unlawfulness of procedure or of decision-making process; or

(c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1). Pursuant to this provision, “[a] superior court may not allow additional evidence where the proponent of the evidence alleges only that the record is incomplete.” *Herman v. Shoreline Hearings Bd.*, 149 Wn. App. 444, 204 P.3d 928 (2009) (citing *Lewis County v. Pub. Employment Relations Comm’n*, 31 Wn. App. 853, 861, 644 P.2d 1231 (1982)).

At issue in *Herman* was a superior court’s modification of a Shoreline Hearings Board order based on consultant declarations and reports that were not submitted to the Board and were not part of the agency record. The Court of Appeals reversed for the following reasons:

The superior court reviews agency orders in a limited appellate capacity. Mr. Herman’s appeal from the board’s decision invoked the court’s appellate, not its general or original, jurisdiction. And, again, the APA controls review of a Shorelines Hearings Board decision. The APA’s

provisions set forth the circumstances in which a reviewing court may receive additional evidence. None apply here.

A court considering a petition for judicial review may not generally admit new evidence or decide disputed factual issues. RCW 34.05.558 (judicial review confined to agency record); RCW 34.05.562 (court may receive new evidence only if it relates to the validity of the agency action at the time it was taken and meets one of three exceptions); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wash. App. 62, 76, 110 P.3d 812 (2005) (new evidence admissible on judicial review only in “highly limited circumstances”). Here, the court did not admit the declarations and reports submitted by Mr. Herman under any of the narrow exceptions provided by the APA. *See* RCW 34.05.562(1). But the court relied on those expert declarations and reports to reach conclusions different from the board’s. That was error.

*Herman*, 149 Wn. App. at 455-56 (some citations omitted). MVID, like Mr. Herman, asked the Superior Court to consider new evidence without showing that any of the exceptions in RCW 34.05.562(1) were met.

The evidence MVID submitted in support of reconsideration clearly did not meet any of the three exceptions in RCW 34.05.562(1). That evidence, which is described below, relates neither to the “improper constitution” of the PCHB nor the “unlawfulness” of PCHB procedures. Also, the third exception does not apply because the PCHB decision rendered in a formal adjudicative proceeding on the basis of an extensive agency record. Thus, in accordance with *Herman*, this Court should affirm the Superior Court’s denial of MVID’s motion for reconsideration

based on the “new evidence” offered by MVID.

**b. MVID’s New Evidence Did Not Support Reconsideration.**

Even if Superior Court had decided to review MVID’s purported new evidence, it would have had no basis to grant MVID’s motion for reconsideration.

MVID’s motion for reconsideration primarily relied on an incomplete copy of the “Methow Valley Irrigation District Canal Management Plan” (the “Canal Plan”) dated December 2007.<sup>9</sup> CP 100-139. MVID explained that, according to the Canal Plan, the “lower 7 miles of the West Side Canal has been lined” and that “the lining has not lessened by even 1 cfs the instantaneous diversion requirements necessary to get water to the end user. CP 73. From this, MVID argued that it has “maximized reductions of waste” and that there is nothing more that it could feasibly do to reduce seepage loss from the West Canal system. CP 74.

The Canal Plan simply does not support any of these assertions. Most importantly, the Canal Plan clearly indicates that MVID has piped only one mile of the West Canal, and has not lined the seven miles claimed in its motion. *See* CP 106 (first six lines of Table 2-1 list 5279

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<sup>9</sup> The copy of the Canal Plan served on the parties did not include the Irrigation District Facility Maps, an important component of the document.

total feet of piping projects on the West Canal in 2006); CP582. Indeed, counsel for MVID later conceded that these assertions were erroneous. CP 501-502 (“The misstatement in MVID’s opening brief concerning seven miles of rehabilitation (lining, not piping) is mine and mine alone, and not my client MVID’s.”).<sup>10</sup>

This misstatement was not the only inaccuracy in MVID’s motion for reconsideration. For example, far from concluding that there is nothing more than can be done to reduce waste from MVID’s system, the Canal Plan lays out a number of options that MVID can undertake at reasonable cost so as to achieve compliance with the 11 cfs diversion limit for the West Canal in Ecology’s 2003 Supplemental Order. CP 117-124. Notably, the Canal Report indicates that if MVID lined approximately five additional miles of the West Canal (less than proposed in the Haller Report), seepage loss could be reduced by 10.5 cfs and the resulting diversion from the Twisp River could be reduced to levels approaching the limit of 11 cfs. CP 120 (Table 5-2).

MVID also misleadingly claimed in support of reconsideration that, according to the Canal Plan, the “current estimated cost” of these

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<sup>10</sup> MVID submitted new arguments for reconsideration in its reply brief in support of its motion for reconsideration, but the reply brief was stricken by the Superior Court. VRP 17-19. Because MVID has not appealed the Superior Court’s order striking the reply brief and accompanying declarations, these arguments and declarations are not properly before the Court.

improvements is “5.0 million dollars.” CP 76. In fact, the Canal Plan indicates that these improvements would cost \$1.8 million. CP 120. Additional improvements discussed in the Canal Plan that could result in significant water savings include truncating portions of the West Canal and converting users to wells (savings anywhere from 0.9 to 11.4 cfs depending on the extent of the project), CP 122 (Table 5-4), and installation and use of a regulating reservoir to store water (another 2.4 cfs in water savings), CP 124. If anything, the Canal Plan confirms that further action by MVID to bring its system up to a reasonable level of efficiency is both necessary and appropriate. CP 583.

Another piece of new evidence that MVID claimed justified reconsideration was an incomplete copy of an e-mail communication authored by Mr. Haller on July 27, 2009.<sup>11</sup> CP 141. The e-mail was not “new evidence” that supported reconsideration. Rather, the e-mail appears to be part of an unsuccessful effort by Ecology to reach a settlement agreement with MVID, and is therefore inadmissible under ER 408. Furthermore, the e-mail merely relates to an apparent problem with a gauging station on the canal system that was under-reporting MVID’s diversion quantities. It does not provide any basis for reconsideration of

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<sup>11</sup> The e-mail communication indicates that it is a response to a message from MVID director Vaughn Jolley that in turn may have responded to other messages. None of the earlier messages are included.

the point that MVID's system is extremely wasteful or the point that available measures exist that would bring MVID's efficiency closer in line with similar systems in Eastern Washington.

In addition, MVID proffered a declaration from Greg Nordang, an MVID board member, relating to a "walk-about tour" conducted in the summer of 2009 in which Ecology representatives are claimed to have commented that the MVID's operations are "reasonably managed." CP 74. As a threshold matter, the alleged discussions recounted in this declaration are hearsay and would not have been admissible even if the Superior Court had the authority to consider additional evidence (and it didn't have such authority). Furthermore, Mr. Haller, attested that Mr. Nordang's declaration was inaccurate and took his comments out of context. CP 584-585. During the walk-about tour, Mr. Haller observed numerous structural and operational problems with MVID's system. CP 584-585. The tour merely confirmed his conclusion that "additional improvements are necessary to avoid wasteful water use by MVID." CP 585. The declaration, even if admissible, did not support reconsideration.

