

FILED  
October 1, 2014  
Court of Appeals  
Division III  
State of Washington

COA #323692-III

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

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ALFREDO AHUMADA, CHRISTINA LOPEZ, and

DIANA RIVERA,

Appellants,

v.

KENNEWICK POLICE DEPT.

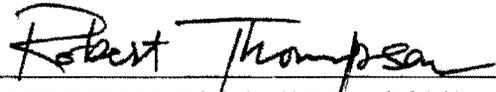
Respondent.

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Benton County Superior Court No. 12-2-02618-9

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DATED this 1st day of October, 2014.



ROBERT THOMPSON - WSPA #13003  
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## TABLE OF CONTENTS

### ASSIGNMENTS OF ERROR

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE	4
III.	ARGUMENT	6
	A. Strict Construction Of Forfeiture Statute Invalidates The Forfeiture In This Case.	6
	B. The Due Process That Is Specifically Built Into The Forfeiture Statutes Invalidates The Forfeiture In This Case.	10
	C. RCW 34.05.534 Does Not Require A Mandatory Filing For Reconsideration Or To Vacate For Appeal.	13
	D. Exhaustion Of Non-Mandatory Procedures Is Excused If Futile.	19
	E. Where There Is Concurrent Jurisdiction The Requirement Of Exhaustion Of Remedies Is Relaxed.	23
	F. Even If Non-mandatory Administrative Remedies Were Not Exhausted, Dismissal Without Prejudice With Directions For A Forfeiture Is The More Appropriate Remedy.	28
III.	CONCLUSION.	29

APPENDIX #1 - 10/04/12 *Default Order of Forfeiture*

APPENDIX #2 - 08/15/13 *Transcript*

APPENDIX #3 - 04/05/14 *Order Dismissing Appeal*

## ASSIGNMENTS OF ERROR

- NO. 1: Whether The Due Process Protections Built Into The Drug Forfeiture Statute Allow The Kennewick Police Department To Determine The Constitutionality Of Its Own Procedures And Ignore Those Protections?
- NO. 2: Whether RCW 34.05.534 Requires A Mandatory Filing For Reconsideration Or To Vacate Before Appealing The Police Department's Summary Findings And Default To Superior Court?
- NO. 3: Whether Exhaustion Of Non-Mandatory Remedies Is Excused Where Futile?
- NO. 4: Whether There Is Concurrent Jurisdiction In The Superior Court On The Forfeiture Actions Of The Police Department When There Is A Constitutional Defense And Issues Involving Due Process?
- NO. 5: Whether Non-Exhaustion Of Non-mandatory Administrative Remedies Require Dismissal With Prejudice Or Remand With Directions For A Forfeiture Hearing As The More Appropriate Remedy?

## TABLE OF AUTHORITIES

### Washington Cases

<i>Allan v. Department of Labor &amp; Indus.</i> , 66 Wn.App. 415, 832 P.2d 489 (1992)	16
<i>American Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1, 802 P.2d 784 (1991)	25
<i>Bare v. Gorton</i> , 84 Wn.2d 380, 526 P.2d 379 (1974)	19
<i>Bruett v. 18328 11th Ave., N.E.</i> , 93 Wn.App. 290, 968 P.2d 913 (1998)	7, 15
<i>Chaney v. Fetterly</i> , 100 Wn.App. 140, 995 P.2d 1284 (2000)	26
<i>Hardee v. Dep't of Soc. &amp; Health Serv.</i> , 152 Wn.App.48, 215 P.3d 214 (2009), <i>aff'd</i> , 172 Wn.2d 1, 235 P.3d 339 (2011)	27
<i>Higgins v. Salewsky</i> , 17 Wn.App. 207, 562 P.2d 655 (1977)	21
<i>In re Real Estate Brokerage Antitrust Litigation</i> , 95 Wn.2d at 302, 622 P.2d 1185 (1980)	25
<i>Jaramillo v. Morris</i> , 50 Wn.App. 822, 828-29, 750 P.2d 1301 (1988)	25
<i>Kringel v. Department of Social &amp; Health Servs.</i> , 47 Wn.App. 51, 733 P.2d 592, <i>rev. den.</i> , 108 Wn.2d 1034 (1987)	25
<i>Lane v. Port of Seattle</i> , 178 Wn.App. 110, 316 P.3d 1070 (2013)	15
<i>Moore v. Pacific Northwest Bell</i> , 34 Wn.App. 448, 662 P.2d 398, <i>rev. den.</i> , 100 Wn.2d 1005 (1983)	25
<i>Northwest Ecosystem Alliance v. Washington Forest Practices Board</i> , 149 Wn.2d 67, 66 P.3d 614 (2003)	15
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003)	7
<i>Orion Corp. v. State</i> , 103 Wn.2d 441, 458, 693 P.2d 1369 (1985)	19
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000)	27
<i>Retail Store Employees Union</i> , 87 Wn.2d 887, 558 P.2d 215 (1976)	21
<i>Scannell v. City of Seattle</i> , 97 Wn.2d 701, 704, 648 P.2d 435 (1982)	15
<i>Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way</i> , 150 Wn.App. 387, 208 P.3d 1189 (2009)	8-10, 11, 28

<i>South Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety &amp; Env't v. King County</i> , 101 Wn.2d 68, 677 P.2d 114 (1984)	14, 21, 22
<i>Tellevik v. Real Property</i> , 125 Wn.2d 364, 884 P.2d 1319 (1994)	9, 11
<i>Valley View Indus. Park v. City of Redmond</i> , 107 Wn.2d 621, 733 P.2d 182 (1987)	25
<i>Vogt v. Seattle-First Nat'l Bank</i> , 117 Wn.2d 541, 817 P.2d 1364 (1991)	25
<i>Yakima County Clean Air Authority v. Glascam Builders, Inc.</i> , 85 Wn.2d 255, 534 P.2d 33 (1975)	13-14
<i>Zylstra v. Piva</i> , 85 Wn.2d 743, 539 P.2d 823 (1975)	20

### **Washington Statutes**

RCW 2.08.010	23
RCW 34.05.030	16
RCW 34.05.440	3, 5, 6, 15, 18, 23, 28
RCW 34.05.470	3, 6, 18, 23, 28
RCW 34.05.570	11, 12, 27
RCW 34.05.534	12, 17
RCW 69.50.505	4, 7, 8, 23, 24, 26

### **Washington Constitution**

Article IV, Section 6	23
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### **U.S. Cases**

<i>Robinson v. Hanrahan</i> , 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972)	10
<i>United States v. James Daniel Good Real Property</i> , 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993)	10
<i>United States v. Kissinger</i> , 250 F.2d 940 (3d Cir. 1958)	20

## I. INTRODUCTION

On October 4, 2012, the Kennewick Police Department, Chief of Police entered a *Default Order of Forfeiture*. (Appendix #1) Among the findings of fact were the following:

WHEREAS, the document submitted by attorney Robert Thompson on August 2, 2012, was merely a Notice of Appearance and not an adequate claim to the property on behalf of any claimant, and

WHEREAS, the Notice of Hearing including time, place, and date of the initial hearing held on September 27, 2012 and mailed to Mr. Chavez and to his attorney, Robert Thompson, on the 17th day of August, 2012, and

WHEREAS, neither Robert Thompson, or any other claimant appeared at the hearing; and

WHEREAS, Joel Chavez and Attorney Kevin Holt appeared at the hearing and received a requested continuance to November 1, 2012 for hearing on Mr. Chavez's claim to the Cadillac Escalade; and

Whereas, the undersigned hearing officer finds that Alfredo Ahumada, Christian Lopez, Diane Rivera, and JP Morgan Bank are in default of any claim to any of the subject property.

The court then forfeited the three vehicles and cash to the Kennewick Police Department: Black 2004 Cadillac Escalade vehicle; White 2005 Nissan vehicle; Black 2006 Lincoln Mark vehicle, and \$65,875 in currency.

Alfredo Ahumada, Christian Lopez, and Diane Rivera filed an appeal through attorney Robert Thompson. In a hearing on August 15,

2013, the Superior Court clearly ruled that insufficient notice was given to Ahumada, Lopez and Rivera:

THE COURT: I've had a chance to read through the briefs here and went back and pull a number of the cases that have been cited here. It's important to recognize in these particular matters my original ruling, and I still stood by that, is that the three named individuals besides Mr. Chavez were never provided notice of the original hearing.

The notice that went out was to Mr. Chavez with a cc to Mr. Thompson. I don't see any other notices addressed to Mr. Ahumada, Ms. Lopez or any of the other parties that were listed by Mr. Thompson in his notice of appearance to the City of Kennewick. . . .

Appendix #2 - 08/15/13 Transcript, p. 18.

Thus, the court ruled that Claimants' attorney letter dated 08/02/12 to the City of Kennewick sufficiently gave notice of claim but that due process was denied to Ahumada, Christina Lopez and Diana Rivera:

In this particular matter I find that you have not exhausted the administrative remedies that were required by the Administrative Proceedings Act. And then the question that I've asked myself is where does that put us? Because I believe your clients are entitled to a hearing. And I think the City of Kennewick still has an obligation to provide your clients that hearing since they were never provided notice, okay? So I don't think the City of Kennewick can proceed with forfeiture until they provide you and your clients notice of those proceedings.

And the City of Kennewick could have, on their own, but they didn't -- when the matter was (sic)when Mr. Chavez's matter was set for a hearing and after you had already filed your notice of appeal to say, Mr. Thompson, why don't we just set aside that notice of appeal and have you come back down here to the administrative process and join in this particular hearing so we

don 't waste a lot of time and money and we get a decision on this thing now rather than sometime down the road. That wasn't done either.

And I make that comment because the forfeiture statutes are strictly construed against the city, against that party that's seeking to forfeit the property because the law requires they cannot forfeit without providing adequate notice to the other parties. They provided adequate notice to Mr. Chavez, but no adequate notice to the other three individuals that Mr. Thompson -- by a notice to the City of Kennewick -- said he was representing. I don't think you can fall back and say, oh, I know, we gave notice on this guy, but we don't have to give notice on these other three, regardless of who's representing. I think you got an obligation to provide notice in regards to all three . . . .

Appendix #2 - 08/15/13 Transcript, p. 18.

