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

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WASHINGTON STATE DEPARTMENT OF ECOLOGY, and  
WASHINGTON POLLUTION CONTROL HEARINGS BOARD,

Petitioners/Appellants,

v.

LOYAL PIG, LLC and COLUMBIA SNAKE RIVER  
IRRIGATORS ASSOCIATION,

Defendants/Respondents.

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**APPELLANT STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY'S REPLY BRIEF**

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## I. INTRODUCTION

A clear statutory scheme controls this matter. All parties agree that RCW 90.03.380 requires a determination of the past “annual consumptive quantity” (ACQ) of the water right because the change requested by Respondent Loyal Pig, LLC (Loyal Pig) would add additional irrigated acreage. The statute requires Ecology to review the “most recent five-year period of continuous beneficial use,” identify the highest two years, and average those to determine ACQ.

The question in this matter is *which* five-year period applies to Loyal Pig’s 2017 water right change application. Ecology applies RCW 90.03.380, along with RCW 90.03.615, to require a review of water use between the years 2012 and 2016 for a change application submitted in 2017. Respondents Loyal Pig and Columbia Snake River Irrigators Association (hereinafter “Irrigators”) argue that Ecology must review the five-year period between 2009 and 2013, which was reviewed at the time of a previous change application approved in 2014. Brief of Respondents (Resp’ts’ Br.) argues for an ACQ “grace period” that protects one ACQ determination five years into the future, a principle they arrive at only by ignoring the relevant statute and conflating it with language from elsewhere in the water code. Irrigators argue that ACQ protects “authorized” water use

for five years into the future, when in fact ACQ requires review of actual water use for five years into the past.

Ecology asks this Court to reverse the superior court and remand with instructions to reinstate Ecology's decision (as upheld by the Pollution Control Hearings Board) and to lift the injunction requiring rule adoption.

## II. REPLY

### A. The Statutory "Grace Period" Does Not Allow ACQ Review Beyond Five Years Without a Relinquishment Exception

Ecology's ACQ process does nothing more than apply the statute as written. In an effort to avoid the consequences of this plain language, and reach back to capture the advantage of a 2009 high-water year, Irrigators lift language about a "grace period" *In re Yakima River Drainage Basin*, 177 Wn.2d 299, 344, 296 P.3d 835 (2013) (*Acquavella V*) and suggest that this grace period is future-looking from one ACQ determination to the next. This argument fails because *Acquavella V* only used the phrase "grace period" to emphasize the narrowness of exceptions to the five-year nonuse period (which are not at issue here), and it cannot override the statutory language. Furthermore, Irrigators' argument fails because they confuse the *authorization* to use water (such as an administrative action approving a permit, certificate, or change of use) with a review of actual water *use*. The statute requires Ecology to review the use of water—not the agency's past authorization of use—and Irrigators' argument fails.

**1. The five-year “grace period,” in the ACQ context, is the review of the “most recent five-year period of continuous beneficial use”**

The statute requires an ACQ review for changes that add additional acres, such as Loyal Pig’s 2017 application:

“[A]nnual consumptive quantity” means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use **within the most recent five-year period of continuous beneficial use of the water right.**

RCW 90.03.380(1) (emphasis added); *See R.D. Merrill Co. v. Pollution Control Hearings Bd.* 137 Wn.2d 118, 126 n.4, 969 P.2d 458 (1999). The five-year ACQ review period may be extended for cause under RCW 90.03.615. This provides that when “the nonuse of the water right has been excused from relinquishment under RCW 90.14.140, the department shall look to the most recent five-year period of continuous beneficial use preceding the date where the excuse for nonuse under RCW 90.14.140 was established and remained in effect.” RCW 90.03.615. “Relinquishment” refers to the reversion of a water right from the user to the state when it is not beneficially used for five years. RCW 90.14.180. The Supreme Court referred to this five-year allowance as a “grace period” in *Acquavella V. Acquavella V*, 177 Wn.2d at 344.