In sum, the Superior Court did not have the authority to consider MVID's new evidence under RCW 34.05.562(1) and such evidence, even if it were considered, did not support MVID's motion for reconsideration. Accordingly, the Superior Court's denial of the motion for reconsideration

was not an abuse of discretion.

**c. There Was No Basis for the Superior Court to Remand this Matter to the PCHB.**

Even if the Superior Court erroneously denied MVID's motion for reconsideration, which it did not, the Superior Court correctly determined that it lacked the authority to grant the remedies requested by MVID in that motion. Specifically, MVID suggested that the Superior Court remand the matter to the PCHB for further proceedings. CP 78. However, a remand is appropriate only if the Superior Court finds that:

(i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency[.]

RCW 34.05.562(2)(b).

MVID failed to show that these statutory requirements for remand were satisfied. None of the materials provided with MVID's motion for reconsideration or stricken reply brief contained new information that was not cumulative to the evidence already submitted and considered by both the PCHB and the Superior Court in its review of MVID's petition as required by RCW 34.05.562(2)(b)(i). *See supra* at 42-46; VRP 9 (acknowledgement by MVID counsel that "[t]he Reply Brief and the

submittals are not anything new”). In any event, the evidence submitted by MVID did not relate to validity of the agency action “at the time it was taken,” but involved a study and other communications occurring several years *after* Ecology issued the order and the PCHB affirmed its validity. Finally, a remand would not have furthered the interests of justice in this matter, as required by RCW 34.05.562(2)(b)(ii), but would have instead served to delay the improvements needed to bring MVID’s system into compliance with the law; rewarded MVID for failing to make reasonable efforts to obtain funding, through public grants or district assessments, to support the upgrade of its water delivery system; opened the door for revisiting factual and legal issues that the Superior Court determined are subject to collateral estoppel; allowed MVID to continue to harm Methow River basin junior water right holders; and harmed endangered salmon and other in-stream resources. Accordingly, the Superior Court’s denial of MVID’s motion for reconsideration was not an abuse of discretion.<sup>12</sup>

### **CONCLUSION**

For the reasons above, Respondent-Intervenors respectfully ask the Court to affirm the decisions below upholding Ecology’s 2003 Supplemental Order in its entirety.

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<sup>12</sup> In response to MVID’s challenges to the PCHB’s findings of fact as not supported by substantial evidence in the record, MVID Br. at 38-68, OWL adopts in full the arguments presented in response by Respondent Department of Ecology.

Dated: September 27, 2010

Respectfully submitted,



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IN THE SUPERIOR COURT OF WASHINGTON  
COUNTY OF OKANOGAN

METHOW VALLEY IRRIGATION DISTRICT,	)	Cause No. 03-2-00518-7
	)	
Petitioner,	)	PCHB No. 02-071
	)	
vs.	)	PCHB No. 02-074
	)	
STATE OF WASHINGTON,	)	PETITIONER'S OPPOSITION TO
DEPARTMENT OF ECOLOGY;	)	OKANOGAN WILDERNESS
OKANOGAN WILDERNESS LEAGUE;	)	LEAGUE'S MOTION FOR PARTIAL
and POLLUTION CONTROL HEARINGS	)	SUMMARY JUDGMENT AND
BOARD,	)	DISMISSAL OF CERTAIN CAUSES
	)	OF ACTION
Respondents,	)	

I.

**BACKGROUND**

The Methow Valley Irrigation District (MVID) has operated open ditch water conveyance canals since the early 1900's. These canals, one on the West side of the Methow River and one on the East side, have serviced the mid-Methow Valley with irrigation water enabling that portion of the Valley to develop economically as an integral part of Okanogan County. Although not a rich agricultural area the MVID canals have enabled a rural lifestyle to develop;

1 "The vagueness standard we applied in *Carter*, which is  
2 also applicable here, is whether persons of common  
3 intelligence and understanding have fair notice of the  
conduct prohibited, and ascertainable standards by which  
to guide their conduct."

4 WAC 173-201A-160(2) is unconstitutionally vague as there is  
5 no ascertainable standard by which an entity can evaluate or judge its  
6 conduct. Just the mere diversion of water in accordance with its lawful water  
7 rights, without more, allows Ecology to make a strictly arbitrary decision, at  
8 the whim of whatever employee happens to be in charge at any given time,  
9 such that neither the District nor any other person or entity can reasonably  
10 gage their conduct in advance.

11 Without any specific scientific findings and instead only the  
12 subjective 'beliefs' of Mr. Barwin the Order's issuance in reliance on an  
13 asserted violation of 90.48 and WAC provisions is null and void. Ecology did  
14 not have authority to issue the Order based on 90.48 and the Board does not  
15 have jurisdiction to resolve these constitutional challenges and did not.

16 **4. The Order In Question Does Constitute An Adjudication Of**  
17 **Competing Water Rights.**

18 OWL and the State cannot deny that the District's constitutionally  
19 protected water rights have priority over the State's adoption of minimum or  
20 base flows adopted in WAC 173-548, the listing of impaired water bodies in the  
21 303(d) list and/or the Conservation Commissioner's report listing the lower  
22 fifteen miles of the Twisp River as a high priority stretch for effecting recovery  
23

1 of listed salmonoid species. To determine that these junior water rights take  
2 precedence over the District's rights necessarily involves an adjudication.

3 a. **MVID Was Entitled To A Notice That Identified The Specific**  
4 **Sections Of Statute Found To Be Violated And The Facts**  
5 **And Methods Supporting Ecology's Determination Of**  
6 **Violations.**

7 Ecology's December 2001 notice of violation commenced an  
8 adjudicative proceeding against MVID. See *Hutmacher v. State of Washington,*  
9 *Board of Nursing*, 81 Wn.App. 768, 771-772, 915 P.2d 1178 (1996) ("an  
10 adjudicative proceeding is not limited to the formal hearing itself, but also  
11 contemplates other stages of proceedings affecting the rights of an individual  
12 under the administrative scheme."). In *Hutmacher*, a statement of charges  
13 commenced an adjudicative proceeding. Likewise, Ecology's notice of violation  
14 stated a charge of water waste, and it was incumbent on Ecology to set forth in  
15 the notice the basis for its determination rather than conclusory remarks about  
16 waste and efficiency.

17 As noted previously the minimal standards for an adequate notice  
18 are evident in the statute under which Ecology claims authority to issue the  
19 Order curtailing MVID's water rights. Because of the importance of RCW  
20 43.27A.190 a portion is quoted again:

21 "[W]henever it appears to the department that a  
22 person is violating or is about to violate any of the  
23 provisions of ...Chapter 90.03 RCW...the  
department may cause a written regulatory order to  
be served upon said person [and]...**The order shall  
specify the provision of the statute, rule,  
regulation, directive or order alleged to be or**

1           **about to be violated, and the facts upon which**  
2           **the conclusion of violating or potential violation**  
3           **is based...**" (emphasis added)

4           In its Order. Ecology failed to identify any section of RCW 90.03  
5 that had been violated by MVID. Ecology further obscured the authority and  
6 basis for its determination of unspecified violations with a mixture of  
7 conclusions on inefficiency over a lengthy period of time (relinquishment) and  
8 adverse impacts on water quality, instream flows, and salmon recovery. *Id.* In  
9 its Order and earlier Notice of Violation, Ecology made no attempt to apply a  
10 reasonable efficiency standard for water waste or to explain its methods in  
11 calculating wasted water reducing the District's historic water right between  
12 102 and 90 cfs to no more than 53 cfs instantaneous diversion. Because the  
13 Order effectively deprives MVID of valuable property rights, minimal standards  
14 of due process dictate that Ecology's Order should have explained at the very  
15 least the methodology by which it arrived at the limitations and explained why  
16 the model establishing 81 cfs as the appropriate diversion limit was "junked".

