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DEC 07 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By.....

NO. 297829

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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JERRIE VANDER HOUWEN, ANNE VANDER HOUWEN and  
FORD ELSAESSER, Chapter 11 Trustee for JERRIE VANDER  
HOUWEN,

Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

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APPELLANT'S REPLY BRIEF

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**A. Respondent's "Standing" Argument Is Baffling.**

The Petition for Review before the trial court in this case was filed on behalf of Vander Houwen. (CP 1-2). On January 06, 2006, Velikanje Halverson substituted as attorney of record for Vander Houwen. (CP 67-68). After the trial court's decision, Vander Houwen, as appellant, and as represented by Velikanje Halverson, filed a notice of appeal with this court. (CP 54-59). Appellant Vander Houwen filed an appellant's brief through his attorney of record.

Even though the fact is not in the record, Monson Fruit or an entity associated with Monson Fruit does indeed now own the former Vander Houwen property at issue in this case. However, it is undisputed that Vander Houwen is still the appellant in this case.

The Respondent's argument borders or crosses the line on being frivolous. It argues that only the applicant for water rights, and not the current property owner, can have standing with respect to the pending application. *See Hanson Indus., Inc., v. Kutschkau*, 158 Wn. App. 278, 294-95, 239 P.3d 367 (2010). There is no dispute that the applicant is the appellant herein. The applicant for

the water rights is the appellant Vander Houwen in this case. Monson Fruit clearly has an interest in the outcome of this appeal since it is the current owner of the property, but it is not the appellant in this case. Vander Houwen is the appellant.

Monson is not an appellant. Monson did and does not seek any form of relief before either the superior court or this court. Monson is the owner of the property at issue in this case and will have rights against Vander Houwen in that regard, but that is not the issue before this Court at this time. Vander Houwen is and was the appellant. It is undisputed that he has standing to pursue this appeal. The State's argument is frivolous in this regard.

**B. Nothing in the Statutory nor Regulatory Scheme Associated with Filing a Petition for Review Requires Compliance with the Rules of Appellate Procedure.**

The fundamental flaw of the Government's argument is that it assumes that the Rules of Appellate procedure apply to a superior court action. They do not.

These rules (RAP) govern proceedings in the Supreme Court and the Court of Appeals for review of a trial court decision and or direct review in the Court of

Appeals of an administrative adjudicative order under  
RCW 34.05.518.

RAP 1.1(a).

A petition for review from a PCHB order is “none of the above.” The rules of appellate procedure have no application in that context. Rather, since it is a proceeding in superior court, the superior court rules, tempered with the statutory scope of review mandates allocate the burdens of the respective parties.

The requirements for a petition for review of the agency action in this case are set forth in RCW 34.05.546. There is no argument or dispute that the appellant’s petition for review met those standards as set forth in the statute. Unlike the Rules of Appellate Procedure that provide that, in the appellant’s brief, the appellant must make a separate assignment of error to each finding of fact that the party contends was improper (RAP 10.3(g)), neither the APA nor any regulation associated therewith mandate such a requirement. In fact, with respect to the petition for review, there is no requirement that a brief of any kind be filed at all, let alone that the non-required brief comply with the RAPs or have any assignments of error.

The case law cited by the DOE in this case all deal with the failure to assign error to findings of fact and conclusions of law at the COURT OF APPEALS level. None of the cases cited by the DOE deal with the middle step of the petition for review to superior court.

There was no “notice of appeal” filed in this case at the trial court level. Rather, it was a “Petition for Review.” It is undisputed that Vander Houwen complied with the requirements of the statute to present a petition for review to the superior court. In that petition for review, the appellant sought superior court review of:

Findings of Fact, Conclusions of Law and Order entered on June 26, 2003 (a copy of which is attached hereto as Exhibit “A” and incorporated by this reference).

(CP 2).

Appellant designated and attached the findings of fact and conclusions of law to the petition for review and the issues raised therein were before the trial court. The APA governs the judicial review of a decision from the PCHB. *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998). The appellate court applies the statutory standards of review directly to

the administrative record. Any decision or findings from the superior court are, essentially, irrelevant to the Court of Appeals analysis. *See Motley-Motley, Inc., v. PCHB*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005).

Because of this standard of review, arguments not made at the trial level are properly considered on appeal to the Court of Appeals. The Court of Appeals looks at the issues anew based on the administrative record. *See Shohomish County v. Hinds*, 61 Wn. App. 371, 375, 810 P.2d 84 (1991).

The rules of appellate procedure do not apply to the petition for review to superior court. Neither the APA nor the PCHB statute or regulation provide the procedure that the superior court must undertake. While not required to do so, the parties in this case filed briefs in superior court. The appellant filed a brief that directly challenged the fact that the PCHB's findings of fact and conclusions of law as to hydraulic continuity and impairment of rights were not supported by substantial evidence. (CP 31-33).

The parties did nothing pursuant to the rules of appellate procedure. There was no designation of the record, whether clerk's

papers or report of proceedings. There was no notice of appeal nor were appellate briefs filed. The parties did file memorandum to assist the court but they were not filed pursuant to RAP mandates as to page limits, content nor style. In fact, the only reason that such briefs were filed was due to the agreement of the parties to assist the superior court. Oral argument was not made before a three judge panel at the Yakima County superior court. There is absolutely no aspect of the rules of appellate procedure that were followed in this case. That's because those rules don't apply.