Not only did the Superior Court rule that the City of Kennewick did not follow the forfeiture statute which must be strictly construed, it also ruled that Ahumada, Lopez and Rivera did not exhaust administrative remedies under RCWs 34.05.440(3)<sup>1</sup> and 34.05.470<sup>2</sup> (i.e., that they failed to file motions to vacate and/or for reconsideration, respectively.) Appendix #3 (04/05/14 *Order Dismissing Appeal*). The three claimants now appeal that ruling.

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<sup>1</sup> See Appendix #4 - RCW 34.05.440. Default.

<sup>2</sup> See Appendix #4 - RCW 34.05.470. Reconsideration.

## II. STATEMENT OF THE CASE

The forfeiture in this case occurred June 20, 2012 when the Kennewick Police seized items allegedly related to illegal drugs transactions of Alfredo Ahumada. Over \$100,000.00 was seized. Attorney Robert Thompson prepared a letter dated August 2, 2012, to notify the City of Kennewick that he represented Ahumada, Christina Lopez and Diana Rivera. The letter read as follows:

K. M. Hohenberg, Chief  
Kennewick Police Department  
Kennewick, WA 99336

RE: Alfredo Ahumada Ozuna

Dear Sir:

Please be advised that this office will represent all claimants on the potential forfeiture actions arising from Mr. Alfredo Ahumada Ozuna's arrest on or about June 20, 2012 in Kennewick, WA.

This includes Joel Chavez (KPD No. 12-18645), Alfredo Ahumada Ozuna, Christina Lopez and Mr. Ahumada's mother, Diana Rivera, and any and all other potential claimants.

Please forward any and all correspondence and or pleadings to this office.

Mr. Ahumada obviously opposed the City's drug forfeiture of their property and asserted their ownership interest (as did Claimants Lopez and

Rivera). The letter was served August 2, 2012, the same day it was dated - i.e. within the 45 days required by RCW 69.50.505.

Attorney Thompson personally delivered the letter to the City of Kennewick PD "on potential forfeiture actions." Attorney Thompson served three people, one of which he believed to be Chief Ken Hohenberg's assistant.

The City ignored Mr. Alfredo's and the other Claimants' notice of claim and contested drug forfeiture. The City sought and obtained a default order from the hearing examiner without notice to Claimants. Neither Attorney Thompson, Thompson's office or Claimants received notice of default by the City of Kennewick. Apparently, the hearing examiner did not ask. Attorney Thompson ultimately learned that the City sought and obtained an order of default where the City argued that Claimants' notice opposing forfeiture was insufficient.

**COURT WRITTEN RULING:** The Superior Court found that the administrative procedure act (RCW 34.05) allowed a party to ask for reconsideration of a default order. The Court mentioned the 7 day requirement of RCW 34.05.440(3):

(3) Within seven days after service of a default order under subsection (2) of this section, or such longer period as provided by agency rule, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon. During the time within which a party

may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of that party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings. (emphasis added).

None of the Claimants filed a motion to vacate under RCW 34.05.440(3) or a motion for reconsideration under RCW 34.05.470. The Court held that Mr. Alfredo and the other Claimants waived their claim by not exhausting administrative remedies. Mr. Alfredo, Lopez and Rivera consistently asserted that the City cannot violate due process and then assert a non-mandatory procedural hurdle to defeat a person's rightful claim.

Mr. Ahumada and Claimants take exception to Findings of Fact #5 (notice of hearing being sent to Mr. Thompson), #6 (notice of Sept. 27, 2012 hearing), and #8 (Mr. Chavez only claimant who properly contested forfeiture). The record does not support Findings #5 & #6 and Finding #8 is a conclusion of law, not a finding of fact.

Mr. Ahumada also takes exception to Conclusions of Law #3 (on exhaustion of remedies); #4 (on exclusive and adequate administrative remedy), #7 (on adequacy of administrative remedy), #8 (on statutory requirement of exhaustion), #9 (on use of the word "may"), #10 (excusing exhaustion), #11 (on inadequacy and futility), #12 (on irreparable harm), #13 (on due process claims excusing exhaustion); #14 (on requirement of

exhaustion under RCW 34.05.440), and #15 (failure to exhaust administrative remedies and lack of jurisdiction).

### III. ARGUMENT

#### **A. Strict Construction Of Forfeiture Statute Invalidates The Forfeiture In This Case.**

RCW 69.50.505(4), (5) provide for forfeiture of drug-related property or proceeds:

(4) If no person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(d), (g), or (h) of this section within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the item seized shall be deemed forfeited. The community property interest in real property of a person whose spouse or domestic partner committed a violation giving rise to seizure of the real property may not be forfeited if the person did not participate in the violation.

(5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right....

RCW 69.50.505(4), (5).

Washington appellate courts have held that forfeitures are not favored and such statutes are construed strictly against the seizing agency. *Bruett v. Real Property Known as 18328 11th Ave. N.E.*, 93 Wn.App. 290, 295, 968 P.2d 913 (1998). The meaning of a statute is a

question of law that the appellate court reviews de novo. *Okeson v. City of Seattle*, 150 Wash.2d 540, 548–49, 78 P.3d 1279 (2003).

In *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn.App. 387, 208 P.3d 1189 (Div. 1, 2009), the City of Everett seized a car and \$260,000 in cash found inside it. The dispositive question for Division I was whether the notices of appearance and requests for discovery that two claimants (Yatin and Vijay) served by their attorney on counsel for the SRDTF satisfied the statute's requirement to “notif[y] the seizing law enforcement agency in writing of [Yatin and Vijay's] claim[s] of ownership or right to possession [of the six properties].” If Yatin and Vijay notified the SRDTF within “ninety days” of the “seizure ... of real property,” they were entitled to a hearing on their claims of rights to the seized properties under RCW 69.50.505(5).

The trial court granted the task force's motions for summary judgment in *Poplar Way*. Like Ahumada's case, the sole basis for the rulings was that Yatin and Vijay failed to give timely written notice contesting the forfeiture. Notices of appearances were served by counsel for Yatin and Ashima Jain, husband and wife, and Vijay and Kiran Jain, husband and wife, on the Snohomish Regional Drug Task

Force (SRDTF). The Superior Court granted forfeiture on summary judgment because the notices did not constitute notices “in writing of the [Yatin and Vijay] claim of ownership. . . .” The appellate court reversed the summary judgment forfeiting claimants' interests holding that notices of appearance and requests for discovery, served by claimants on counsel for regional drug task force, were sufficient to comply with requirements of drug seizure and forfeiture statute; thus, claimants were entitled to hearing on their claims of rights to the properties. The court in *Poplar Way* held that the notice and right to a hearing were a matter of due process: "Due process requires that they receive a full adversarial hearing within 90 days." *Poplar Way*, 150 Wn.App. at 398 (citing *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 87, 838 P.2d 111 (1992)).

In this case, the facts were undisputed as to the notice given by Mr. Thompson on behalf of Ahumada, Lopez and Rivera. Due process required a full evidentiary hearing but the Superior Court summarily forfeited Ahumda's, Lopez's and Rivera's claims. The Superior Court ruled correctly in its oral ruling on August 15, 2013 but then reversed itself in written findings.

In *Poplar Way*, Division I rejected the city's argument on sufficiency of notice as one unsupported by statute or case law. *Poplar*

*Way*, 150 Wn.App. at 394. The same is true in this case - Claimants gave notice and a hearing was denied contrary to the statute and due process. This court should reach the same result that Division I reached in *Poplar Way* - "reverse all summary judgment orders and remand for a hearing to be held within 90 days of the filing of this opinion." *Poplar Way*, 150 Wn.App. at 401.

**B. The Due Process That Is Specifically Built Into The Forfeiture Statutes Invalidates The Forfeiture In This Case.**

As can be seen above, with respect to forfeiture, due process demands a meaningful opportunity to be heard. In *Robinson v. Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972), a forfeiture case, the United States Supreme Court decided that an imprisoned appellant did not receive due process when the State sent forfeiture notices to his home address rather than to the jail facility where he was held. The Illinois vehicle forfeiture statute authorized service of notice by certified mail to the address as listed in the records of the Secretary of State. *Id.* at 38, n.1. The Court noted that the State knew appellant was not at the address to which the notice was mailed, and the State also knew appellant could not get to that address since he was, at that very time, confined in the county jail.

It is undisputed that the cornerstone of due process is notice and opportunity to be heard. Such was denied in this case. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the U.S. Supreme Court held that in the absence of exigent circumstances, due process requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. This was repeated in *Tellevik v. Real Property*, 125 Wn.2d 364, 370, 884 P.2d 1319 (1994) (*Tellevik II*), where the Washington Supreme Court revisited the constitutionality of Washington's drug forfeiture statute in light of *Good*. The *Tellevik* Court found that an ex parte probable cause hearing allowing seizure does not mean that the seizing agency takes control of the property. Due process entitles a claimant to a full adversarial hearing within 90 days after seizure. Like *Tellevik*, Claimants in this case were denied any meaningful due process in this forfeiture action. The Superior Court's Findings of Fact #5 (notice of hearing being sent to Mr. Thompson), #6 (notice of Sept. 27, 2012 hearing), and #8 (Mr. Chavez only claimant who properly contested forfeiture), are not supported by the record. Attorney Mr. Thompson's letter to the prosecutor fulfilled the requirements of RCW 69.50.505. See *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn.App. 387, 208 P.3d 1189 (2009),

where notices of appearance and requests for discovery sufficient notice of claim.

Judicial review of rulings under the APA (RCW 34.05.570) is governed by RCW 34.05.570(3), which provides for court review of unconstitutional agency actions:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter . . .

...

RCW 34.05.570 appears to conflict with RCW 34.05.534 (Exhaustion of administrative remedies), if "A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being

challenged," and that person does not file for reconsideration or to vacate to exhaust administrative remedies.

The Court of Appeals should correct this situation by directing the Kennewick PD the Superior Court to hear the matter.

**C. RCW 34.05.534 Does Not Require A Mandatory Filing For Reconsideration Or To Vacate For Appeal.**

Conclusions of Law #3, #4, #7, #8, #10, #11, #12, #13, #14 and #15 all deal with the following: exhaustion of remedies; exclusive and adequate administrative remedy, adequacy of administrative remedy, statutory requirement of exhaustion, use of the word "may", excusing exhaustion, inadequacy and futility, irreparable harm, due process claims excusing exhaustion, the requirement of exhaustion under RCW 34.05.440, and the failure to exhaust remedies and jurisdiction, respectively. Mr. Ahumada challenges these conclusions of law.