17           **b. MVID Was Entitled To A Hearing Before Ecology Ordered**  
18           **Diminished Use Of Vested Water Rights.**

19           Under RCW 43.27A.090(12), Ecology is authorized to hold hearings  
20 and conduct investigations to implement ch. RCW 43.27A (including RCW  
21 43.27A.190, which Ecology claims as the source for its authority in issuing the  
22 Order). Ecology's authority to provide a hearing is not prevented by RCW  
23 43.21B.400, which precludes Ecology from holding adjudicative proceedings  
pursuant to the Administrative Procedures Act because the Board has

1 authority to hold such hearings. To the extent that it denies a constitutional  
2 guarantee of procedural due process when water rights are diminished, RCW  
3 43.21B.400 has been held unconstitutional. *Sheep Mountain Cattle Co. v. State*  
4 *of Washington*, 45 Wn.App. 427, 430, 726 P.2d 55 (1986). In *Sheep Mountain*,  
5 Ecology argued, unsuccessfully, that due process was satisfied by the  
6 possibility of an appeal to the Pollution Control Hearings Board so that  
7 Ecology's Order was not "final." *Sheep Mountain* rejected this argument,  
8 holding that the Order was final even where the statute provided that the Order  
9 became final unless appealed to the Board. *Id.* at 431. Similarly, RCW  
10 43.27A.190 provides that Ecology's Order against MVID is "effective  
11 immediately," but appealable to the Board.

12 In this instance, Ecology should have provided MVID with a  
13 hearing before issuing an Order curtailing water rights. At the very least, such  
14 a hearing should have been provided through an adequate Notice of Violation  
15 so that MVID was put on notice that an Order limiting it to 53 cfs would issue  
16 so MVID could respond to specific allegations of water waste before Ecology  
17 issued its final Order. Because Ecology's Notice of Violation provided no  
18 explanation of alleged water waste, an adequate response was not possible.

19  
20 **c. Ecology Has Unlawfully Engaged In Adjudication Of Water  
Rights To Enhance Its Inferior Right To Instream Flows.**

21 The authority to adjudicate water rights has been exclusively  
22 assigned to Washington's superior courts. *Rettkowski*, 122 Wn.2d at 226  
23 (Ecology exceeded its authority when it issued cease and desist order

1 prohibiting irrigation withdrawals that Ecology thought to adversely affect  
2 surface water rights of ranchers that Ecology determined to be senior).  
3 Ecology's enforcement Order against MVID exceeds Ecology's authority because  
4 the Order adjudicates competing claims to the same water. Ecology has  
5 ordered MVID to reduce the quantity of water used under its senior water  
6 rights for the express purpose of satisfying Ecology's and Fisheries' more junior  
7 instream flow rights.

8 Ecology's authority under RCW 43.27A.190 to issue regulatory  
9 Orders against persons violating the Water Code does not include authority to  
10 adjudicate between competing water rights. *Id.* at 226. Were it otherwise,  
11 "Ecology could circumvent the general adjudication process by conducting  
12 minor, ad hoc investigations and subsequent piecemeal adjudications  
13 throughout the state." *Id.* at 230. Rather than enforcing the Water Code  
14 under an objective reasonable efficiency standard, Ecology has engaged in an  
15 unauthorized and piece-meal adjudication that reduced MVID's senior water  
16 rights for the benefit of Ecology's and others' junior rights in the same water  
17 source.

18 MVID owns water rights with dates of priority that occur before  
19 1918 and 1936. Ecology holds instream flow rights in the Methow and Twisp  
20 Rivers with a priority date of 1976 that are junior to the rights of MVID. WAC  
21 173-548-070. Ecology's instream flow rights may not be used or enforced to  
22  
23

1 curtail, limit, or diminish senior water rights. RCW 90.03.345; RCW  
2 90.22.030; WAC 173-548-070.

3 In its Order, however, Ecology claims that “MVID’s wasteful  
4 diversion and use of water during low water years, when the minimum or base  
5 flows adopted in WAC 173-548 are not achieved, negatively affects aquatic  
6 resources of significant importance to the State of Washington.” This is  
7 contrary to the holding in *Grimes* to the effect that the impact that a perfected  
8 senior water right has on the water source flora, fauna or junior rights is not a  
9 basis for impairing existing water right, *Grimes*, 121 Wn.2d at pp. 475-476. Of  
10 course OWL claims waste is not a beneficial use. But that raises the whole  
11 question over the Order, which does not speak to “waste” but instead is an  
12 attempt to adjudicate a substantial portion of the District’s water rights out of  
13 existence by way of relinquishment, which can only occur pursuant to 90.14.130  
14 in the context of a due process proceeding. In other words, Ecology’s Order  
15 expressly acknowledges that the exercise of MVID’s claimed and certified senior  
16 rights compete with Ecology’s full enjoyment of its junior rights. Ecology’s  
17 Order implicitly determines that MVID’s valid water rights are less than the  
18 water rights claimed by and certified to MVID. Under these circumstances,  
19 Ecology has exceeded its authority by adjudicating and reducing MVID’s water  
20 rights to suit the State’s instream flow objectives.

21 MVID finds OWL’s distinction of *Rettkowski’s* applicability as  
22 between the District’s claimed rights in the East Canal and West Canal  
23

1 insightful. The District does not believe, however, that the Court need be  
2 involved in such a fine distinction. The bottom line is that Ecology is not making  
3 a “tentative” determination that the District’s claimed water diversion rights are  
4 inferior to junior water right claims rather it is issuing a final Order based on a  
5 regulatory adjudication. OWL emphasizes this at page 11 of its brief where it  
6 asserts as follows:

7 “In other words, Ecology is required to consider harm to  
8 other water rights, both senior and junior, in making a waste  
9 determination. Not only are the junior instream flow rights  
10 on the Twisp and Methow River’s harmed when the MVID  
11 diverts ‘nearly the entire flow,’ see NOV at 2, but junior  
diversionary water right holders are also harmed because  
they must curtail their own diversions when stream flows fall  
below the regulatory minimums.”

