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

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.

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

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR3

III. STATEMENT OF ISSUES.....4

IV. STATEMENT OF THE CASE4

 A. The PCHB’s Denial of Loyal Pig’s Water Right Change Application.....5

 B. Ecology Reviews the Most Recent Five-Year Period of Use to Determine the statutory “Annual Consumptive Quantity”9

 1. Ecology’s past and present practice9

 2. Irrigators’ allegation about Ecology’s past practice12

V. ARGUMENT15

 A. The PCHB Properly Denied Loyal Pig’s Water Right Change Based on its Failure to Provide Water Use Information for the Most Recent Five-Year Period Preceding its Application.....16

 1. Standard of review: This Court reviews the PCHB’s decision de novo and Irrigators bear the burden of showing an error16

 2. Ecology cannot approve a 2017 change application to irrigate additional acres without reviewing water use between 2012 and 2016 (PCHB Issues 2, 3, 5, and 7)17

 3. Res judicata does not bar statutorily required reviews (PCHB Issue 1).....22

4.	The trust exemption does not operate to move the ACQ review period (PCHB Issue 4)	25
B.	Ecology Need Not Undertake Rulemaking to Apply the Express terms of RCW 90.03.380.....	27
1.	The standard of review on the rulemaking claim is de novo	28
a.	Ecology’s current practice is not a “rule”	29
b.	Ecology’s prior practice was not a rule, and departure from it to comply with statute does not require rulemaking	31
c.	If This Court Reaches the Question of Ecology’s Past Practice, It Should Find that the Superior Court Erred and Abused Its Discretion in Finding a Universal Practice of “res judicata”	33
2.	Standard of Review on Evidentiary Rulings	34
3.	The Superior Court Allowed Inadmissible Evidence	35
a.	Inadmissible legal opinions were prejudicial and irrelevant	36
b.	Inadmissible hearsay: 803(20) exception does not allow declarant testimony about “customs pertaining to land”	38
c.	Inadmissible hearsay: The trial court erred in allowing an unattributed statement as an admission of party opponent.....	42
4.	The superior court abused its discretion in concluding that Ecology had adopted a universal past practice of “res judicata”	43
VI.	CONCLUSION	44

TABLE OF AUTHORITIES

Cases

<i>Budget Rent A Car Corp. v. Dep't of Licensing</i> , 144 Wn.2d 889, 31 P.3d 1174, (2001).....	29, 30, 31
<i>Bickford v. Dep't of Ecology</i> , PCHB No. 09-063 (Nov. 20, 2009).....	20
<i>Dep't of Ecology v. Campbell & Gwinn</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	31
<i>Cano-Garcia v. King Cty.</i> , 168 Wn. App. 233, 277 P.3d 34 (2012).....	35
<i>Christensen v. Grant Cty. Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004).....	23
<i>City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 164 Wn.2d 768, 193 P.3d 1077 (2008).....	23–24
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998).....	16, 31
<i>Dot Foods, Inc. v. Dep't of Rev.</i> , 185 Wn.2d 239, 372 P.3d 747 (2016).....	23
<i>Ebel v. Fairwood Park II Homeowners' Ass'n</i> , 136 Wn. App. 787, 150 P.3d 1163 (2007).....	38
<i>Failor's Pharmacy v. Dep't of Soc. & Health Servs.</i> , 125 Wn.2d 488, 886 P.2d 147 (1994).....	29
<i>Fort v. Dep't. of Ecology</i> , 133 Wn. App. 90, 135 P.3d 515 (2006).....	17
<i>Foster v. Dep't of Ecology</i> , 184 Wn.2d. 465, 362 P.3d 959 (2015).....	18
<i>Goodover v. Lindsey's, Inc.</i> , 232 Mont. 302, 757 P.2d 1290 (1988).....	39
<i>In re Yakima River Drainage Basin</i> , 177 Wn.2d 299, 296 P.3d 835 (2013).....	19, 22
<i>Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 122 Wn. App. 736, 87 P.3d 774 (2004).....	35