To retain a water right over *more* than five years of nonuse, a water user must qualify for a relinquishment exception. This is true for the ACQ five-year review lookback as well as the five-year relinquishment allowance: RCW 90.03.615 expressly incorporates relinquishment exceptions into ACQ, so that a right that would qualify for more than five years of nonuse for relinquishment purposes also qualifies for longer than five years for ACQ review.

Irrigators cite to language by the Supreme Court regarding a “five-year grace period” to suggest that this grace period is future-looking and can override the plain language of the statute. *Acquavella V*, 177 Wn.2d at 344. But *Acquavella V* had nothing to do with ACQ determinations. It cannot override the plain language of the statute.

Irrigators do not argue that any relinquishment exception provides them an “excuse for nonuse” as provided for by RCW 90.03.615.<sup>1</sup> Instead, they insist that a “grace period” begins at the time of one ACQ determination, barring subsequent ACQ determinations for at least five years in the future. Resp’ts’ Br. at 2.

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<sup>1</sup> Brief of Respondents refers to an earlier exception argument without providing any analysis or explanation as to why it could apply. Irrigators’ requested relief is the reinstatement of the preliminary Franklin County Water Conservancy Board decision from 2017, which does not reference any exceptions. Nothing in the record explains what exception might apply, what year(s) of nonuse (or low use), if any, would be excused by an exception, and what the resulting ACQ would be.

Irrigators' reliance on *Acquavella V* is misplaced and only confuses the matter. Unlike in this case, the scenario in *Acquavella V* did not involve application of the ACQ formula under RCW 90.03.380(1), or sequential water right change applications. *Acquavella V* involved a general adjudication of water rights in which the Yakima County Superior Court determined the historic water use of area water users. A water user claimed a relinquishment exception under RCW 90.14.140, and the Supreme Court rejected the exception. In using the phrase "grace period," the Supreme Court warned that, if exceptions were read too broadly, they would swallow the five-year rule itself; exceptions must be construed narrowly or else the five-year "grace period" would be meaningless. *Acquavella V*, 177 Wn.2d at 344–45. The exception at issue in *Acquavella V* required planning for a future development. The Supreme Court ruled that the exception must be earned within the first five years, or the exception cannot allow for more than five years of nonuse:

To read the statute as allowing a plan to be determined at any point during the 15-year period [allowed for that exception] would read the 5-year grace period out of the statute and nullify the automatic presumption of relinquishment that attaches after 5 years of nonuse. In addition, in *R.D. Merrill* we cautioned that the excuses for nonuse must be construed narrowly in order to respect our water code's preference that water be beneficially used.

*Acquavella V*, 177 Wn.2d at 344 (internal citation omitted).

The Supreme Court’s reference to a “grace period” underlines the “water code’s preference that water be beneficially used,” and that exceptions from relinquishment therefore must be read *narrowly*.<sup>2</sup> *Id.*

*Acquavella V* is of limited use here because it involved a superior court adjudication and a relinquishment exception, not an ACQ change with no exceptions. Irrigators’ argument lifts the idea of “grace period” from *Acquavella V* and applies it out of context to argue that ACQ carries forward from one ACQ authorization into the future. Any confusion they introduce can be resolved with a clear reading of the statute. ACQ must look back, so that a 2017 change looks to actual water use from 2012 to 2016. Loyal Pig is credited with high use during that period and low use is ignored. That is the “grace” allowed by the Legislature in its authorization to Ecology here.