In *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d 255, 534 P.2d 33 (1975), a case raising questions as to the constitutionality of portions of the Washington Clean Air Act, the Yakima County Clean Air Authority levied a \$250 penalty upon Glascam Builders. No administrative action was taken by respondent who refused to pay the penalty. On April 6, 1973, an action was instituted to collect the penalty. The superior court entered a summary judgment of dismissal upon the

ground that a regulation and a statute (RCW 70.94.431) were unconstitutional. An appeal followed and the Supreme Court held:

The rule is well established that one claiming a constitutional right as a defense can proceed directly to assert that right in a judicial proceeding. There are several sound reasons for this rule. An administrative tribunal is without authority to determine the constitutionality of a statute, and, therefore, there is no administrative remedy to exhaust. The administrative remedy is established by the same statute which is being challenged and recourse to an administrative remedy would put the respondent in the position of proceeding under the statute which it seeks to challenge.

The rule is well stated in 2 Am.Jur.2d Administrative Law s 599 (1962) wherein it is said:

(I)n regard to enforcement proceedings it has been held that a defense of unconstitutionality of the statute providing the administrative procedure is not precluded by failure to exhaust appeal procedures, and that where the jurisdiction of the court has not been withdrawn by statute, the doctrine of exhaustion of administrative remedies is wholly misapplied when invoked against one not seeking equitable relief but merely defending himself against a regulation or order asserted to be invalid.

Thus, *Glascam Builders*, claiming a constitutional right as a defense to the collection of the \$250.00 administrative penalty,<sup>3</sup> could proceed directly to assert that right in a judicial proceeding, without exhausting administrative remedies. *Glascam Builders*, 85 Wn.2d at 257.

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<sup>3</sup> The question of the constitutional defense in *Glascam Builders* was stated by the court as follows: "Is the administrative penalty provision of RCW 70.94.431 and section 7.01 of consolidated regulation No. 1 a violation of due process?" In this case, the question was whether the process in seeking a default judgment violated due process.

*South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984), South Hollywood Hills court generally stated, "[I]f the party is challenging the constitutionality of the agency's action or of the agency itself, the exhaustion requirement will be waived." *South Hollywood*, 101 Wn.2d at 74.

Generally, forfeitures are not favored and such statutes are construed strictly against the seizing agency. *Bruett v. Real Property Known as 18328 11th Ave. N.E.*, 93 Wn.App. 290, 295, 968 P.2d 913 (1998).

When the Superior Court in this case considered "exhaustion of administrative remedies," it implicitly considered whether RCW 34.05.440(3) (motion to vacate) is mandatory (even though the statute says "may," not "must" or "shall"). E.g., *Lane v. Port of Seattle*, 178 Wn.App. 110, 316 P.3d 1070 (2013) (plaintiffs argued that a port's involvement with economic development was limited to programs for job training and placement under RCW 53.08.245(2); court held that the supposed limiting language, which stated that economic development programs "may include" job training and placement, was simply permissive); see also *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982) (where a statute uses both "shall" and "may," the court

presumes that the clause using "shall" is mandatory and the clause using "may" is permissive).

Conclusion of Law #9 states that "use of the word 'may' in RCW 34.05.440(3) does not negate the exhaustion requirement" citing *Northwest Ecosystem Alliance v. Washington Forest Practices Board*, 149 Wn.2d 67, 66 P.3d 614 (2003). With all due respect, *Northwest Ecosystemmen* addresses rule making by state agencies, not forfeitures against individuals.<sup>4</sup> Several environmental groups sued, under the Administrative Procedures Act, contending that various Washington state agencies "failed to promulgate forest practice rules that advanced the environmental protection purposes and policies of the Forest Practices Act of 1974." The groups claimed that existing regulations did not meet the standards of various statutes, were arbitrary and capricious, or lacked a

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<sup>4</sup> The difference between "adjudicative proceedings" and "judicial review and civil enforcement" versus rulemaking is explained in *Allan v. Department of Labor & Indus.*, 66 Wn.App. 415, 420, 832 P.2d 489 (1992):

Under RCW 34.05.030(2)(c) the Department (of Labor & Industries) is subject to the terms of the Administrative Procedure Act except with respect to "adjudicative proceedings" and "judicial review and civil enforcement." Rulemaking by the Department is subject to the APA. Rulemaking is defined as 'legislation on the administrative level, i.e., legislation within the confines of the granting statute, as required by the constitution and its doctrine of non-delegability and separability of powers.' The test has also been articulated as the difference between making new laws and executing laws already in existence.

sound scientific basis. The trial court dismissed the case because the plaintiffs failed to exhaust administrative remedies. The groups appealed.

The Supreme Court affirmed. One reason for dismissal, the court explained, was the groups' failure to petition the State for rule making regarding forestry practices and, thus, their failure to exhaust their administrative remedies. Once those procedures were exhausted, then there may be grounds for appeal to the courts.

Ahumada's case is distinguishable. In essence, the Kennewick PD granted summary judgment and forfeiture on the notice Mr. Thompson provided the Kennewick police. The facts were undisputed as to the notice Mr. Thompson filed (it spoke for itself), and the Kennewick police were left to decide the constitutionality of its own actions - whether the notice of claim could be ignored and whether due process was served. In other words, the Kennewick police decided whether adequate claim was made by Ahumada, Lopez and Rivera and whether due process was afforded without notice and opportunity to be heard. Moving to reconsider or to vacate was useless where the facts were undisputed on the notice given by Thompson and the due process Ahumada, Lopez and Rivera did not receive. If all forfeiture claimants had to file for reconsideration or to vacate on undisputed facts when wrongfully denied notice, due process and a hearing, the right to appeal such deprivations of

due process would be crippled. Neither statute nor case law imposes such a requirement on a claimant's right to due process in forfeiture actions.

In addition, RCW 34.05.534 covers exhaustion of administrative remedies:

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

....

(3) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:

- (a) The remedies would be patently inadequate;
- (b) The exhaustion of remedies would be futile; or
- (c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.

Thus, given the City's and the hearing examiner's position that all Claimants' notice of claim was inadequate and no hearing was needed, a motion to vacate or for reconsideration was futile. This is especially true since the City failed to acknowledge receipt of claim, waited for 45 days, appeared administratively, and obtained a default order without notice. The City's approach was forfeiture by stealth, not forfeiture by notice and opportunity to be heard. Minimally, the Superior Court should have

remanded for a forfeiture hearing with respect to Ahumada and the other Claimants.

**D. Exhaustion Of Non-Mandatory Procedures Is Excused If Futile.**

As noted above, Claimants made a claim which was ignored and defaulted on by the seizing agency. In essence, the City moved for summary judgment on the default. Any motion for reconsideration/vacate under RCW 34.05.440(3) or .470 would have been futile as evidenced by the seizing agency's treatment of Claimants' attorney - i.e., the City's failure to acknowledge receipt of claim and/or give specific notice of forfeiture and the police chief's finding of constitutionality of the notice and due process not given on those undisputed facts. Also, RCW 34.05.470(5) specifically provides that "The filing of a petition for reconsideration is not a prerequisite for seeking judicial review."

Futility excuses exhaustion of administrative remedy. Futility is seen when " 'the available administrative remedies are inadequate, or if they are vain and useless,' " *Orion Corp. v. State*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985). In *Orion Corp.*, the owner of 80% of a tidelands of a major estuary on Puget Sound did not have to exhaust administrative remedies before commencing action which alleged that the State and County regulation of the estuary amounted to an unconstitutional taking

by inverse condemnation. The State and County had made a policy choice to prevent development of the estuary, rendering any application for substantial development and conditional use permits a vain and useless act.

In *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1974), the Supreme Court considered whether plaintiff, co-treasurer of 'levy pass committee' in the Marysville school district, could challenge the constitutionality of RCW 42.17.140. Section 14 imposed spending limitations on campaign expenditures in any election campaign for public office or in connection with ballot propositions. As to the issue of exhaustion, although the Public Disclosure Commission had authority to provide certain relief from some requirements of campaign spending limits, the court held that plaintiff had no administrative remedy to exhaust where the issue raised was the constitutionality of the law sought to be enforced. "An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." *Gorton*, 84 Wn.2d at 383 (citing *United States v. Kissinger*, 250 F.2d 940 (3d Cir. 1958); *cert. denied*, 356 U.S. 958, 78 S.Ct. 995, 2 L.Ed.2d 1066 (1958). 3 K. Davis, *Administrative Law Treatise* s 20.04, at 74 (1958)).

Again, in *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975), the controversy centered on the applicability of the Public Employees' Collective Bargaining Act to employees of the county juvenile court facility and the validity of a contract between the county and the union which represented such employees. The remedies prescribed by either the Act or the contract would have been futile such that failure to exhaust such remedies did not bar certain county employees from bringing an action against the county and the union for declaratory judgment that the contract between union and county was invalid. The Washington Supreme Court held that the remedies prescribed by either the bargaining act or the contract in question would have been futile where the controversy centers on the applicability of the act and the validity of the contract.

In *Higgins v. Salewsky*, 17 Wn.App. 207, 562 P.2d 655 (1977), the trial court voided a Centralia, Washington civil service examination for the position of fire captain, and ordered the City to enact legislation creating a lawful civil service system for its fire department. The City of Centralia, its civil service commission and the successful candidate for fire captain, Alfred Gray, appealed. One of the issues was "Did the trial court err in not requiring the plaintiffs to exhaust their administrative remedies before bringing this declaratory judgment action?" The answer was, "The fundamental issue before the trial court

was whether or not Centralia had established a valid civil service system for its fire department. An administrative agency does not have the authority to decide the validity of the law under which it operates; and, further, in view of our holding herein, there is no administrative remedy to exhaust." *Higgins*, 17 Wn.App. at 213.

To summarize, "Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality." *South Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't v. King County*, 101Wn.2d 68, 74, 677 P.2d 114 (1984); see also *Retail Store Employees Union*, 87 Wn.2d at 907 n. 7, 558 P.2d 215 (1976) (failure to exhaust administrative remedies will not "necessarily" preclude an action when the lawsuit presents only issues of law).