12 Ecology, under the guise of making a tentative determination cannot  
13 adjudicate substantial constitutionally protected water rights relinquished  
14 without a full hearing or judicial determination as spelled out in *Rettkowski*:

15 “Under RCW 90.03 (hereinafter the Water Code), a  
16 “first in time, first in right” rule is followed for appropriations  
17 of both groundwater and surface water. RCW 90.03.010.  
18 Ecology claims that it was attempting to follow this rule  
19 when it issued the cease and desist orders to the Irrigators.  
20 While Ecology cannot point to any statute which specifically  
21 authorizes the procedures it followed in issuing these orders,  
22 it argues that it derives inherent authority to do so from the  
23 penumbra of a number of statutes. Primarily, Ecology rests  
upon its enabling statute as vesting it with the plenary  
authority to protect senior water rights from encroachment  
or diminution by junior appropriators. That statute  
proclaims that Ecology “shall regulate and control the  
diversion of water in accordance with the rights thereto”.  
RCW 43.21A.064(3). Ecology additionally point out that it is  
authorized to issue regulatory orders “whenever it appears to

1 [Ecology] that a person is violating or is about to violate any  
2 of the provisions of [the Water Code]". RCW 43.27A.190.

3 .....  
4 Nowhere in Ecology's enabling statutes was it vested  
5 with similar authority to conduct general adjudications or  
6 even **regulatory adjudications** of water rights. (our  
7 emphasis)

8 .....  
9 Since Ecology has no explicit statutory authority to  
10 rely upon, it asks instead that we extend a number of  
11 previous cases to allow it the authority to make "tentative  
12 determinations" of the priorities of existing water rights in  
13 order to regulate. *Funk v. Bartholet*, 157 Wash. 584, 594,  
14 289 P. 1018 (1930); *Mack v. Eldorado Water Dist.*, 56 Wn.2d  
15 584, 587, 354 P.2d 917 (1960); *Stempel v. Department of*  
16 *Water Resources*, 82 Wn.2d 109, 116, 508 P.2d 166 (1973).  
17 Ecology argues that it only "tentatively determined" that the  
18 Irrigators' rights were junior to those of the Ranchers, and  
19 that a final determination would occur if the PCHB hearings  
20 were allowed to proceed.

21 There are two problems with this argument.

22 .....  
23 Once the permit has been granted, the situation is  
significantly different. Permit holders have a vested property  
interest in their water rights to the extent that the water is  
beneficially used. *Department of Ecology v. Acquavella*, 100  
Wn.2d 651, 655-56, 674 P.2d 160 (1983). *See also*  
*Department of Ecology v. United States Bur. Of Reclamation*,  
118 Wn.2d 761, 767, 827 P.2d 275 (1992) (recognizing  
permit holder's property interest in water rights). **Unlike the  
permitting process, in which Ecology only tentatively  
determines the existence of claimed water rights, a later  
decision that an existing permit conflicts with another  
claimed use and must be regulated necessarily involves a  
determination of the priorities of the conflicting uses.**  
In order to properly prioritize competing claims, it is  
necessary to examine when the use was begun, whether the

1 claim had been filed pursuant to the water rights registration  
2 act, RCW 90.14, and whether it had been lost or diminished  
3 over time. **These determinations necessarily implicate  
4 important property rights.** (our emphasis)

5 .....  
6 The second problem with Ecology's argument that it  
7 was only "tentatively determining" water rights is that the  
8 PCHB has no jurisdiction to conduct adjudication hearings  
9 regarding such rights. The statute creating the PCHB  
10 specifically forbids it to conduct hearings on "[p]roceedings  
11 by [Ecology] relating to general adjudications of water rights".  
12 RCW 43.21B.110(2)(c). Both Ecology and the PCHB argue  
13 that this case did not involve a general adjudication, but  
14 rather an appeal of an administrative order issued by  
15 Ecology, which would be within the jurisdiction of the PCHB.  
16 RCW 43.212B.110(1)(b),(c).

17 This bootstrap argument is unpersuasive. The  
18 administrative orders in question were based upon Ecology's  
19 determinations of the existence, quantities, and relative  
20 priorities of various legally held water rights. **Ecology  
21 cannot sustain the argument that it conducted only a  
22 little, or a limited, or a tentative, adjudication, so that it  
23 is then permitted to have the PCHB conduct a more  
thorough adjudication.** The PCHB *cannot* adjudicate  
priorities between water users. Nor can Ecology determine  
allegedly senior water rights outside of the context of a  
general adjudication." (our emphasis)

Rettkowski, at pp. 226-229.

A similar holding is found in *Pub. Util. Dist. v. Ecology*, 146 Wn.2d  
778, 51 P.3d 744 (2002):

"However, Ecology cites other statutes that it says gives it  
authority to consider the public interest when acting on a  
change application. Ecology maintains that while there is no  
express language in RCW 90.03.380 concerning a public  
interest test, Ecology has authority derived from other  
statutes to consider the public interest. Ecology points to  
RCW 90.03.005 (policy of the state to promote the use of the  
public waters to obtain maximum net benefits), and RCW

1 90.54.020(2) and (10) (in allocation of waters among  
2 potential uses and users, the securing of maximum net  
3 benefits is directed; expression of the public interest will be  
4 sought at all stages of water planning and allocation).  
5 Ecology urges that we read these statutes together with RCW  
6 90.03.380 and harmonize all the statutes.

7 These statutes do not provide the authorization Ecology  
8 claims.”

9 *Pub. Util. Dist.*, at p. 796.

10 Based on the unusual wording of the Order, which contains no  
11 allegation of “waste”, Ecology’s attempt to limit the District’s senior water rights  
12 in favor of statutory programs, fish or downstream junior water right holders  
13 necessarily fails.

14 The question of relinquishment, like abandonment is a question of  
15 fact. The facts noted in *PUD v. Ecology*, at pp. 799-800 are uncannily similar to  
16 the case at bar. There the Court held the facts did not support abandonment:

17 “...While it is true that in 1956 a portion of the flume  
18 collapsed, and the District thereafter decommissioned the  
19 project insofar as power production was concerned, the  
20 District continued to engage in studies, acquired and  
21 changed water rights for purposes for hydroelectric power  
22 production. The District began feasibility studies in 1961,  
23 which led to possible new projects and to the District’s  
application for a new federal license in 1965. In connection  
with its proposed new project, it applied for and obtained  
additional water rights and a change in point of diversion of  
its 1907 right. In 1966, Ecology approved a reservoir permit  
for the proposed project. Although the District concluded by  
1969 that the project was not feasible after all, its efforts to  
that point do not show intent to abandon its water rights.  
From 1978 to 1984, the District collaborated on another  
proposed project, with a contract to sell the power generated  
to another power company. This proposal, too, fell through.  
While the District did not pursue plans for another project

1 until it began the process for the present one, it did engage  
2 in a number of engineering studies in the meantime. In  
3 1980, it applied for a supplementary water right for future  
4 development of the Sullivan Creek project.

.....  
5 Under these facts as a whole, which are not disputed by  
6 Ecology, we conclude that the District has established that it  
7 did not intend to abandon its 1907 water right.”

8 In another vein, although the amount of conveyance water in the  
9 Methow Valley required for open canals is high it is not wasteful and, in fact,  
10 returns beneficial flows to the Twisp and Methow Rivers downstream.

11 Q. All right. And what are the water quality effect sources of the Methow  
12 Valley Irrigation District that Ecology believes are at play in connection with  
13 the issuance of the Order?