<i>Lockwood v. AC & S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987).....	42
<i>Luisi Truck Lines, Inc. v. Wash. Utilities & Transp. Comm'n</i> , 72 Wn.2d 887, 435 P.2d 654, (1967).....	24
<i>Lynn v. Labor Ready, Inc.</i> , 136 Wn. App. 295, 151 P.3d 201 (2006).....	38
<i>McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.</i> , 142 Wn.2d 316, 12 P.3d 144 (2000).....	28, 30
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	16
<i>Pueblo of Jemez v. United States</i> , 366 F.Supp. 3d 1234 (D.N.M. 2018).....	39
<i>R.D. Merrill Co. v. Pollution Control Hearings Bd.</i> , 137 Wn.2d 118, 969 P.2d 458 (1999).....	18
<i>Rettkowski v. Dep't of Ecology</i> , 122 Wn.2d 219, 858 P.2d 232 (1993).....	17
<i>Schibel v. Eymann</i> , 189 Wn.2d 93, 399 P.3d 1129 (2017).....	23
<i>Skagit Cty. v. Skagit Hill Recycling, Inc.</i> , 162 Wn. App. 308, 253 P.3d 1135 (2011).....	17
<i>Simmons v. Dep't of Ecology</i> , PCHB No. 99-099, at 7 (Jan. 30, 2001)	18
<i>State v. Gonzalez-Gonzalez</i> , 193 Wn. App. 683, 370 P.3d 989 (2016).....	34, 35
<i>State v. Hudlow</i> , 182 Wn. App. 266, 331 P.3d 90 (2014).....	34
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	34
<i>Sudar v. Dep't of Fish and Wildlife Comm'n</i> , 187 Wn. App. 22, 347 P.3d 1090 (2015).....	28, 32, 33
<i>Terrell C. v. Dep't of Soc. & Health Servs.</i> , 120 Wn. App. 20, 84 P.3d 899 (2004).....	36
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	36

Statutes

RCW 34.04.570(2)..... 27
RCW 34.05 15
RCW 34.05.010 16
RCW 34.05.010(16)..... 29
RCW 34.05.570(1)(a) 16
RCW 34.05.570(3)..... 16
RCW 46.87 30
RCW 90.03.380 1,10,11,14,18,20,25,27,37,41
RCW 90.03.380(1)..... 3,4,5,8,9,15,18,19,28,31,32,44
RCW 90.03.615 8,19,20,21,26,27,37
RCW 90.13.615 22
RCW 90.14.140 9, 20, 37
RCW 90.14.140(2)(h) 8, 25
RCW 90.42 8
RCW 90.80 24
RCW 90.80.055(1)(b) 24
RCW 90.80.080(1)..... 6
RCW 90.80.080(2), (4) 6
RCW 90.80.080(4).....6
RCW 90.80.80 6

Rules

CR 56(c)..... 35
CR 56(e)..... 36
ER 801(c) 38
ER 801(d)(2) 42
ER 802 38
ER 803(20)..... 38,39,41,42
Laws of 1997, ch. 442.....10

Laws of 1997, ch. 442, § 801.....18

I. INTRODUCTION

This case involves the interpretation of RCW 90.03.380, a provision in the water code that governs applications for changes of water rights. It started with a routine Department of Ecology water right decision when Loyal Pig, LLC (Loyal Pig) submitted an application to change a water right to “spread” its allowed water—to irrigate additional land without using additional water. Ecology denied the application, which was affirmed by the Pollution Control Hearing Board (PCHB) due to Loyal Pig’s failure to provide information about its recent water use as required by statute. That water right decision, along with a rulemaking challenge added at Benton County Superior Court, are before this Court on appeal.

Ecology, under its mandate to regulate the use of the State’s waters, may not approve spreading unless it confirms that water consumption will not increase. Ecology makes this determination by following a specific statutory formula, set forth in RCW 90.03.380. That formula anticipates that water use varies over time, and therefore defines “annual consumptive quantity” (ACQ) as the average of the two highest years within the “most recent five-year period” of continuous water use preceding the application. This ACQ then becomes a cap on the future consumptive quantity of water that can be used.