In this case, according to the City, Mr. Ahumada and Claimants Christina Lopez and Diana Rivera, did not "properly contest forfeiture." (Finding #8). The agency made that finding on undisputed facts regarding notice that was filed - the police chief then made a finding that due process notice of claim was inadequate as a matter of law and that Claimants were afforded due process. According to the City and the agency, the process of failing to give specific notice of forfeiture hearing and entry of default were proper. Given the position of the City and the police department that

no claim was properly filed and that no specific notice was required, any reconsideration and request to vacate were futile. Also, such a finding on the constitutionality of the due process was outside the expertise of the Kennewick Police Department.

**E. Where There Is Concurrent Jurisdiction The Requirement Of Exhaustion Of Remedies Is Relaxed.**

The last Conclusion of Law by the Superior Court (#15) states "Because the Appellants did not exhaust his administrative remedies as required, this court lacks jurisdiction over this appeal." Exhaustion of remedies is not required where the agency action infringes on claimants' rights. As stated in *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 74, 677 P.2d 114 (1984):

**Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality.** For example, if resort to the administrative procedures would be futile, exhaustion is not required. *Zylstra v. Piva*, 85 Wash.2d 743, 539 P.2d 823 (1975). **Similarly, if the party is challenging the constitutionality of the agency's action or of the agency itself, the exhaustion requirement will be waived.** *Ackerley Communications, Inc. v. Seattle*, 92 Wash.2d 905, 602 P.2d 1177 (1979) *cert. denied*, 449 U.S. 804, 101 S.Ct. 49, 66 L.Ed.2d 7 (1980); *Higgins v. Salewsky*, 17 Wash.App. 207, 562 P.2d 655 (1977). Also, if the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures, the failure to exhaust those procedures will be excused. *Gardner v. Pierce Cy. Bd. of Comm'rs*, 27 Wash.App. 241, 243-44, 617 P.2d 743 (1980).

RCW 2.08.010 grants original jurisdiction to the superior court in all cases in which the value of the property in controversy exceeds three hundred dollars, codifying Article IV, Section 6 of the Washington Constitution. RCW 69.50.505. Mr. Ahumada, Lopez and Rivera challenged the constitutionality of the City's actions - i.e., the failure to follow the due process set out in RCW 69.50.505(5). As noted above, the language of RCW 34.05.470(5) makes the filing for reconsideration optional: "The filing of a petition for reconsideration is not a prerequisite for seeking judicial review." Thus, reconsideration is not the issue. There is nothing mandatory in the language of .440(3) to move to vacate either. According to the language of .440(3), Claimant "*may* file a written motion requesting that the order be vacated."

Ultimately, there is a question of whether exhaustion of remedies even applies where the courts have concurrent jurisdiction. RCW 69.50.505(5) provides for such concurrent jurisdiction between the seizing agency and the courts:

(5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. . . . The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee,

except where the seizing agency is a state agency as defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. . . . The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020.

....A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.

The present case is not one in which an administrative tribunal had exclusive original jurisdiction and the superior court had only appellate jurisdiction. The significance of "primary jurisdiction" and exhaustion of remedies has been explained by the Supreme Court as follows:

When both a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision. The court will usually defer to agency jurisdiction if enforcement of a private claim involves a factual question requiring expertise that the courts do not have or involves an area where a uniform determination is desirable. No fixed formula exists for determining when the doctrine of primary jurisdiction should be applied.

*Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 554, 817 P.2d 1364 (1991); (citations omitted); *see also American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 5-6, 802 P.2d 784 (1991); *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 633, 733 P.2d 182 (1987) (superior court had original

jurisdiction over constitutional takings claim); *Jaramillo v. Morris*, 50 Wn.App. 822, 828-29, 750 P.2d 1301 (1988).

The Supreme Court further commented on "primary jurisdiction and "exhaustion of remedies" in another case:

'Primary jurisdiction' ... applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

...

The application of the doctrine of primary jurisdiction is "not mandatory in any given case, but rather is within the sound discretion of the court"; it is 'predicated on an attitude of judicial self-restraint.'<sup>1</sup> (sites omitted)

*In re Real Estate Brokerage Antitrust Litigation*, 95 Wn.2d at 302, 305, 622 P.2d 1185 (1980) (quoting *Schmidt v. Old Union Stockyards Co.*, 58 Wn.2d at 484, 364 P.2d 23; see also *Kringel v. Department of Social & Health Servs.*, 47 Wn.App. 51, 53, 733 P.2d 592, rev. den., 108 Wn.2d 1034 (1987); see also *Moore v. Pacific Northwest Bell*, 34 Wn.App. 448, 451-52, 662 P.2d 398, rev. den., 100 Wn.2d 1005 (1983).

Thus, in *Chaney v. Fetterly*, 100 Wn.App. 140, 995 P.2d 1284 (2000), the appellate court vacated a lower court order where neighbors sought an injunction and damages against adjoining landowners who were constructing a house, alleging that the home's foundation encroached on the required setback. The Superior Court granted summary judgment for the defendants, based on failure to exhaust administrative remedies and plaintiffs appealed. The Court of Appeals held that: (1) the superior court

and the county's quasi-judicial administrative agency had concurrent original jurisdiction over the neighbors' suit, and thus, the neighbors were not required to exhaust administrative remedies; (2) the doctrine of primary jurisdiction did not preclude the Superior Court from exercising original jurisdiction; and (3) a remand was necessary, for a determination of the equities of granting an injunction.

In this case the Superior Court and the City police had concurrent original jurisdiction under RCW 69.50.505(5). Mr. Ahumada and the other Claimants were not required to file for reconsideration or to vacate under RCW 34.05. The Superior Court correctly exercised original jurisdiction and heard the case for a determination on the constitutionality and equities of granting the City forfeiture in this action. The Court of Appeals should so conclude.

In addition, appellate courts exercising review under RCW 34.05 sit in the same position as the superior court and, thus, apply the standards of review in RCW 34.05.570(3) directly to the agency record. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 76–77, 11 P.3d 726 (2000); *Hardee v. Dep't of Soc. & Health Serv.*, 152 Wn.App. 48, 54, 215 P.3d 214 (2009), *aff'd*, 172 Wn.2d 1, 235 P.3d 339 (2011). The Superior Court should have granted relief when the City police erroneously interpreted or misapplied the law, substantial evidence did not

support the agency's order, or the agency order was arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i); *Postema*, 142 Wn.2d at 77.

In its August 15, 2013 oral ruling, the Superior Court correctly ruled that adequate notice of claim was given and that the City failed to give notice and opportunity to be heard. Moreover, substantial evidence did not support the Kennewick PD's default order finding otherwise. The Kennewick police department's findings and forfeiture order was arbitrary and capricious in view of the undisputed facts on notice of claim and lack of notice and opportunity to be heard. Accordingly, the Superior Court's written order dismissing the Ahumada's, Lopez's and Rivera's claim should be reverse.

**F. Even If Non-mandatory Administrative Remedies Were Not Exhausted, Dismissal Without Prejudice With Directions For A Forfeiture Is The More Appropriate Remedy.**

Mr. Ahumada and Claimants believe the Court of Appeals should reverse this matter and hold that the City of Kennewick violated due process in the forfeiture of Ahumada's and the other Claimants' property interests and order return of the property. Such result should be the outcome of the failure to follow the forfeiture statute. Alternatively, the Claimants believe that the next best remedy is remand to the Superior Court with directions to have a forfeiture hearing.

As noted above, in *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn.App. 387, 208 P.3d 1189 (2009), the court remanded with instructions. *Poplar Way*, 150 Wn.App. at 393. "On remand, the trial court shall hold a hearing within 90 days of the filing of this opinion to address the rights of Yatin and Vijay as well as others with claimed interests in the property." *Poplar Way*, 150 Wn.App. at 401.

In this case, the Superior Court remanded the claim in its August 15, 2011 oral findings, so due process could be achieved. Like the claimants' notices of appearance and requests for discovery in *Poplar Way*, the notice by Mr. Ahumada and the other Claimants in this case complied with the requirements of RCW 69.50.505(5), the drug seizure and forfeiture statute. Mr. Ahumada and the others were entitled to a hearing on their claims or rights to the properties. Due process demands it. The appellate court should, minimally, remand in this case with instructions to have a forfeiture hearing by either the Superior Court of Kennewick PD.

### III. CONCLUSION

In sum, the language of the APA is permissible, not mandatory. Motions to vacate "may" be made under RCW 34.05.440(3) (under .470, motions to reconsideration are not fatal). The statute does not say motions

for reconsideration "must" be made. To interpret this language has mandatory would frustrate claimants' rights to due process under the drug forfeiture laws. RCW 69.50.505. In any event, the Superior Court had primary jurisdiction over constitutional questions of due process, not the Kennewick PD.

For the reasons and arguments stated above, the Court of Appeals should reverse this matter and hold that the City of Kennewick violated due process in the forfeiture of Ahumada's and the other Claimants' property interests and order return of the property. Alternatively, the Court should remand the matter back to the court for a hearing on forfeiture.

DATED this 1st day of October August, 2014.

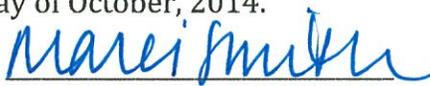
Respectfully submitted,

By:   
ROBERT THOMPSON - WSBA #13003  
Counsel

#### CERTIFICATE OF TRANSMITTAL

I hereby certify under penalty of perjury that on the date below a copy of this was sent to [ ] the attorney for City of Kennewick, the plaintiff by [ X ] mail, postage prepaid [ ], delivery by attorneys messenger service and to [ ] the defendant by [ X ] electronic mail, [ ] hand delivery to a responsible person at his/her current place of abode.

Signed at Pasco, WA on this 1st day of October, 2014.

  
MARCI SMITH, Legal Assistant

# APPENDIX #1





# APPENDIX #2

KENNEWICK POLICE DEPARTMENT  
OFFICE OF THE CHIEF OF POLICE

KENNEWICK POLICE DEPARTMENT,

)  
) No. 12-18645

)  
) DEFAULT ORDER OF FORFEITURE

vs.