In fact, the Supreme Court in *Acquavella V* may have said it best—conferring any extra-statutory protection “would read the 5-year grace period [here, the five-year ACQ period] out of the statute.” *Id.* Baseless

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<sup>2</sup> Other cases holding that relinquishment exceptions must be construed narrowly include *Crown West Realty, LLC v. Pollution Control Hearings Bd.*, 7 Wn. App. 2d 710, 435 P.3d 288 (2019); *City of Union Gap v. Dep’t of Ecology*, 148 Wn. App. 519, 195 P.3d 580 (2008) (where nonuse was not disputed, water right relinquished because development exception did not apply); *R.D. Merrill* 137 Wn.2d at 140–42; *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 594–95, 957 P.2d 1241 (1998) (water right measured by beneficial use, not system capacity); *Pacific Land Partners, LLC v. Dep’t of Ecology*, 150 Wn. App. 740, 753, 208 P.3d 586 (2009) (legal proceedings only prevented use prior to 1986, so nonuse from 1986 to 1995 was not excused and relinquishment statute applied); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 75, 110 P.3d 812 (2005) (upholding relinquishment where water right had not been used on the property for more than five years).

extensions of the statutory time periods threaten to render them superfluous. For this reason, Ecology is correct to require water use data between 2012 and 2016 for Loyal Pig's 2017 water right change application, and asks this Court to reverse the superior court's decisions.

**2. ACQ requires that Ecology look at “continuous beneficial use,” not legally authorized use**

Ecology and Irrigators agree that there is a five-year grace period in the water code; the question is which five years the law requires Ecology to review for an ACQ determination. Ecology looks to years of “continuous beneficial use,” that is, actual application of water for irrigation. Irrigators would look at years of *authorization for* water use. This is an important distinction, as the face of a water right document (such as a permit, certificate, or change authorization) often allows for greater quantity of water than is beneficially used over time.

Irrigators state that “[t]here is no dispute that Loyal Pig's **non-use of the 2014 authorized quantities** is protected from relinquishment under RCW 90.14.140.” Resp'ts' Br. at 25 (emphasis added). This is not accurate. The statute requires that, for both relinquishment and ACQ, Ecology review actual water used, not “authorized quantities” of water used. Ecology authorized quantities in 2014 based on ACQ analysis looking back five years, to 2009 (as required by RCW 90.03.380). When reviewing a 2017

change application, Ecology does not look back to past *authorizations*—it looks to past water *use*. This is the express direction of the Legislature in RCW 90.03.380.

Irrigators point out that ACQ is intended to protect against “detriment or injury to existing rights,” implying that a review of actual beneficial use is not relevant to this determination.” Resp’ts’ Br. at 7. They point to a comment from the Supreme Court in *Okanogan Wilderness League, Inc.* regarding injury to current rights by “revival” of an unused right. *Id.* at 7–8. It is unclear how this could support Irrigators’ argument. In that case, the Supreme Court addressed Ecology’s authority to quantify a water right’s past beneficial use before approving change to the point of diversion under RCW 90.03.380. *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 779–80, 947 P.2d 732 (1997).<sup>3</sup> The Supreme Court held that, to approve such a change, Ecology must assess *both* past beneficial use *and* injury to existing rights. *Id.* at 781 (“[A] change in diversion point may be granted only to the extent the water right has been put to beneficial use, has not been abandoned or otherwise extinguished, and does not cause detriment or injury to other right holders.”). Irrigators

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<sup>3</sup> *Okanogan Wilderness League, Inc.* construes RCW 90.03.380 as it relates to changes in point of diversion (the location where the water is taken from the source). It does not comment on changes that add additional acreage, like Loyal Pig’s, or the ACQ test at issue here.

appear to argue that, because Ecology authorized this use in 2014, it cannot now review the years 2014 through 2017 without first showing injury to existing rights. But the law requires a review of recent use for every change application, and includes no such provision that waives ACQ in subsequent years.

Likewise, Respondents' Brief also argues that the question of RCW 90.03.380 "begs the question of whether the Legislature ever intended that an 'increase' was to arise from fluctuations" in past use. Resp'ts' Br. at 27. In fact, the Legislature answers this very question with a statutory formula that presumes fluctuations in use over five years, then averages the two highest years.