14 A. Well, by the process of diverting more water than is, **in my opinion,**  
15 reasonably necessary, it takes water out of the river, **reducing flow in the**  
16 **river; doesn't necessarily consume it, it'll return further down.** But  
17 these bypass reaches have a negative effect on aquatic resources, which  
18 that's one of the purposes of the standards is to protect those aquatic  
19 resources. (Plaintiff's emphasis)

20 (Deposition of Robert Barwin dated October 25, 2002; p. 70, ll. 21-25; p. 71, ll.  
21 1-6 [**Appendix** "27"])

22 Finally, in this regard, transportation water (conveyance loss) is a  
23 necessary aspect of water delivery and it is considered as a part of a water user's  
beneficially used water.

“It has long been settled in this state that property owners have a  
vested interest in their water rights to the extent that the water is  
beneficially used on the land.’ Included in the vested rights is the  
right to diversion, **delivery** and application ‘according to the usual  
methods of artificial irrigation employed in the vicinity where such  
land is situated.’” (our emphasis)

*Grimes*, at p. 477.

1           Effectively, what Ecology did was arrive at a figure it liked, 53 cfs,  
2 contrary to the "model" calculation of 81 cfs, and then issued the Order in  
3 question adjudicating any diversions in excess of that figure to have been  
4 relinquished in favor of State claimed junior water rights. (Barwin Dep. p. 111,  
5 cited at p. 18 of this brief) It arrived at the figures it wanted by, in part,  
6 considering that MVID's water would be delivered through a non-viable, non-  
7 customary, closed pipe, irrigation system thereby effectively adjudicating the  
8 District's substantial property rights including necessary "delivery"  
9 [transportation] water "according to the customary method of artificial irrigation  
10 employed in the vicinity..." (*Grimes* p. 477) out of existence.

11           **C. MVID Did Not Receive Due Process.**

12           Ecology issued a Notice of Violation (NOV or Notice) to the Methow Valley  
13 Irrigation District (Notice) on the 27<sup>th</sup> day of December 2001. The Notice provided  
14 no diversion limitation figures and specifically provided that it was "not an Order"  
15 and requested a reply from MVID.

16           MVID, at great expense, prepared and submitted a detailed response to  
17 each statement contained in the Notice including voluminous documentation  
18 supporting each specific response. (**Appendix "16"**)

19           Within weeks of receiving MVID's response, Ecology, without a hearing and  
20 without any consideration of MVID's response and in violation of MVID's due  
21 process rights, issued its preordained Order attempting to deprive MVID of its  
22 lawful and constitutionally protected water rights.  
23

1 "A. Yep. This is a recommendation for enforcement, which is prepared by staff  
2 in either the Water Quality or the Water Resources Program, along with --  
it's basically a recommendation to the signing manager to support the action  
that's proposed.

3 Q. And attached to that as part of Exhibit 4 is a Notice of Violation; is that  
4 correct?

5 A. That's correct.

6 Q. In the exact form it was mailed out to the District?

7 A. I'd have to go through it word by word, but it is typical that the proposed  
8 action is sent along with the recommendation. So if either Tom Tebb or I did  
not change it, we would have signed it and sent it out.

9 Q. And as part of that recommendation and Notice of Violation is an Order in  
10 the exact form that was ultimately sent out on April 29<sup>th</sup>, 2002; is that  
correct?

11 A. Correct.

12 (Barwin Depo., p. 53, ll. 13-25; p. 54, ll. 8-12 [**Appendix "28"**])

13 Water rights are property rights susceptible of constitutional protections  
14 including the protection of due process. *DOE v. USBR*, 118 Wn.2d at p. 767  
15 (1992).

16 Under the Fourteenth Amendment to the U.S. Constitution and Article I,  
17 Section 3 of the Washington Constitution, a person cannot be deprived of life,  
18 liberty, or property without due process of law. The constitutional guarantee of  
19 procedural due process is implicated when an interest in property is injured by  
20 government action. *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103  
21 Wn.App. 411, 425 12 P.3d 1022 (2000). At a minimum, procedural due process  
22 requires notice and an opportunity to be heard. *Id.* In its adjudicatory  
23 enforcement action against MVID, Ecology failed to satisfy even the most minimal

1 standards of procedural due process.

2 The degree of due process required depends on a balancing of (1) the  
3 private interest to be protected; (2) the risk of an erroneous deprivation of the  
4 private interest by government action; and (3) the government's interest in  
5 maintaining the procedures afforded to the private interest. *Rivett v. City of*  
6 *Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994). In this instance, the  
7 District's water rights are property rights that are protected by the state and  
8 federal constitutions. *Grimes*, 121 Wn.2d at 478. The risk and consequences of  
9 erroneous action by Ecology are severe. Ecology's Order decreed a reduction of  
10 the District's water rights from more than 90 cfs to a right of only 53 cfs. It was a  
11 final Order, the violation of which subjected the District to severe penalties. See  
12 RCW 90.03.600 (Ecology may levy civil penalties against MVID for any violation  
13 of a provision of RCW ch. 90.03.); see also RCW 34.05.010(11)(a) ("Order" means  
14 "a written statement of particular applicability that finally determines the legal  
15 rights, duties, privileges, immunities, or other legal interests of a specific person  
16 or persons."). Yet, compliance also creates a significant risk that MVID will  
17 relinquish its larger water right through non-use. RCW 90.14.130. Accordingly,  
18 Ecology must be held to a higher standard of proof in dealing with the  
19 deprivation of a substantial portion of the District's water right.

20  
21 "The United States Supreme Court has deemed a higher level of  
22 certainty 'necessary to preserve fundamental fairness in a variety of  
23 *government-initiated proceedings* that threaten the individual  
involved with a 'significant deprivation of liberty' or 'stigma.'" *Id.*  
(emphasis added) (citation omitted)

1 .....  
2 "Moreover, with respect to the risk of erroneous deprivation in  
3 this proceeding, there is little solace to be found in the availability  
4 of judicial review which is high on deference but low on correction  
5 of errors. RCW 34.05-570(3)(e) (A court shall grant relief from an  
6 agency order if it decides the order 'is not supported by evidence  
7 that is substantial when viewed in light of the whole record before  
8 the court.'). Appellate review cannot cure an inadequate standard  
9 of proof. *Santosky*, 455 U.S. at 757 n. 9. Appellate courts  
10 determine only whether factual findings are supported by  
11 substantial evidence and, if so, whether the findings in turn  
12 support the conclusions of law and judgment. *Green Thumb, Inc. v.*  
*Tiegs*, 45 Wn.App. 672, 676, 726 P.2d 1024 (1986).

9 Problems inherent in an interest-depriving procedure are thus  
10 only compounded when the possibilities for factual review are  
11 extremely limited. The risk of error is increased precisely because  
12 the opportunity for correcting error is minimal. Under the second  
*Mathews* factor, an increased risk of erroneous result is indicative  
of the fact that due process requires an increased standard of  
proof."

13 *Bang Nguyen v. Dept. of Health*, 144 Wn.2d 516, 528 and 530, 29 P.3d 689  
(2001).