Here, when Loyal Pig applied to “spread” its water in 2017, Ecology required a review of the water use between 2012 and 2016 to select the “two highest” years within that time. But Loyal Pig refused to provide the most recent water use information; instead, insisting that Ecology was required to rely on a previous ACQ calculation from a spreading change application on the same water right in 2014. That 2014 application reviewed water consumption from 2009 to 2013 (the five years preceding the 2014 change). At that time, it identified the “two highest years” of water use as 2009 and 2013. Because including water usage from 2009 is beyond the five-year period preceding Loyal Pig’s 2017 application, Ecology properly denied Loyal Pig’s application to change its water right.

Loyal Pig, along with the Columbia Snake River Irrigators Association (together, “Irrigators”) appealed Ecology’s decision to the PCHB, which upheld Ecology’s denial of the water right change.

Irrigators then appealed to the Benton County Superior Court, which reversed the PCHB (First Claim for Relief). The Irrigators also brought a “rulemaking” claim (Second Claim for Relief) before the superior court pursuant to the Administrative Procedure Act (APA).

The superior court granted Irrigators’ summary judgment on both claims in two separate orders. With respect to the appeal of the PCHB decision, the superior court reversed the decision and ordered approval of

Loyal Pig's change application. With respect to the rulemaking claim, the superior court held that Ecology violated the APA by applying the statutory formula without first adopting a rule through formal rulemaking. The superior court also granted Irrigators a permanent injunction barring Ecology from using the statutory formula for sequential ACQ calculations unless Ecology engages in formal rulemaking to implement the statute. Ecology appeals the superior court's granting of summary judgment in favor of the Irrigators as to both the First and Second Claims for Relief.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in reversing the PCHB's summary judgment order, which affirmed Ecology's denial of Loyal Pig's water right change application.

2. The superior court erred in granting Irrigators' motion for summary judgment finding that Ecology unlawfully requires a "five-year review" for sequential evaluations of ACQ under RCW 90.03.380(1) without rulemaking, and in entering an injunction barring Ecology from doing so.

3. The superior court abused its discretion in admitting evidence suggesting that Ecology had a prior, widespread practice of following a different formula than the "five-year review" under

RCW 90.03.380(1), including erroneously applying hearsay exceptions to allow declarations about Ecology's perceived past practice.

III. STATEMENT OF ISSUES

1. Did the PCHB properly affirm Ecology's denial of Loyal Pig's water right change application where information was not provided to determine ACQ between 2012 and 2016 for a 2017 water right change, and no information was provided to justify any exemption that would move the five-year period?

2. Is Ecology required to undergo rulemaking to require review of the "most recent five-year period of continuous beneficial use" to approve sequential water right changes under RCW 90.03.380(1)?

3. If Ecology's past practice is relevant to determining whether rulemaking is now required, did the superior court err and abuse its discretion in admitting evidence suggesting Ecology used to have a universal past practice contrary to the statute?

IV. STATEMENT OF THE CASE

This appeal seeks reversal of two separate decisions by the superior court. The first is Ecology's denial of Loyal Pig's water right change application, upheld by the PCHB. Second, Ecology challenges the superior court's ruling that Ecology engaged in unlawful rulemaking by applying the statutory formula to calculate annual water consumption and enjoined

Ecology from applying the statute to sequential water right changes without first going through formal rulemaking.

A. The PCHB's Denial of Loyal Pig's Water Right Change Application

The facts relied on by the PCHB in affirming Ecology's denial of Loyal Pig's change application are a matter of record. CP at 339–41. Loyal Pig, an irrigator of farmland in Benton County, wishes to spread water held under Water Certificate No. G3-01349. This water right allows withdrawal of water from two wells in rural Franklin County for farmland irrigation. CP at 140.

In 2014, Ecology approved a prior change to this water right to add additional irrigated acres, *i.e.*, to “spread” the same quantity of allowed water over a larger area of land. CP at 139–52. Ecology and the applicant agreed that the water right, originally approved in 1970, “had witnessed a significant amount of decreased irrigated ground prior to the 2009 period.” CP at 414. The 2014 change application required a review of ACQ to determine the quantity of water that could be “spread” under RCW 90.03.380(1). The 2014 ACQ analysis looked to the “most recent five-year period of continuous beneficial use,” which at that time was 2009 to 2013. Ecology determined that the “two highest years” of water use in that timeframe were 2009 and 2013, which were averaged to calculate the

final ACQ figure. CP at 139–54.¹ Ecology issued a decision approving the water right change, and its 2014 decision was not appealed.² CP at 236.