The appellant did comply with the rules of appellate procedure when they did apply. When required to make assignments of error and set forth the findings of facts and conclusions of law that were being challenged, pursuant to the rules of appellate procedure, the appellant did so. There are no similar requirements under the APA, PCHB or superior court rules. The appellant has complied with all applicable rules and the motion should be denied and the appeal heard on the merits.

C. **The Record Does not Contain Substantial Evidence to Support any Finding of Fact in this Case.**

Appellant has previously set forth the deficiencies in the Government's presentation in this case. However, this Court must be mindful that second hearing that occurred in this case was not being conducted on a "clean sheet of paper." Rather, the trial court, with respect to the first petition for review in this case, clearly set forth the scope of the remand hearing. In particular, the Court defined the scope of the remand as:

The Court concludes that, given the Washington State Supreme Court ruling in *Postema v. PCHB*, 142 Wn.2d 68 (2000), inadequate evidence was presented to the Board regarding Vanderhouwen's failure to satisfy the statutory requirements of RCW 90.03.290 as hydraulic continuity alone is not sufficient to support Ecology's denial of a water right application. **The Court remands this matter to the Board for further proceedings to present evidence in addition to hydraulic continuity supporting Ecology's denial of Vanderhouwen's application for permits for ground water wells.**

(CP 28 (emphasis added))

The remand in this case was for DOE to present evidence as to the production of additional evidence to justify its denial of

Vander Houwen's applications. As more fully set forth in the Court's memorandum opinion:

The underlying factual issue in this case is whether the Naches River is in hydraulic continuity with Petitioner's two wells, and if so, whether the proposed withdrawal adversely affects public interest or impairs existing water rights.

\* \* \* \*

Here, there was not a showing that the Naches River, a "highly" appropriated river but not a "fully" appropriated river had minimum flows established by regulation. There was evidence that some rightful users, in some years, have had their water allocations diminished. There was no evidence supporting a finding that impairment would necessarily occur.

\* \* \* \*

There was no evidence as to the length of time it would take to equalize the pressure, or at what rate this discharge would occur, or what impact seasonal recharges due to weather would have on the flow.

Mr. Vanderhouwen raised the issue in his testimony, and DOE did not respond with evidence, as to whether there is an opportunity for the aquifer to resaturate during a season when agricultural demands on the Naches are minimal or non-existent.

(CP 29-30).

The Government seeks to conveniently forget this fact. The remand was not some sort of “do-over” for Vander Houwen. Rather it was to give the Government the opportunity to fix its own deficiency and demonstrate that something, other the alleged “hydraulic continuity” was at play in this application. In particular, it was the Government, and not Vander Houwen, that was tasked with showing some sort of “impairment” in this case. This the Government has utterly failed to do. It hasn’t even tried.

This Court must be mindful of the undisputed facts in this case. The section 34 well at issue in this case is 1.7 miles, that’s 1.7 miles, from the Naches River. That well is drilled into a water aquifer that is located well below the Naches river through a bed of rock. (Respondent Brief at 9-10). It simply defies reason to think that a ground water well drilled two miles away and drilled into an aquifer located below the river bed could have any conceivable “hydraulic continuity” with the Naches River.

Secondly, there is absolutely no showing of any impairment to an existing right even if such hydraulic continuity existed. As was explained in detail in previous briefing, *Postema v. Pollution*

*Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), clearly requires more than just some sort of hint or showing of “hydraulic continuity.” Rather, there must be a showing of a substantial impairment of existing right in order to justify the Government’s denial of the application.

As noted above, the Government doesn’t even try to meet this standard. While some mention of some sort of “fish” right is mentioned in the Board’s decision, there is no evidence in the record to support any such a right, let alone an impairment thereof. There is absolutely no evidence that any irrigator’s rights would be impaired if the application was approved. There is no evidence of impairment and the Government should not be given a third bite of the apple to make such a showing. The Superior Court should be reversed and the application for water right should be approved.

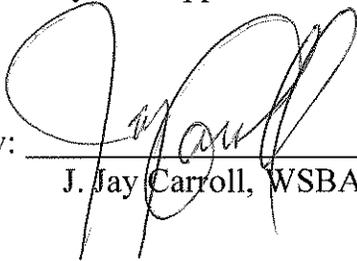
**D. Conclusion.**

The proper appellant is involved in this case. There is no need to follow the rules of appellate procedure at the trial court level. The Government has utterly failed to satisfy its burden on remand from the first trial court to show an impairment of right in this case.

Accordingly, the trial court should be reversed and the appellant's application for a water right should be approved.

Respectfully submitted this 6<sup>th</sup> day of December, 2011.

VELIKANJE HALVERSON P.C.  
Attorneys for Appellant

By: 

\_\_\_\_\_  
J. Jay Carroll, WSBA 17424

CERTIFICATE OF SERVICE

I, JENNIFER FITZSIMMONS, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the assistant to J. Jay Carroll, the attorney for Appellant, and am competent to be a witness herein.

On December 10, 2011, I caused to be sent via U.S. Mail, the original and one copy of the foregoing document to the following:

Clerk, Court of Appeals, Div. III  
500 N. Cedar Street  
Spokane, WA 99201

On December 10, 2011, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Joan Margaret Marchioro  
WA State Atty General's Office  
Ecology Division  
2425 Bristol Ct SW, Fl 2  
PO Box 40117  
Olympia, WA 98504

U.S. MAIL

Dated this 10th day of December, 2011.

VELIKANJE HALVERSON P.C.



Jennifer Fitzsimmons

Legal Assistant to J. Jay Carroll

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