To the extent Irrigators argue that Ecology must show actual injury to other rights before reviewing water use between 2012 and 2017, this can be ignored; it is nowhere in the law. Irrigators' argument that evidence of beneficial use is irrelevant, as long as water use was previously authorized, is simply wrong. The law anticipates that usage of water will fluctuate within the authorized amount. This is what ACQ itself is designed to accommodate.

The answer to the question of "which five years" must Ecology review for making an ACQ determination is plain in the statute.

RCW 90.03.380 directs Ecology to look at “continuous beneficial use” at the time of a change application.

**B. The Superior Court Erred in Ruling that Ecology’s Application of RCW 90.03.380 Constitutes the Adoption of a Rule**

In denying Loyal Pig’s change application, Ecology applied RCW 90.03.380 to require a review of the “most recent five-year period” of water use for ACQ. Ecology finds this to be the clear statutory requirement and does not deny that it is a regular agency practice. Irrigators argue that, because Ecology regularly applies this method, it must adopt a rule under the Administrative Procedures Act (APA), RCW 34.05. Ecology agrees that it has not undertaken rulemaking prior to implement the ACQ language of RCW 90.03.380, because it simply applies the statute as written. Ecology asks this Court to reverse the superior court in finding that it must adopt a rule in order to implement ACQ.

**1. Irrigators have not shown an Ecology past practice**

Because the statutory process is clear, Ecology need not, as a matter of law, adopt a rule in order to require a review of the “most recent five-year period” of water use for ACQ. For that reason, Ecology’s alleged past practice is not relevant to this question. If this Court does reach this factual question, however, it should find that Irrigators have failed to show that there was a past practice.

Irrigators argue that Ecology violated the APA because Ecology, at some time in the past, applied RCW 90.03.380 to allow a “carry forward” grace period (or application of a pseudo-“res judicata” doctrine) from one water right change application to another, without requiring a fresh ACQ lookback for the new application. They argue that this practice was so prevalent that Ecology must undertake APA rulemaking to follow the statutory process now.

As evidence of Ecology’s past practice, Irrigators provided the superior court with three declarations from area water users testifying in support of their preferred ACQ calculation method. Irrigators rely on the Declaration of Darryll Olsen, Ph.D., which included extensive testimony about the law. CP at 134–37. Much of this is repeated verbatim, again, in Respondents’ Brief. Resp’ts’ Br. at 17–18. Declarant Dr. Olsen also stated that he believed that Ecology, in the past, followed the Irrigators’ preferred method.<sup>4</sup> Irrigators’ Declarant Mark Nielson stated that he recalled

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<sup>4</sup>Ecology does not object to Dr. Olsen’s declarations about his personal belief of Ecology practice. These are his own beliefs; but they are not evidence of Ecology’s practice. Ecology objects to Dr. Olsen’s statements about the beliefs of others in the community, which are hearsay statements offered as evidence of the truth of the matter asserted about the beliefs of others. The only admissible statement is that Dr. Olsen personally believed that Ecology once followed such a practice. This is not admissible evidence of Ecology past practice under ER 803(20), “customs affecting lands in the community,” which generally requires widespread documentation about the beliefs of many individuals in the community over time, and is appropriate for showing historic practices where no documentary evidence is available. *See* Appellant State of Washington, Department of Ecology’s Br. at 38–39.

unidentified Ecology staff giving a “presentation” about his preferred method. CP at 211–12. Irrigators’ Declarant Timothy Reiersen, P.E., submitted statements about the problems with changing a method. *Id.* at 458–61. These declarations also included extensive testimony about the general understanding in the “water rights community”—the thoughts of other, unidentified individuals—about Ecology’s method at some unspecified time before 2009.