In January 2017, Loyal Pig filed a second application, this time with the Franklin County Water Conservancy Board (Franklin Board),³ requesting another change of its water right to, once again, spread water over a greater amount of acreage. CP at 129. Loyal Pig applied to spread and change water on the “Columbia East” parcel of the water right, which was split off in 2014. CP at 73–80. Ecology received a Report of Examination from the Franklin Board recommending approval of the change. CP at 13–84. Notably, the 2017 Report of Examination stated that an ACQ calculation was required to confirm that the proposed spreading would not result in an increase of consumptive use of water. CP at 171. However, the Report of Examination only included an acreage calculation and provided no information on Loyal Pig’s water use from 2014 to 2017 (three of the five years before the change application). *Id.* Instead, the 2017

¹ In addition to spreading water, the 2014 change reduced the quantity of water from the original right, split the right into two portions, and changed the place of use. CP at 153–54.

² Ecology approved the 2014 change through a modification to a water conservancy board decision under the process outlined in RCW 90.80.80. CP at 80.

³ In certain counties, water right holders have a choice to file a water right change or transfer application with Ecology or a local county water conservancy board. A water conservancy board prepares a record of decision on a water right transfer application that is transmitted to Ecology for review. RCW 90.80.080(1). Such a decision is conditional because the final decision on the application is made by Ecology, which can affirm, reverse, or modify the water conservancy board’s decision after reviewing it to ensure “compliance with applicable state water law.” RCW 90.80.080(2), (4).

Report of Examination referred back to the 2014 change application (which averaged use from highest years 2009 and 2013) and simply provided the ACQ figure determined for that earlier application. *Id.* Importantly, the Report of Examination stated that “existing crop rotations and water right crop irrigation use . . . has remained the same” since the 2014 change. CP at 256. Therefore, water usage had not significantly decreased (through irrigation of fewer acres) nor had it increased (by irrigating crops that use more water).

Because the Report of Examination did not include information necessary to conduct an updated ACQ review in 2017, Ecology found that the ACQ analysis did not satisfy the statutory criteria. It thus denied the application by reversing the Franklin Board’s conditional decision. CP at 26-27. It is this decision, not the earlier change approved in 2014, that is the subject of this appeal.

Irrigators appealed Ecology’s decision to the PCHB. They argued that Ecology’s denial of the water change should be reversed on the following grounds: (1) Ecology should have utilized the ACQ from the 2014 change application under the doctrine of *res judicata*, (2) the governing statute requires a forward-looking “grace period” that prevents any ACQ analysis on subsequent water right change applications, (3) one of Ecology’s policies permitting a simplified tentative determination of ACQ

requires use of the 2014 ACQ; and (4) the 2014 ACQ should apply because a portion of the relevant water right was placed into a temporary trust. CP at 105–06.

In ruling on cross-motions for summary judgment, on February 23, 2018, the PCHB upheld Ecology’s decision. It held that neither *res judicata* nor collateral estoppel applied to the 2014 ACQ determination, which was not a judicial determination or made in a judicial or quasi-judicial proceeding. It further held that the Irrigators’ arguments for a “grace period” and their arguments based on Ecology’s policy were not supported by authority. CP at 349. It further found that the Franklin Board’s original Report of Examination determination could not qualify for a trust exemption because it did not adequately analyze the effect of a 2017 donation of the water right into trust⁴. CP at 350. The PCHB concluded that Ecology lawfully reversed the Report of Examination and denied the water right change. CP at 350–51. The PCHB ruled that:

According to RCW 90.03.380(1), an ACQ analysis was required for the most recent five-year period of continuous beneficial use of the water right, even though an analysis had been conducted in 2014 for a previous change of the same water right (G3-01340). **Therefore, the statutory time**

⁴ A water right holder may donate a water right into the State Water Right Trust program, RCW 90.42. A water right is exempt from relinquishment “if such right is a trust water right . . .” RCW 90.14.140(2)(h). This exemption also serves to move the “most recent five-year period of continuous beneficial use” for ACQ calculations. RCW 90.03.615.

period for a 2017 ACQ calculation should have been 2012–2016.

CP at 347–48 (emphasis added).