)  
)  
) ALFREDO AHUMADA, CHRISTINA LOPEZ, JP  
) MORGAN BANK, JOEL CHAVEZ, WELLS  
) FARGO BANK, and DIANA RIVERA,  
)  
)

**THIS MATTER** having come before the Hearings Officer, Darin R Campbell on the 27<sup>th</sup> day of September, 2012, at 4:00pm. at the Kennewick Police Department, he finds as follows:

**WHEREAS**, on the 20<sup>TH</sup> day of June, 2012, the following item(s) were seized by the Kennewick Police Department pursuant to RCW 69.50.505 as proceeds traceable to illegal drug transactions from the person of Alfredo Ahumada;

2004 Cadillac Escalade Black VIN 3GYEK62N24G244899;

2005 Nissan White VIN: 1N6AA07A35N525044;

2006 Lincoln Mark Black VIN: 5LTPW18586FJ08890;

U.S. Currency: \$65,875; and

**WHEREAS**, claimant Joel Chavez made a proper written claim to the Cadillac Escalade within 45 days and the hearing for his claim has been continued to November 1<sup>st</sup> 2012 at his request. Mr. Chavez's claim to the Cadillac Escalade has not been forfeited; and

**WHEREAS**, claimant Wells Fargo Bank made a proper written claim to the Nissan within 45 days and the Kennewick Police Department does not dispute that Wells Fargo Bank is an innocent owner of that vehicle. Wells Fargo Bank's claim to the Nissan has not been forfeited; and

**WHEREAS**, with the exception of Joel Chavez and Wells Fargo Bank, no other claimant submitted a proper written claim to any of the subject property within the required 45 day time frame; and

DEFAULT ORDER OF FORFEITURE  
Page 1 of 2

Lisa M. Beaton  
Kennewick City Attorney  
210 W. 6<sup>th</sup> Avenue  
PO Box 6108  
Kennewick WA 99336  
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Fax: (509) 585-4424

1           **WHEREAS**, the document submitted by attorney Robert Thompson on August 2, 2012, was  
2 merely a Notice of Appearance and not an adequate claim to the property on behalf of any claimant;

3           **WHEREAS**, the Notice of Hearing including time, place, and date of the initial hearing held on  
4 September 27, 2012 was mailed to Mr. Chavez and to his attorney, Robert Thompson, on the 17<sup>th</sup> day of  
5 August, 2012; and

6           **WHEREAS**, Joel Chavez and Attorney Kevin Holt appeared at the hearing and received a  
7 requested continuance to November 1, 2012 for hearing on Mr. Chavez's claim to the Cadillac Escalade;  
8 and

9           **WHEREAS**, neither Robert Thompson, nor any other claimant appeared at the hearing; and

10           **WHEREAS**, the undersigned hearings officer finds that Alfredo Ahumada, Christina Lopez, Diana  
11 Rivera, and JP Morgan Bank are in default of any claim to any of the subject property

12           **NOW, THEREFORE, IT IS HEREBY ORDERED** that any right, title, and interest of Alfredo  
13 Ahumada, Christina Lopez, Diana Rivera, and JP Morgan Bank in the following described property:

14           2004 Cadillac Escalade Black VIN 3GYEK62N24G244899;

15           2005 Nissan White VIN: 1N6AA07A35N525044;

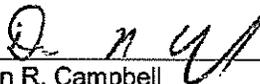
16           2006 Lincoln Mark Black VIN: 5LTPW18586FJ08890;

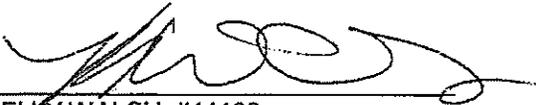
17           U.S. Currency: \$65,875; and

18 and is hereby forfeited to the Kennewick Police Department and subject only to the remaining active  
19 claims of Joel Chavez to the Cadillac Escalade and Wells Fargo Bank to the white Nissan.

20           DATED this 4 of October, 2012.

21 Presented by:

22             
Darin R. Campbell  
Hearing Officer

23             
24           KELLY WALSH, #44100  
25           Assistant City Attorney

26           DEFAULT ORDER OF FORFEITURE  
27           Page 2 of 2

28           Lisa M. Beaton  
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APPEARANCES:

FOR THE PLAINTIFF:            ROBERT THOMPSON  
   Attorney at Law  
   514 W. Margaret  
   Pasco, WA 99301

FOR THE DEFENDANT:            KELLY WALSH  
   Attorney at Law  
   210 W. Sixth Avenue  
   Kennewick, WA 99336

1 August 15, 2013

2 Kennewick, WA

3 MR. THOMPSON: Afternoon, Your Honor.

4 THE COURT: Good afternoon.

5 MR. THOMPSON: It seems like we got to stop  
6 meeting like this at 2:30 on Thursdays; huh?

7 THE COURT: Depends on where we're meeting,  
8 I guess.

9 MR. THOMPSON: Yeah. We're here in  
10 reference to Kennewick Police Department, Benton  
11 County Superior Cause Number 12-2-02168-9. I  
12 represent Alfredo Ahumada, Christina Lopez and Diane  
13 Rivera in regards to a forfeiture action that was  
14 conducted by the City of Kennewick.

15 When we were last here, the court had  
16 determined that the City of Kennewick had not  
17 provided proper notice to my clients, but raised the  
18 issue of whether or not the claimants themselves did  
19 not exhaust their administrative remedies.

20 THE COURT: Uh-huh.

21 MR. THOMPSON: So I think both sides have  
22 diligently pursued the issue, maybe ad nauseam, it  
23 all depends on one's perspective.

24 It would be simple if there were Washington  
25 State cases on point in the drug forfeiture arena.

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There are none that I could find.

I know the courts take these matters serious. I know the court's had the opportunity to review the briefing.

Suffice it to say, crystalizing the issue is whether or not -- I'm just going to touch on the points and not argue unless the court wants to hear argument, Your Honor. I think the briefs are actually --

THE COURT: Not necessarily.

MR. THOMPSON: -- pretty well written.

THE COURT: I've read the briefs, so.

MR. THOMPSON: What we're really looking at here in a case like this is whether or not, when you combine the two statues, when you look at 69.50, you look at the concurrent jurisdiction that is described therein, whether it's within an administrative body or whether it's in front of a Superior Court is the first issue that the court needs to consider. And that deals with exhaustion of remedies and whether -- who has primary jurisdiction or not. I think the briefing is pretty self-explanatory on that particular one. I'll leave that unless the court has some questions.

The other issue, frankly, Your Honor, is

1           whether or not, when you read these two statutes in  
2           combination, was it the legislature's intent to  
3           provide people an opportunity to be heard when it  
4           comes to people forfeiting their rights to their  
5           personal property.

6           Obviously the government and the claimants have  
7           completely different perspectives on what those  
8           rights are. And it becomes important in this regard,  
9           Your Honor. When we look at the due process clause,  
10          there are cases in the State of Washington that I  
11          have not seen overturned that suggest in situations  
12          where constitutional rights have in fact been  
13          violated, you don't have to exhaust your remedies.  
14          And I'm stating this first simply to state that,  
15          again, the language is permissive, doesn't use the  
16          word shall. So I think when you read -- when you do  
17          some statutory construction, you look at what the  
18          rights that are attempting to be bestowed by the  
19          legislature on claimants, like my clients, it becomes  
20          clear not only is there concurrent jurisdiction, but  
21          fundamental fairness requires that people have the  
22          opportunity to be heard.

23          This is not a dispositive hearing, Your Honor.  
24          Again, all Mr. Ahumada wants to have is have an  
25          opportunity to be heard by a tribunal and layout the

1 facts and to find out whether there was, in fact,  
2 probable cause to seize these assets or not.

3 Basically, Your Honor, when the court has a  
4 chance to review South Hollywood Hills Citizens  
5 Association versus King County at 101 Wa.2nd, 68,  
6 Page 64, it states, Washington courts have recognized  
7 exceptions to the exhaustions requirements in  
8 circumstances in which those policies are outweighed  
9 by considerations of fairness or practicality.

10 For example, if resort to the administrative  
11 process would be futile, exhaustion is not required.  
12 Similarly if the parties challenging the  
13 constitutionality of the agency's action or of the  
14 agency itself, exhaustion requirement will be waived.

15 Also if the aggrieved party has no notice of  
16 the initial administrative decision or no opportunity  
17 to exercise administrative review procedures, the  
18 failure to exhaust those procedures will be excused.

19 And again, Your Honor, I have not found any  
20 cases that contradict this.

21 The City spent, I think, most of its time not  
22 really taking a look at the due process  
23 constitutionality in their response, as best I can  
24 make out. What they want to tell the court, it has  
25 to be futile. A standard that, frankly has never

1           been addressed in a drug forfeiture situation.  
2           Again, I have found no cases in the State of  
3           Washington that stand for the proposition that once  
4           an administrative body has made a decision that an  
5           individual was foreclosed from seeking review to  
6           Superior Court. There are no cases that say that.

7           I think where the government and the claimants  
8           really start to go separate ways, there is a big  
9           difference between rule making in the Administrative  
10          Procedures Act, and the exhaustion of remedies within  
11          that agency itself. But when you look at what the  
12          document that was drafted, I'm assuming by the City  
13          of Kennewick's attorneys, it became a legal issue  
14          that was in fact decided by the ALJ. If you look at  
15          the specific language, he's making a legal  
16          determination that the notice that was provided was  
17          insufficient. There's nothing -- the notice speaks  
18          for itself. There is nothing, when you look at the  
19          futility aspect of what the City has argued, what is  
20          there to say? Either it is or it is not. The court  
21          made a legal finding. We think because that's a  
22          legal finding, it would have been futile to go  
23          forward.

24          The government spends a bit of a time, there is  
25          nothing that says that Darin Campbell was in a

1           cahoots with the City of Kennewick. Frankly it's an  
2 impossible standard to meet anyway.

3           It is one of those sort of things where this  
4 court, looking at the evidence that it has in front  
5 of it, simply needs to make a determination whether  
6 Mr. Ahumada and the other two claimants have a right  
7 simply to be heard or not, or are they foreclosed  
8 because they didn't exhaust their administrative  
9 remedies. We think because it's a constitutional  
10 issue that we don't have to exhaust, it's not  
11 applicable in a situation like this. We also believe  
12 that because of the concurrent jurisdiction, we don't  
13 have to exhaust the administrative remedies.