Ecology, in response, submitted declarations from long-time Water Resources Program staff members explaining that they have never applied Irrigators’ method, nor do they know of anyone else in Ecology doing so. *Id.* at 237, 529–30. It is important here to note that the Irrigators’ witness, Declarant Dr. Olsen, refers to an Ecology staffer who “agreed three times” about his “grace period” theory. Resp’ts’ Br. at 40; CP at 473. In open court, Declarant Dr. Olsen made an unsworn statement that the staffer he was referring to was Mr. Mark Schuppe. Resp’ts’ Br. at 40. Critically, Mr. Schuppe’s own declaration **contradicts Dr. Olsen and refutes** this statement. CP at 529–30. Irrigators did not show, as a matter of uncontested facts on summary judgment, Ecology staff made statements in 2017 agreeing that the “res judicata” process ever has, will be, or should be applied to sequential water right changes.

Irrigators submitted no actual documents evidencing this purportedly widespread past practice. The closest thing they have been able to produce is a copy of a decision known as *Bugni*, a superior court order within the *Acquavella* adjudication (as was the ruling in *Acquavella V*, discussed above). In that matter, the Yakima County Superior Court confirmed the Bugni water right in a Conditional Final Order (CFO) in 2001. A CFO “is the mechanism, in a case this large, that concludes the proceedings” for a set of water users in a specific area. CP at 195. The CFO constituted an actual judicial determination of the specifications of the right, including quantity. While processing a subsequent change application to change the water right, Ecology discovered information that nonuse of water had occurred prior to the date that the CFO was entered and included consideration of those pre-CFO years in its tentative determination of the validity and extent of the water right. The superior court held that res judicata precluded Ecology from assessing water use during years before the CFO, because the CFO was a final order. *Id.* at 192–204.

Contrary to Irrigators’ argument, *Bugni* does not exemplify a past practice by Ecology of adopting a past ACQ analysis instead of conducting a new one. In fact, it indicates that, as of 2001, Ecology was applying the ACQ statute as written, and as it does today. *Id.* In that case, the Yakima County Superior Court ruled that its own factual findings, within that very

case, barred new factual findings by Ecology. *Bugni* is distinct from the current case on both facts and law.

Irrigators' argument is bereft of any evidence demonstrating that Ecology had a past practice of relying on past ACQ calculations when fewer than five years had transpired since one was conducted during review of an earlier application seeking a change of the same water right. To the extent this is relevant to this Court's determination on whether Ecology adopted an unlawful rule, it would be an abuse of discretion for the Court to find a past practice contrary to its current practice.

## **2. Ecology's published policies cannot change the statutory ACQ requirement**

Irrigators argue that Policy POL 1120 is evidence of Ecology's one-time pseudo-"res judicata" method. Resp'ts' Br. at 5-6. First, POL 1120 is not an ACQ policy; In fact, POL 1120 only states that Ecology has discretion to perform a simplified *tentative determination* to quantify a water right instead. CP at 502. ACQ is not a "tentative determination," it is a distinct statutory process that applies only to changes that add additional acreage. POL 1120 itself says "[s]ee POL 1210 and PRO 1210 for guidance on establishing water use and estimating the annual consumptive quantity of a water right." *Id.* Ecology's separate ACQ policy, POL 1210, contains no provision for a simplified "five-year review" process when

ACQ is required. *Id.* at 538. Ecology policies do not support Irrigators' argument that Ecology at any time followed their "res judicata" method of ACQ.

### III. CONCLUSION

Ecology applied RCW 90.03.380 to Loyal Pig's 2017 water right change, requiring a review of water usage from 2012 to 2016. It is Ecology's general practice to do so, and Ecology should not be required to undertake a costly and time-consuming rulemaking process of RCW 34.05 in order to merely apply the law as written.

Ecology respectfully requests that this Court reverse and remand with instructions for the superior court to reverse both summary judgment rulings, enter summary judgment in favor of Ecology, and lift the rulemaking injunction.

RESPECTFULLY SUBMITTED this 5th day of August 2019.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the state of Washington that on August 5, 2019, I caused to be served a copy of Appellant State of Washington, Department of Ecology's Reply Brief in the above-captioned matter upon the parties herein via the Appellate Courts' Portal filing system, which will send electronic notifications of such filing to the following:

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