14 By comparison to the severe impact on the District, Ecology bore an easy  
15 burden in providing procedural due process to MVID. According to Ecology, it  
16 studied the MVID irrigation system and formulated its water right limitations  
17 over an extended period of time. After fourteen years (1988-2002), of working  
18 with the District, it is reasonable to think that Ecology would have developed a  
19 detailed legal and factual rationale to set forth in its Notice of Violation and final  
20 Order. The Notice of Violation, was, however, vague and, it turns out,  
21 unsupported by any analysis of the actual quantity of water that Ecology  
22 considered to be efficient for MVID.  
23

1 By issuing a Notice of Violation with allegations of waste prior to issuing an  
2 enforcement Order, Ecology also demonstrated that it was reasonable for Ecology  
3 to provide MVID with an opportunity to make an informed response to specific  
4 allegations of waste. Rather than provide a meaningful notice and opportunity  
5 for hearing, however, Ecology issued a vague notice, citing primarily 90.48, a  
6 statute that was not applicable, and failed to inform the District of the basis for  
7 Ecology's limitation figures thereby precluding any meaningful response to the  
8 figures arrived at. (Ecology never provided MVID with an opportunity to review  
9 and comment on Ecology's water quantity calculations for a reasonably efficient  
10 water conveyance and distribution systems. Ecology never provided MVID with  
11 the opportunity to challenge its "junking" of the model establishing 81 cfs as the  
12 correct diversion amount.

13 Ecology's attempt to unilaterally limit and adjudicate MVID's water rights,  
14 without a hearing, effectively shifted the burden of proof to Appellant and in so  
15 doing violated MVID's constitutional protection and right to due process. (*Sheep*  
16 *Mtn.* and RCW 90.14.130) A tentative determination of relinquished water rights  
17 pursuant to change application request subjecting the MVID to a more thorough  
18 adjudication before the PCHB does not satisfy DOE's statutory authority or  
19 MVID's constitutional protection. *Rettkowski, id.*

20 Ecology's attempt to determine, limit and rule out of existence MVID's  
21 substantial, valuable and constitutionally protected water rights, without a  
22 hearing, and or without notice in compliance with RCW 90.14.130 and in  
23

1 violation of RCW 43.27A.190 violated MVID's right to due process and the law  
2 such that Ecology's Order should be declared a nullity.

3 "Q. And the District wasn't given an opportunity to challenge or respond to  
4 Ecology's determination that its water right was limited in the Methow River  
to a maximum rate, diversion rate of 24 cfs or 5.829 acre-feet annually?

5 A. Same answer as the first."

6 (Barwin Depo., p. 58, ll. 14-19 [**Appendix "29"**])

7 "Q. And Ecology cannot declare or Order vested water rights of the Methow Valley  
Irrigation District abandoned or relinquished without a hearing; is that  
8 correct?

9 A. In the form of a show cause hearing of some sort, yes.

10 Q. And Ecology did not provide Methow Valley Irrigation District with a *show  
cause hearing* prior to issuance of the Order in question, did it?

11 A. No."

12 (Barwin Depo., p. 64, ll. 8-15 [**Appendix "30"**])

13 Ecology, by admitting it had deferred exercising its prosecutorial powers in  
14 connection with issuance of the Order, which by its very terms constituted an  
15 Order of relinquishment, fell within the prescription of RCW 90.14.130. As  
16 argued in MVID's response to the State brief's, failure to follow 90.14.130, is fatal  
17 to the Order in question.

18 **1. MVID Satisfies Its Burden.**

19 Procedural due process constrains governmental decision-making  
20 that deprives individuals of protected liberty or property interest. Due process is  
21 a flexible concept, the exact contours of which are determined by the particular  
22 situation. The essential elements of due process are a right to notice and a  
23 meaningful opportunity to be heard. *Rhoades v. City Of Battle Ground*, 115

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1 Wn.App. 752, 765-766, 63 P.3d 142 (2002).

2       **[15]** Procedural due process constrains governmental decision  
3 making that deprives individuals of liberty or property interests  
4 within the meaning of the Due Process Clause, *Mathews v.*  
5 *Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976).  
6 Due process is a flexible concept; the exact contours are  
7 determined by the particular situation. *Mathews*, 424 U.S. at 334.  
8 But an essential principle of due process is the right to notice and  
9 a meaningful opportunity to be heard. *Cleveland Bd. Of Educ. V.*  
10 *Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L.Ed. 2d 494  
11 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339  
12 U.S. 306, 313, 70 S. Ct. 652, 94 L.Ed. 865 [1950]).

13       **[16]** A meaningful opportunity to be heard means “at a  
14 meaningful time and in a meaningful manner.” *Mathews*, 424  
15 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.  
16 Ct. 1187, 14 L.Ed. 2d 62 [1965]). The United States Supreme  
17 Court “consistently has held that some form of hearing is required  
18 *before* an individual is finally deprived of a property interest.”  
19 *Mathews*, 424 U.S. at 333.” (court’s emphasis)

20 *Rhoades* at 765-766.

21       Seemingly the District’s burden is satisfied wherein Mr. Barwin  
22 testified that declaring or ordering water rights abandoned or relinquished  
23 cannot be accomplished without a hearing and that no show cause hearing was  
afforded the District in this case prior to issuance of the Order. The District has  
satisfied its burden of proving its being deprived of due process of law.

Ecology’s Order is just that, a declaration of abandonment and or  
relinquishment. The Order does not direct the District to discontinue wasting  
water and provide it time to implement reasonable rehabilitation efforts as would  
issue pursuant to RCW 43.27A-190. Instead the Order sets out what Ecology  
has unilaterally determined, after “junking” the model, which calculated 81 cfs as  
the proper diversion figure, to be the extent of the District’s diversion water

1 rights, with the remainder presumably reverting to the State. The Order in  
2 question is an adjudicatory regulation effectuating a relinquishment of the  
3 District's rights.

4 The District could bring on other water users within its rights but for  
5 the Order in question. However, the Order prevents the District from meeting  
6 existing demands, let alone new ones.

7 "A. But not to the wasted amount of water.

8 Q. Not to the wasted amount of water.

9 And how much of the water above 29 cfs in the Twisp River and  
24 cfs in the Methow River is wasted by the District when it diverts?

10 A. My opinion is all of the water diverted above those amounts would  
constitute waste.

11 Q. But those amounts we've determined only relate to service of the new,  
smaller irrigation district, correct?

12 A. That's correct.

13 Q. So any water above that may have been perfectly legitimate and beneficially  
used to serve the old district -

14 A. And has been...

15 MS. MARCHIORO: (Indicating).

16 Q. --the much larger district?

17 A. I apologize for talking over you.

18 Q. That's all right.

19 A. And those amounts in large part, in my opinion, have been transferred to  
the individual water users to serve from wells and they're authorized to do  
that.

20 Q. How much of the District's water right has been transferred to persons  
excluded from the District?

21 A. About 20 cfs.

22 Q. Okay.

23 A. Total.

Q. And how much of the District's water right did you start out with

1 determining that they had vested over their historical use?

2 A. To date, I have not yet attempted to answer that question.

3 Q. Okay.

4 A. I would have to do the same sort of analysis, but go back to the district as  
it was before all the 2000 decisions.