14           Then finally, Your Honor, the tired catch  
15 phrase in the world of due process and the government  
16 taking property away from citizens is, is it  
17 equitable? Is it fair under the due process clause?  
18 It simply is not. We just want -- all we want to do  
19 is have our day in court, Your Honor, whether it's in  
20 front of this court or whether it's back in front of  
21 the ALJ. It's a simple matter as that. We simply  
22 ask the court to allow us to go forward with that.

23           MS. WALSH: Thank you, Your Honor. I do  
24 want to rely strongly on the brief, but just want to  
25 emphasize the strong bias for exhaustion, which we've

1           -- we hear repeatedly.

2           Also, one of the key rationales for this  
3 doctrine is to allow the agency an opportunity to  
4 correct its own errors. So the argument that -- as  
5 Your Honor ruled, the City didn't provide proper  
6 notice in this case. One of the key -- or the key  
7 purposes for the exhaustion doctrine is to give the  
8 City, the agency, an opportunity to correct those  
9 errors. We discussed a lot at the last hearing about  
10 how the record revealed there was a lot of confusion  
11 as to who Mr. Thompson represented, who was properly  
12 claiming, and we essentially wanted to clarify  
13 things.

14           Mr. Thompson did not appear, we weren't able to  
15 clarify things with him on that day and the City made  
16 its position known to the hearings examiner.

17           I do want to address some of the arguments that  
18 have been made by counsel, because every argument  
19 that is made in favor of excusing the exhaustion  
20 doctrine in this case has been decided by a  
21 Washington court.

22           First whether the word may seek vacation of an  
23 order of default in the specific RCW that the  
24 appellants should have exhausted in this case. In  
25 North -- in the Supreme Court of Washington in

1 Northwest Ecology Alliance versus Washington Forest  
2 Practice Board, specifically rejected this argument.  
3 They said the word "may" is used simply to say that  
4 it's permissible. You aren't required to do  
5 anything. The court -- a quote of the court is that  
6 they may have chosen to simply give up. May is used  
7 to say that it's permissible if you want to pursue  
8 this any further. It doesn't have any relation to  
9 exhaustion of administrative remedies. So that  
10 argument was explicitly rejected in Northwest  
11 Ecological Alliance.

12 Also the -- a person can't just claim  
13 constitutionality and say that this automatically  
14 excuses exhaustion. Mr. Thompson quoted South  
15 Hollywood Hills. That case is directly on point. It  
16 doesn't involve forfeiture action, but it's an  
17 administrative action in which the South Hollywood  
18 Hills agents -- sorry, Association, was not given  
19 proper notice of a hearing in which a hearings  
20 examiner made a decision that affected their  
21 property. Court agreed that they didn't get proper  
22 notice of that hearing. But the court stated you did  
23 receive proper notice of the ruling that was made of  
24 that hearing and you failed to exhaust your remedy of  
25 appealing that ruling or having additional review of

1 that ruling, which is exactly what happened here.  
2 This court has ruled that Mr. Thompson and his  
3 clients did not receive proper notice of the initial  
4 hearing, but they did receive proper notice of the  
5 order of default that they were required to seek  
6 review from the hearings examiner of that ruling.

7 And that is specifically addressed in South  
8 Hollywood Hills. So they made the same argument. We  
9 didn't receive adequate notice of the initial hearing  
10 so we shouldn't be required to exhaust, and the court  
11 rejected that.

12 As to futility. The case law is very clear  
13 that futility has to be obvious. Many of the cases  
14 that Mr. Thompson or the appellants have quoted in  
15 their brief and in their reply brief do not go  
16 directly to the issue. There is a quote on the  
17 supplement -- Page 10 of the appellant's supplemental  
18 reply brief stating that it would be futile to  
19 relitigate this issue. That's where the City's issue  
20 is, Your Honor, because we never litigated this  
21 issue. Mr. Thompson wasn't there. We made our  
22 position known to the hearings examiner. He  
23 indicated, on Page 32 of the transcript, he said, if  
24 nobody else is here, then they're not going to have  
25 anymore claim. So if your -- you, Mr. Holt, are not

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representing anyone else, I think that solves the issue.

This was not litigated. And the hearings examiner never got to hear Mr. Thompson's position. The hearings examiner never got to pass on his position, his claim; never got to hear argument from both sides and have a fully litigated issue for Your Honor to review.

The hearings examiner was not able to pass on those objections and that is required as a specific reason why the exhaustion doctrine is required.

Mere speculation that the hearings examiner will rule against the party who was suppose to exhaust is not sufficient for futility.

I mentioned a couple cases that the appellants also mentioned in their supplemental reply, indicating that it was futile in -- I'm sorry, I don't have the case name off the top of my head for Your Honor, but -- an appellant was arguing that it was -- the court ruled that it was futile for a -- to require a particular appellant to exhaust their remedies because the City had a policy, a written policy that it was bound by.

In another case the City had a written ordinance that it was bound by that would not -- I

1 think these were in development cases where  
2 developers were trying to develop certain property  
3 and there were zoning regulations and rules in place  
4 that the City was bound by and could not deviate  
5 from. That would be futile.

6 Mr. Thompson, in the supplemental reply, also  
7 mentions some cases in which the -- I think they're  
8 for benefits, claims of benefits, for long-term  
9 benefits or short-term benefits. One individual was  
10 denied their short-term benefits and they fully  
11 exhausted their remedies in that situation. The  
12 court said it would be futile to require them to  
13 exhaust their long-term benefits because it's the  
14 same exact standard. It would have the same exact  
15 outcome.

16 These are -- that type of futility is  
17 completely different from the facts we have here.

18 And then lastly, a claimant cannot fail to meet  
19 that 45 day removal deadline and then be allowed to  
20 abandon the administrative process. There's -- in  
21 the forfeiture statute, there is an ability for a  
22 claimant to properly remove the case to a court of  
23 proper jurisdiction. However they must do that  
24 within 45 days of submitting their claim to the  
25 agency.

1           In this case the appellants did not do that. I  
2           don't think there is any dispute that they tried to  
3           do that. But it would not be a rational reading of  
4           the statute to claim that that alone, the existence  
5           of that ability to remove, would negate any  
6           requirement of exhaustion of administrative remedies.  
7           The appropriate reading is, if you fail to meet that  
8           45 day window and you fail to remove it, you are  
9           married to the administrative process. You're  
10          committed to the administrative process because you  
11          didn't make your deadline; and to abandon that early  
12          and claim, well, it could have been filed here, too.  
13          So we don't have to exhaust administrative remedies,  
14          doesn't make sense. It doesn't make that 45-day  
15          requirement make any sense. And I think it's an  
16          irrational reading of that particular statute.

17                 So, Your Honor, I don't want to be too long  
18                 winded, I know Your Honor's read the brief. But all  
19                 of the purposes that are listed over and over again  
20                 and are listed in the City's brief, those purposes  
21                 are very evident here and they -- the rationals for  
22                 this doctrine would have -- it would have been --  
23                 this situation would have been well-served had the  
24                 exhaustion of administrative remedies taken place.

25                 I want to just lastly point out that the

1 claimant, who the City did receive a separate claim  
2 from, Mr. Chavez, we had a full hearing for Mr.  
3 Chavez in April. There was a three-day evidentiary  
4 hearing and a ruling on that decision. It was the  
5 same evidence and same witnesses that would have been  
6 presented against the appellants. If the appellants  
7 had exhausted their administrative remedies, it would  
8 have been very easy for either the City to agree  
9 while we're all here, we've finally got everybody  
10 here. We've got some clarity on who Mr. Thompson  
11 represents, so let's just do it all. Or the City  
12 could have been ordered, over its objection, by the  
13 hearings examiner with that same rationale. You have  
14 to do a hearing for Mr. Chavez anyway. What's the  
15 problem with adding these other people now that we  
16 have clarity from Mr. Thompson and we know who is  
17 actually claiming.

18 So it really has delayed everything about an  
19 additional year and caused a lot of confusion and the  
20 -- and not given this court an adequate record to be  
21 able to rule on why the hearings examiner did what he  
22 did, because he didn't have the ability to pass on  
23 Mr. Thompson's objections to that default order.

24 So all of the reasonings for this doctrine are  
25 clearly applicable here.

1           And again -- I know I've said lastly many times  
2           -- the last point I want to make is that an appellant  
3           and a Washington court has made the this isn't fair  
4           argument before. Page 13 of the City's supplemental  
5           brief in Graham Neighborhood Association, basically  
6           the facts of what the city did in that situation --  
7           or Pierce County, I'm sorry, did seem a little  
8           unfair. They cancelled the FG Association's ability  
9           to develop a certain property. But then one of their  
10          employees continued to talked with FG and talk about  
11          the development and gave them the impression that  
12          their application had never been cancelled. The  
13          hearings examiner looked at all this and said this  
14          isn't fair. This isn't fair. It's given -- the  
15          hearings examiner ruling was, given the overall  
16          confusion and the county's testimony, it would be  
17          unconscionable to cancel this project.

18                 The reviewing court disagreed and said that the  
19                 FG wasn't required to appeal the cancel -- the  
20                 cancellation to a hearings examiner within 14 days.  
21                 They didn't do that and they took specific offense to  
22                 the fact that the hearings examiner tried to, quote,  
23                 create an equitable exemption to the statutory 14-day  
24                 appeal requirement. These have been rejected when it  
25                 comes to exhaustion and that was required here.

1           And I truly believe things would have come out  
2 a lot differently had the appellants exhausted that  
3 remedy.

4           MR. THOMPSON: Just briefly in response,  
5 Your Honor. The last time we were present, you know,  
6 the idea of the APA Act is simply to give an agency,  
7 Kennewick Police Department as represented by  
8 counsel, an opportunity to change their minds.

9           Now remember the argument we had last? They  
10 still don't think the court -- that they have to give  
11 due process. Okay? So I don't know how far we want  
12 to run with this, but this is kind of fascinating. I  
13 mean, it's not very often you get two statutes that  
14 have goals that don't always jibe very well together.  
15 I mean, it's pretty clear that the idea before we  
16 take property under the due process laws, give people  
17 a hearing. My clients were denied that hearing,  
18 period.

19           The APA Act should not stand in the way because  
20 of the constitutional requirements the City of  
21 Kennewick violated from giving them that right to a  
22 hearing. I think it's pretty simple like that.