5 Q. And until you do that you can't regulate the District's water flow, until you do  
that, correct?

6 A. I think I don't agree with that.

7 Q. Okay. Until you do that you won't really know how much water right the  
District has either to divert in the Twisp River or Methow River or for other  
8 uses, correct?

9 A. I'm not sure I understand your question well enough to agree or disagree."

10 (Barwin Depo. P. 67, ll. 9-25; p. 68; p. 69, ll. 1-2 [**Appendix "31"**])

11 If this were an Order to stop waste the Order would have had to have  
12 been couched in accordance with RCW 43.27A.190 to "...order necessary  
13 corrective action to be taken with regard to such acts within a specific and  
14 reasonable time." In this case Ecology did not issue an Order specifying that the  
15 District was wasting water and providing a time period during which  
16 improvements were to be made after which further enforcement action would be  
17 taken if not complied with. Instead, Ecology without any representation or notice  
18 to the District that it was deferring "its prosecutorial discretion" undertook to  
19 manage the rehabilitation project itself by hiring the contractor charged with  
20 accomplishing the rehab project. When Ecology's contractor failed to come up  
21 with the promised rehabilitation project, Ecology then participated in a two-year  
22 facilitation process to develop a new plan for a rehabilitated open canal delivery  
23 system. At the end of that facilitation process, which reached a consensus to

1 continue the rehab by lining portions of the open canal delivery system, Ecology,  
2 instead of complying with Mr. Phillips' representation that it would continue to  
3 facilitate funding, but at a lower level, refused any further financing and declared  
4 a substantial portion of the District's water right vitiated and void without any  
5 type of show cause hearing whatsoever.

6 The District's water rights are constitutionally protected property  
7 rights. And these rights are entitled to constitutional due process protection.  
8 *Sheep Mountain Cattle Co. v. DOE*, 45 Wn.App. 427, 430-431, 726 P.2d 55 (1986);  
9 *Rettkowski v. DOE* at 219; *DOE v. USBR*, 118 Wn.2d at 767 (1992).

10 It is important to note that the Notice of Violation primarily addressed  
11 Ecology's claim of the District's violation of RCW 90.48. Appropriately the  
12 majority of the District's response addressed 90.48 not 90.03. Now OWL and the  
13 State argue 90.48 does not count because it was not addressed by the PCHB.  
14 This argument further buttresses the District's claim that it is entitled to a full  
15 hearing in advance of having to appeal to the PCHB in order for it to present full  
16 evidence in response to the actual charges or claims being made by Ecology  
17 without having to address them for the first time on appeal. Under the facts of  
18 this case the District attempted to respond to 90.48 and instead was required to  
19 shift into high gear with regard to 90.03 at the appeal stage rather than an initial  
20 show cause hearing stage.

21 **2. Chapter 90.14 And Sheep Mountain Do Apply.**

22 As mentioned previously, the relinquishment statute RCW 90.14.130  
23

1 cannot be segregated or sidestepped by issuing an Order under the guise of a  
2 temporary determination as part of a change application process. *Rettkowski*.  
3 There is nothing temporary about Order DE 02-WRCR-3950. It effectively  
4 declares a substantial portion of the District's water rights relinquished for  
5 failure to put it to beneficial use. There is no substantive difference between  
6 Ecology limiting a person's water right because of non-use (relinquishment) or  
7 because all of the water was not efficiently put to beneficial use (relinquishment).  
8 The effect is exactly the same, to wit: an attempt to deprive a person's  
9 constitutionally protected property right in favor of reversion to the State. (See  
10 RCW 90.14.180)

11 To allow a party a full hearing before depriving that party of a  
12 constitutionally protected property right for non-use, but not provide a hearing  
13 for a party whose water right is declared invalid under a claim of waste  
14 constitutes unequal protection of the law. There is no basis for a distinction.  
15 The property right is the same – a constitutionally protected property right.  
16 Whether Ecology's action is precipitated by a claim of non-use or wasteful use  
17 does not lessen the constitutional protections to which a property right holder is  
18 otherwise entitled.

19 "Under the equal protection clause, persons similarly situated with  
20 respect to the law...must receive similar treatment." *State v. Blilie*,  
21 132 Wn.2d 484, 493, 939 P.2d 691 (1997)."

22 *Rhoades at 759.*

23 OWL attempts to distinguish *Sheep Mountain* on the basis that *Sheep*

1 *Mountain* was not given an opportunity to respond. Neither was the MVID. The  
2 Notice of Violation specifically noted that "it is not an order". The District spent  
3 considerable time and money putting together an extensive response primarily to  
4 RCW 90.48, with documentation supporting its response. Had the Notice been a  
5 meaningful attempt to put the District on notice that it was going to be deprived  
6 of its constitutionally protected water rights it would be entitled to receive an  
7 answer as to whether or not its response satisfied Ecology or not. Instead  
8 Ecology issues the Order, the first and only Order, without advance notice,  
9 without an opportunity for a hearing, and without an opportunity to determine  
10 whether or not its answers were adequate or not.

11 "[6] Where there is a deprivation of a significant property interest,  
12 due process requires a **predeprivation** hearing. *Olympic Forest*  
13 *Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002  
(1973)." (our emphasis)

14 *Carlstrom v. State*, 103 Wn.2d 391, 694 P.2d 1 at p. 399 (1985).

15 OWL's distinction is non-sensical. Whether you forsake, abandon or  
16 renounce or give over a right based on non-use is no different than loss of a right  
17 based on claimed over-use in terms of the constitutional protections to which a  
18 water right holder is otherwise entitled.

19 OWL's assertion that a water right holder is entitled to due process  
20 only in connection with particular statutory procedures is incorrect. Due process  
21 applies at every stage of any proceeding where significant property rights are at  
22 issue. *Chaussee, Id.* Due process is not relegated to a particular statute, it is a  
23 fundamental underpinning of American jurisprudence and is applicable in any

1 setting where a person's constitutionally protected property rights are in  
2 question. *Sheep Mountain* still holds for the proposition that a person's water  
3 rights are to be accorded due process rights. MVID asserts that the legislator's  
4 amendment of 90.03.130 does not obviate the need for a predeprivation hearing  
5 before an appeal. *Rettkowski*.

6 **3. MVID Did Not Receive Adequate Procedural Due Process.**

7 OWL claims that the Notice of Violation included all the necessary  
8 information and an opportunity to respond. Now we know to the contrary, based  
9 on Mr. Barwin's testimony, the calculations as to what amount of waste, if any,  
10 had not even been calculated at the time of the NOV or the Order issued.  
11 Furthermore, there is evidence that the Order was drafted at the same time as  
12 the Notice of Violation, giving rise to the strong inference that the District's good  
13 faith response was inconsequential. Ecology had already determined to issue the  
14 Order regardless of the District's response. This position is further buttressed by  
15 the fact that Ecology made no attempt to answer the District's response in any  
16 regard or to put the District on notice that an Order might issue or what it could  
17 do about modifying its practices in order to avoid a negative Order. Instead  
18 Ecology continued to participate in the facilitation, which arrived at a consensus  
19 to proceed with lining the canals, thereby, through its actions, conveying to the  
20 District that it was satisfying the NOV and its responsibility to achieve reasonable  
21 conveyance efficiency.  
22  
23

1           The argument that the PCHB met the procedural requirements of  
2 Chapter 43.21B by providing a full evidentiary hearing comes too late and does  
3 not address MVID's argument. *Rettkowski*.

4           The Notice of Violation was primarily drafted with reference to a  
5 claimed violation of RCW 90.48 and the District's primary effort in responding  
6 was directed accordingly. Only later, at the PCHB level, does the District find  
7 that 90.48 would not be considered by the PCHB when, in fact, the MVID had to  
8 divide its preparation and argument time and expense between the two cited  
9 Chapters.

10           Further proof of failure of due process is highlighted by OWL's  
11 citation of RCW 90.03.605(1)(c). As noted in that belatedly cited "provision" of  
12 the statute, Ecology is charged with achieving compliance with the water laws by  
13 either (1) issuing a Notice of Violation (NOV) or (2) an administrative Order. If an  
14 Order issues apart from the requirement that it "shall specify the provisions of  
15 the statute, rules, regulations, directive or order alleged to be or about to be  
16 violated, and the facts upon which the conclusions of our violation is based....", it  
17 becomes effective immediately upon receipt. Unlike an Order, issuance of a  
18 Notice of Violation (NOV) is not an Order; it does not become effective  
19 immediately. Obviously, the purpose of issuing an NOV instead of an Order is to  
20 provide a party the opportunity to respond. Inherent in the opportunity to  
21 respond is the presumption that Ecology will answer that response before issuing  
22  
23

1 an Order otherwise there would be no reason to proceed with the Notice of  
2 Violation process as opposed to the issuance of an Order in the first instance.

3 MVID cannot presume that the legislature provided for a distinction  
4 between the Notice of Violation procedures, as opposed to issuance of an Order to  
5 be meaningless. Ecology, choosing the Notice of Violation route, was required to  
6 review the response and to first engage the party responding as to the adequacy  
7 or inadequacy of the response and provide an opportunity for that person or  
8 entity to advocate the adequacy of that response before any final Order issues.

9 Due process requires that notice be given prior to deprivation of a  
10 constitutional right. *State v. Fleming*, 41 Wn.App. 33, 701 P.2d 815 (1985).  
11 Notice that fails to adequately apprise a person or entity of the potential  
12 consequences affecting those constitutional rights is inadequate. In this case  
13 nowhere in the Notice of Violation is there any statement that failure to respond  
14 to the Notice within thirty (30) days or an inadequate response will result in  
15 relinquishment of your substantial constitutionally protected water rights.

16 Furthermore, procedural due process constrains governmental  
17 decision-making that deprives individuals or entities of protected property  
18 interests. *Rhoades v. City of Battle Ground*, 115 Wn.App. 752, 765, 63 P.3d 142  
19 (2002). *Rhoades* is particularly significant in holding that procedural due  
20 process is a flexible concept; the exact contours of which are determined by the  
21 particular situation. *Rhoades, Id.*, p. 765. In addition, *Rhoades* holds that when  
22 the loss of a property right is at issue, a hearing at a meaningful time means a  
23

1 hearing before one is finally deprived of that property interest. *Rhoades, Id.*, p.  
2 765-766. In this regard it is important to note that Order No. DE 02WRRCR-3950  
3 was a final Order and that it provided as follows, to wit:

4 "Failure to comply with this order may result in the issuance of  
5 civil penalties or other actions, whether administrative or judicial,  
6 to enforce the terms of this order."

7 Just because the Pollution Control Hearing Board may follow its  
8 procedures and afford the parties due process at the appeal level does not excuse  
9 Ecology from affording a person or entity due process in connection with its  
10 statutory duties affecting a person or entity's constitutionally protected property  
11 rights.

12 OWL's citing of cases concerning the fundamental requirements of  
13 due process at page 18 of its brief are exquisitely supportive of the District's  
14 claims. Beginning with constitutionally protected real property rights the  
15 question then becomes, has the District been afforded procedural safeguards in  
16 this particular situation that are tailored to the specific function to be served?  
17 Furthermore, due process being a flexible concept will vary according to the  
18 relative weight of the various interests. The weight to be accorded water rights or  
19 deprivation thereof in connection with real property in arid country should be  
20 heavy indeed. Particularly relevant here is the holding in *Bang Nguyen, supra*.  
21 In that case the Court held that due process of law requires proof by a clear  
22 preponderance of the evidence before a person may be deprived of a particularly  
23 important individual interest. In addition the Court ruled that important State

1 interests and societal interests may require a higher standard of proof in a  
2 proceeding involving a risk of deprivation of an individual right. *Bang Nguyen*, at  
3 pp. 525-526.

4 As noted earlier, the Order sets forth no facts, merely conclusions  
5 and even at that there is no conclusion that the District is engaged in wasteful  
6 water practices. Most importantly, however, Ecology has no authority to  
7 adjudicate water rights out of existence when acting upon a change request.  
8 Neither does Ecology have authority to adjudicate water rights out of existence  
9 under the guise of regulation of waste. Such conduct is regulatory adjudication  
10 specifically proscribed in *Rettkowski*.

#### 11 IV.

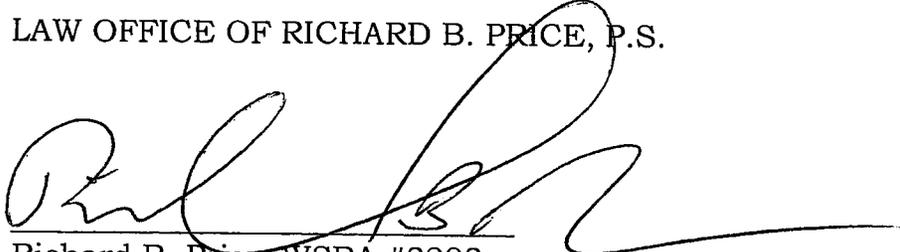
#### 12 CONCLUSION

13 Ecology accepted the responsibility to manage the rehabilitation of  
14 the District's water distribution project. After five to six years of effort it was  
15 unable to provide the District with a project, let alone a project that it could  
16 afford to operate. Based on the State's representations that it would cooperate  
17 with the District in proceeding to rehabilitate the open canal delivery system and  
18 thereafter reaching consensus that the District's open canal system should be  
19 continued with lining and thereafter failing to provide any further funding, let  
20 alone reduced funding, without a hearing pulling all funding for improvements  
21 and declaring a substantial portion of the District's constitutionally protected  
22 water rights out of existence constitutes bad faith, failure to deal scrupulously  
23

1 with a citizen, failure to provide due process, and raises valid equitable and  
2 constitutional claims over which the Pollution Control Hearing Board has no  
3 jurisdiction. Based on the evidence before this Court OWL's motion should be  
4 denied in all respects and it justifies a decree in the District's favor on each and  
5 every issue sua sponte.

6  
7 DATED this 14<sup>th</sup> day of July 2004.

8  
9 LAW OFFICE OF RICHARD B. PRICE, P.S.

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13 Attorney for Plaintiff

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