23           And again, I can't change the -- you know, if I  
24 was representing the Kennewick Police Department, no  
25 notice would be sufficient. And that's what I heard

1 last. It's a constitutional issue. They drafted the  
2 paperwork that the judge signed off on the record  
3 making a legal decision. No factual questions. We  
4 don't have to exhaust the remedies. That's our  
5 position, Your Honor. I'll leave it at that.

6 THE COURT: I've had a chance to read  
7 through the briefs here and went back and pull a  
8 number of the cases that have been cited here. It's  
9 important to recognize in these particular matters --  
10 my original ruling, and I still stood by that, is  
11 that the three named individuals besides Mr. Chavez  
12 were never provided notice of the original hearing.

13 The notice that went out was to Mr. Chavez with  
14 a cc to Mr. Thompson. I don't see any other notices  
15 addressed to Mr. Ahumada, Ms. Lopez or any of the  
16 other parties that were listed by Mr. Thompson in his  
17 notice of appearance to the City of Kennewick.

18 City of Kennewick says, well, notice of  
19 appearance is sufficient under the rule to require us  
20 to have a hearing and to provide notice to these  
21 parties. Okay?

22 There was a lot of confusion in regards to who  
23 represented Mr. Chavez either initially or even later  
24 on. Mr. Holt finally stepped in because of conflict  
25 and took on Mr. Chavez's case, and there was, after

1 some continuances, an actual hearing on that matter.

2 Mr. Thompson in the meantime, immediately filed  
3 a notice of appeal.

4 Now as I read the cases in this particular  
5 matter, Mr. Thompson raises an issue regarding  
6 futility. There is no showing -- and there is a  
7 burden on Mr. Thompson to show this court that there  
8 is a substantial burden on his behalf to show that it  
9 would be futile to request of the administrative  
10 hearing officer a request to vacate that default  
11 order that was entered. And I don't find that such  
12 an action would have been futile, okay? It almost  
13 begs the question, you know, if you request and then  
14 he says I'm not hearing this, blah, blah, blah, blah,  
15 blah, then you may show futility. But until you do  
16 it you don't know. And I can't imagine, I haven't  
17 seen anything else that substantiates anything that  
18 would indicate that not -- that by not doing the  
19 request for motion to vacate in front of Mr. Campbell  
20 would have been futile under the circumstances. So I  
21 don't buy that argument.

22 The other issue is in regards to  
23 constitutionality. And the case law is kind of  
24 interesting in regards to that because when it talks  
25 about the ability to raise the constitutional issues,

1 it's in regards to the constitutionality of the  
2 agency itself and any rulings that they make. That  
3 they don't have the constitutional basis to do  
4 things.

5 Now the state statutes in this matter under  
6 69.55.05 are pretty clear that it sets up an  
7 administrative process for forfeiture because it  
8 designates the chief of police, chief law enforcement  
9 officer, whatever, is the person now responsible for  
10 conducting the hearings and sending out notices and  
11 things of that nature. So it envisions a  
12 administrative process in regards to the forfeiture  
13 actions. It's not a matter of concurrent  
14 jurisdiction.

15 And Mr. Thompson, you cite the -- I think it's  
16 a federal case in your supplemental brief. And  
17 that's an interesting case. Now the City of  
18 Kennewick says it doesn't apply, at least that's what  
19 you claim. But I've read the case and the case is  
20 kind of interesting because it really defines whether  
21 you have a concurrent jurisdiction situation or  
22 whether you have, as this particular situation,  
23 original jurisdiction in the administrative tribunal  
24 versus the court tribunal. And it really says you  
25 take a look at the roles of the two, the

1 administrative and the court.

2 The way the statutes are set up by forfeiture  
3 is the superior court, unless there is a request to  
4 remove the matter within 45 days to superior court,  
5 becomes an appellate court, and therefore does not  
6 have original jurisdiction. And that original  
7 jurisdiction then lies with the administrative  
8 agency, which makes the exhaustion of remedies  
9 becomes critical before you can appeal the case to  
10 superior court.

11 The other thing that's interesting about this  
12 matter is the fact that typically when someone files  
13 an appeal, the other side -- to a proper tribunal,  
14 the other side comes in immediately and seeks to  
15 dismiss that for want of exhaustion of the  
16 administrative remedies. In this particular case,  
17 the City of Kennewick waits until oral argument to  
18 raise that issue for the first time. It's not in  
19 their original brief because I went back and looked  
20 at it. They talk about all the notice requirement,  
21 they don't talk about how exhaustion of  
22 administrative remedies as being a jurisdictional  
23 requirement for this court to hear anything. And the  
24 exhaustion of administrative remedy is jurisdictional  
25 regardless of what the issues are that you're seeking

1 this court to address. The issue is whether or not  
2 you have exhausted those administrative remedies;  
3 that then gives this court the authority and the  
4 power to do anything in this particular matter, other  
5 than to make a determination as to whether or not  
6 you've exhausted those administrative remedies.

7 In this particular matter I find that you have  
8 not exhausted the administrative remedies that were  
9 required by the Administrative Proceedings Act.

10 And then the question that I've asked myself is  
11 where does that put us? Because I believe your  
12 clients are entitled to a hearing. And I think the  
13 City of Kennewick still has an obligation to provide  
14 your clients that hearing since they were never  
15 provided notice, okay? So I don't think the City of  
16 Kennewick can proceed with forfeiture until they  
17 provide you and your clients notice of those  
18 proceedings.

19 And the City of Kennewick could have, on their  
20 own, but they didn't -- when the matter was -- when  
21 Mr. Chavez's matter was set for a hearing and after  
22 you had already filed your notice of appeal to say,  
23 Mr. Thompson, why don't we just set aside that notice  
24 of appeal and have you come back down here to the  
25 administrative process and join in this particular

1 hearing so we don't waste a lot of time and money and  
2 we get a decision on this thing now rather than  
3 sometime down the road. That wasn't done either.

4 And I make that comment because the forfeiture  
5 statutes are strictly construed against the city,  
6 against that party that's seeking to forfeit the  
7 property because the law requires they cannot forfeit  
8 without providing adequate notice to the other  
9 parties. They provided adequate notice to Mr.  
10 Chavez, but no adequate notice to the other three  
11 individuals that Mr. Thompson -- by a notice to the  
12 City of Kennewick -- said he was representing.

13 I don't think you can fall back and say, oh, I  
14 know, we gave notice on this guy, but we don't have  
15 to give notice on these other three, regardless of  
16 who's representing. I think you got an obligation to  
17 provide notice in regards to all three.

18 So where I view this thing at at this point in  
19 time is that I think the City's got to give you  
20 notice and you're entitled to a hearing. And then  
21 before the matter comes back on appeal, then you have  
22 to exhaust the administrative remedies that are set  
23 forth by statute. And, yes, the language says may,  
24 it doesn't say must. If it says must, then every  
25 case would be automatically appealed and additional

1           hearings sought in order to just affirm the award of  
2           that tribunal. So the may allows for the opportunity  
3           to have the administrative officer readdress those  
4           concerns and let that be done in a timely fashion.

5                       MS. WALSH: May I ask a clarifying  
6           question, Your Honor?

7                       THE COURT: Uh-huh.

8                       MS. WALSH: Is Your Honor's ruling that the  
9           appellants did not exhaust their administrative  
10          remedies, but they were exempt from doing so?  
11          Because the remedy is dismissal of the appeal if they  
12          were required to do so.

13                      THE COURT: They are required to exhaust  
14          administrative remedies, okay? They haven't done  
15          that, okay? But my original ruling in regards to  
16          this matter was that they were never provided the  
17          notice for the hearing before they filed their  
18          appeal. So the appeal is not timely for certain. So  
19          there is no basis for an appeal at this point in  
20          time.

21                      They should have exhausted the administrative  
22          remedies. But I don't think it works as an absolute  
23          defense to the City to say, well, they didn't exhaust  
24          their administrative remedies, and therefore they're  
25          out in the cold, the forfeiture stands and they get

1 no hearing because we did not provide them notice. I  
2 think it goes back to square one, okay? They did not  
3 exhaust their administrative review -- or remedies in  
4 this particular matter. The City did not make a  
5 timely motion relative to the exhaustion of remedies.  
6 They waited until a year and a half later on appeal  
7 to raise the issue for the first time when they  
8 should have proceeded directly to the superior court  
9 when Mr. Thompson filed his notice of appeal and  
10 asked to have it dismissed at that time.

11 MS. WALSH: Your Honor, if I may, the City  
12 did -- the first time we were able to have any kind  
13 of hearing on this case was the City moving to  
14 dismiss because Mr. Thompson filed his appeal in  
15 October of last year, the end of October of last  
16 year, and we did not receive a brief. And so in  
17 March or --

18 THE COURT: You received a brief in regards  
19 to his appeal.

20 MS. WALSH: No, in March of 2013 the City  
21 moved to dismiss for abandonment of the appeal and  
22 that was denied and his delay was excused.

23 THE COURT: That's a different issue. If  
24 you're asking to have the superior court to dismiss  
25 his appeal because of lack of exhaustion of

1 administrative remedies, the first time that I can  
2 see that that issue was ever raised was at oral  
3 argument in front of me a month or so ago on this  
4 matter.

5 MS. WALSH: I agree.

6 THE COURT: Okay.

7 MS. WALSH: That was only three months  
8 after we --

9 THE COURT: But your basis for dismissal --

10 MS. WALSH: -- were finally able to get a  
11 brief.

12 THE COURT: -- was for an abandonment of an  
13 appeal, not because -- or as an exhaustion of  
14 administrative remedies.

15 MS. WALSH: Yes.

16 THE COURT: I think you could have  
17 proceeded as soon as he filed his notice of appeal,  
18 file a request for dismissal, and raise the argument  
19 that he has not exhausted his administrative remedies  
20 at that time, rather than waiting until this matter  
21 comes on for oral argument to raise that issue.  
22 That's a separate issue that the court's ruling on.  
23 It can only rule upon that which is presented to the  
24 court.

25 MS. WALSH: I agree. I just want to take

1 exception to the indication that the City waited a  
2 year and a half. This was filed at the end of last  
3 year. We moved to dismiss in March. We had oral  
4 argument in July.

5 THE COURT: Yeah. I think you could have  
6 filed a request for dismissal in two weeks when he  
7 filed his notice to appeal.

8 MS. WALSH: I agree. But I guess what my  
9 question is the authority that indicates that because  
10 the City didn't do that and we did it at oral  
11 argument instead, that that requirement is waived,  
12 that the exhaustion of administrative remedies  
13 requirement is waived. Because regardless --

14 THE COURT: I think he still has to exhaust  
15 his administrative remedies, okay? But -- in order  
16 to bring the matter back before this court. But we  
17 get back to the original situation and that is the  
18 notice requirement was not provided. How do you  
19 default somebody if you don't give them notice?  
20 Okay?

21 MS. WALSH: Is Your Honor able to rule on  
22 that if there is no jurisdiction?

23 THE COURT: Well, you know, it's going to  
24 come back before this court because if you're not  
25 going to give Mr. Thompson an administrative hearing,

1 you're not going to give him notice, he's going to  
2 raise the same argument back in front of this court  
3 and then the futility argument will hold weight at  
4 that point in time because you're not going to allow  
5 him another opportunity to do that which he could  
6 have done, okay? And you're going to forfeit this  
7 matter without providing proper notice.

8 It's the same thing with starting any lawsuit.  
9 How do you prevail on a lawsuit unless you can  
10 demonstrate that you have provided notice to the  
11 opposing party that you're seeking some sort of  
12 relieve or remedy? That is a jurisdictional  
13 requirement before you can proceed with anything,  
14 whether it's an administrative relief or in court.

15 MS. WALSH: I agree. But when the City  
16 enters a default order and there's a remedy to say,  
17 hey, wait a minute, that order was improper and  
18 they're required to do that within seven days and  
19 they do not, it doesn't start back at square one.

20 THE COURT: Well, I guess I disagree with  
21 you until you can provide this court that you have  
22 actually provided notice to Mr. Thompson of the  
23 initial hearing and what relief that he has.

24 MS. WALSH: But the issue wasn't the  
25 initial hearing it was the default order that they

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did receive notice of and failed to do anything with it.

THE COURT: Again, you're seeking to obtain property by way of default, again, without proper initial notice of the proceedings. I think that's jurisdictional.

MS. WALSH: But that's the purpose of the rule indicating that if you have objections to this default notice, you bring a motion to vacate in seven days; and if you don't, you are out in the cold.

MR. THOMPSON: Your Honor, we're not going to be able to -- there are remedies to this court's decision.

THE COURT: My ruling today is that he did not exhaust the administrative remedies, okay? And my earlier ruling that he was not provided notice still stands. If that brings the matter back before this court, we'll be arguing those items again.

MS. WALSH: Okay, thank you.

MR. THOMPSON: Thank you, Your Honor.

(Court was adjourned.)

1 STATE OF WASHINGTON )  
2 COUNTY OF BENTON ) ss.

3  
4 I, CHERYL A. PELLETIER, Official Court Reporter of  
5 the superior court of the Kennewick Judicial District,  
6 State of Washington, in and for the County of Benton,  
7 hereby certify that the foregoing pages comprise a full,  
8 true and correct transcript of the proceedings had in the  
9 within-entitled matter, recorded by me in stenotype on the  
10 date and at the place herein written; and that the same  
11 was transcribed by computer-aided transcription.

12  
13 That I am certified to report superior court  
14 proceedings in the State of Washington.

15  
16 WHEREFORE, I have affixed my official signature this  
17 8th day of November, 2013.

18  
19  
20  
21 Cheryl A. Pelletier, RPR, CCR  
22 Official Court Reporter  
23  
24  
25

# APPENDIX #3

MAR 05 2014

FILED 4

qpm

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

KENNEWICK POLICE DEPARTMENT,

Respondent,

vs.

ALFREDO AHUMADA, CHRISTINA  
LOPEZ, DIANA RIVERA,

Appellants.

No. 12-2-02618-9

ORDER DISMISSING APPEAL

THIS MATTER having come on for oral argument on July 11, 2013, with supplemental argument on August 15, 2013, on appeal from an administrative ruling, the City of Kennewick being represented by Kelly Walsh, Assistant City Attorney, and the above Appellants being represented by attorney Robert Thompson; the Court having considered the files and records herein, and having listened to the arguments of counsel, makes the following:

**I. FINDINGS OF FACT**

1. On June 20, 2012, the Kennewick Police Department seized three vehicles and cash from the home of Alfredo Ahumada pursuant to RCW 69.50.505.
2. Notice of Intent to Forfeit the property was personally served upon each of the Appellants on June 28, 2012.
3. Joel Chavez sent a letter stating his intent to contest the forfeiture to the Kennewick Police Department on July 25, 2012.
4. On August 2, 2012, the Kennewick Police Department received notice that Robert Thompson would represent "Joel Chavez, Alfredo Ahumada Ozuna, Christina Lopez, Diana Rivera, and any and all other potential claimants" to the "potential forfeiture actions."
5. The City scheduled an administrative hearing for September 27, 2012. Notice of the hearing was sent to Mr. Chavez and Mr. Thompson on August 17, 2012 via certified mail.

ORDER DISMISSING APPEAL  
Page 1 of 3

Kennewick City Attorney  
Lisa Beaton  
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- 1 6. Notice of the September 27, 2012 hearing was not sent to the Appellants or to Mr.  
2 Thompson on their specific behalf.
- 3 7. Mr. Thompson did not appear for the September 27, 2012 hearing, nor did the  
4 Appellants. Kevin Holt was present with Mr. Chavez on Mr. Thompson's behalf.
- 5 8. The hearing examiner ruled that Mr. Chavez was the only claimant who had  
6 properly contested the forfeiture. Because the Appellants were not present, had not  
7 properly contested forfeiture within the time frame provided in RCW 69.50.505(4),  
8 and because Mr. Holt had nothing to offer on Mr. Thompson's or the Appellant's  
9 behalf, the Appellant's interests in the subject property were defaulted.
- 10 9. The written administrative Order of Default defaulting the Appellants' interests in  
11 the property seized was signed by the hearings examiner on October 4, 2012.
- 12 10. The Order of Default was served via electronic mail and hand delivered via  
13 legal messenger service upon Attorney Robert Thompson and Attorney Kevin Holt  
14 on October 8, 2012.
- 15 11. The Appellants did not file a written motion to vacate the default order  
16 entered against them with the Kennewick Police Department.
- 17 12. The Appellants appealed the Order of Default directly to Benton County Superior  
18 Court on October 30, 2012, asking this Court to vacate the order.

## 19 II. CONCLUSIONS OF LAW

- 20 1. The seizure of the subject property is governed by the administrative process and  
21 RCW 34.05.
- 22 2. The Order of Default entered against the Appellants in this case is an agency  
23 order.
- 24 3. A person may file a petition for judicial review of an agency order under the  
25 Administrative Procedure Act only after exhausting all administrative remedies.  
26 RCW 34.05.534.
- 27 4. Administrative remedies must be exhausted when the relief sought could be  
28 obtained by resort to an exclusive or adequate administrative remedy. *Citizens for  
Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861 (1997).
5. A party's failure to employ and exhaust available administrative remedies merits  
dismissal of the appeal.
6. RCW 34.05.440(3) indicates that a person against whom an Order of Default is  
entered may file a written motion with the agency requesting that the order is

ORDER DISMISSING APPEAL

Page 2 of 3

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1 vacated, and stating the grounds relied upon within seven days of being served  
2 with the order.

- 3 7. RCW 34.05.440(3) provided an adequate administrative remedy for the relief  
4 sought by the Appellants in this judicial appeal.
- 5 8. The remedy provided by RCW 34.05.440(3) is not a motion to reconsider  
6 governed by RCW 34.05.470(5). Therefore, no statute explicitly states that  
7 exhaustion of the remedy provided by RCW 34.05.440(3) is not required.
- 8 9. The use of the word "may" in RCW 34.05.440(3) does not negate the exhaustion  
9 requirement. *Northwest Ecosystem Alliance v. Washington Forest Practices*  
10 *Board*, 149 Wash.2d 67 (2003).
- 11 10. Under the forfeiture process described in RCW 69.50.505, the role of the judicial  
12 system is to review agency orders. Therefore, the Appellants are not excused from  
13 the exhaustion requirement merely because RCW 69.50.505(5) allows a person to  
14 remove the case from the agency to the court within a specified timeframe.
- 15 11. The Appellants are not excused from the exhaustion requirement because the  
16 Appellants have not met their burden to show that the remedy provided by RCW  
17 34.05.440(3) would have been patently inadequate or futile.
- 18 12. The Appellants have not met their burden to show that irreparable harm that  
19 would have resulted from having to exhaust administrative remedies would have  
20 outweighed the public policy requiring exhaustion.
- 21 13. The Appellants' due process claims do not create an exception to the exhaustion  
22 requirement.
- 23 14. The Appellants were required to exhaust the remedy provided to them by RCW  
24 34.05.440(3) before filing this appeal.
- 25 15. Because the Appellants did not exhaust their administrative remedies as required,  
26 this court lacks jurisdiction over this appeal.

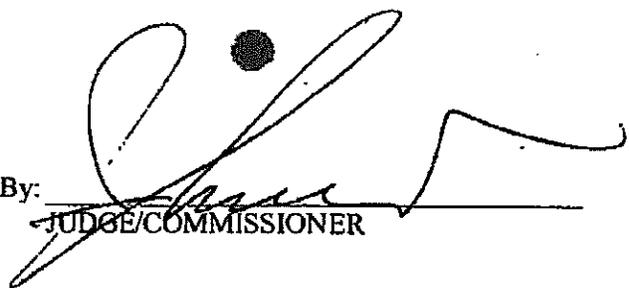
### 27 III. ORDER

28 IT IS ORDERED, ADJUDGED AND DECREED that the appeal is DISMISSED due to the  
Appellants' failure to exhaust their administrative remedies.

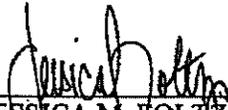
Dated this 5 day of March, 2014.

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By:



JUDGE/COMMISSIONER



JESSICA M. FOLTZ, WSBA #41866  
Assistant City Attorney

Approved as to form by:

ROBERT THOMPSON, WSBA # 13003  
Attorney for the Appellant