Thereafter, the Irrigators appealed to the Benton County Superior Court. The superior court reversed the PCHB order on different grounds and reinstated the Conservancy Board’s Report of Examination. CP at 314-51.

B. Ecology Reviews the Most Recent Five-Year Period of Use to Determine the Statutory “Annual Consumptive Quantity”

1. Ecology’s past and present practice

The Loyal Pig change application is a typical example of an application to “spread” water that requires an ACQ review. Ecology applies this formula because RCW 90.03.380(1) requires a review of the “most recent five-year period” of water use for purposes of determining ACQ, regardless of whether ACQ was calculated during an earlier evaluation of a preceding water right change application. CP at 237, 529. The statute has no exception or “grace period” that makes this a special circumstance.

Before 1997, the water code did not allow for “spreading,” or changing a water right to add additional irrigated acreage, at all. When the Legislature allowed Ecology to authorize “spreading” changes in 1997, it did so with an express limitation that spreading may only be permitted “if such change results in no increase in the annual consumptive quantity of

water used under the water right.” RCW 90.03.380; Water Resource Management–Modifications, Laws of 1997, ch. 442. By reviewing past consumptive quantity, Ecology ensures that adding irrigated acreage does not enlarge the water right beyond what was previously consumed. This assures that there will be no greater impact to the hydrologic system and other water rights.

Long-time Ecology staffer Herman Spangle, who made the initial permit recommendation on the Loyal Pig application at issue in the PCHB appeal, has been with Ecology since 1996. CP at 237. When reviewing the Loyal Pig change application, Mr. Spangle and his supervisor at the time, Keith Stoffel, both determined that evaluation of the 2017 change request required water usage information from 2012–2016. *Id.* Ecology Staffer Mark Schuppe has been with Ecology since 1991, both as the Central Regional Office Water Resources Program Manager and at the Office of Columbia River, and has been responsible for water right changes for many years. Mr. Schuppe attested in a declaration that he has not, now or in the past, known of any Ecology policy or practice to bar a new ACQ analysis within five years of a previous change that involved an ACQ analysis.

I have never been trained on this kind of bar, “lock in” or “res judicata,” nor have I been advised by my supervisors or advised my staff to follow “res judicata” instead of performing an updated ACQ analysis. . . .

. . . .

. . . I can recall no policy, training or guidance that ever promoted a “res judicata” bar on sequential ACQ calculations.

CP at 529–30.

Ecology’s water right change practices are described in two policies. First, POL-1120, “Tentative Determinations of Water Rights,” was adopted in 2004. This policy describes the process for determining how much water was beneficially used for purposes of relinquishment, which is different from the ACQ process⁵. CP at 532–37. POL-1120 includes a discretionary “simplified” process for reviewing proposed changes “when a tentative determination or other actions concerning beneficial use of the water right has recently occurred.” CP at 534. Ecology staff do not use this policy to allow, much less require, carrying forward an ACQ calculation from one year to the next, where doing so would calculate the ACQ based on water usage outside the “most recent five-year period” preceding the new application. CP at 529.

The second policy, POL-1210, was also adopted in 2004. CP at 538-41. The policy describes Ecology’s practice to determine ACQ, and has no exception for any kind of “grace period” in the case of sequential

⁵ A tentative determination finds the extent and validity of legal water for any water right change. CP at 532–37. An ACQ analysis is necessary only for changes to place of use, point of diversion, and/or purpose of use of a water right to enable additional irrigated acreage. RCW 90.03.380.

water right changes. CP at 540–41. POL-1210 is not a rule, and states on its face that it is used “to guide and ensure consistency among water resources program staff in the administration of laws and regulations.” CP at 541.

Unlike POL-1120 (Tentative Determinations), POL-1210 (ACQ) has no provision for a “simplified” ACQ process. It does not reference “res judicata” or any “carry forward” of a past ACQ. As Mr. Schuppe attested, “I have not, now or in the past, interpreted POL-1210 to bar an ACQ analysis within five years of a previous analysis, and I am not aware of anyone else at Ecology who has done so.” CP at 529. The “res judicata” method would be a more generous ACQ process than applied by Ecology, and could result in higher water quantities that permitted under statute by allowing years of high water use (such as 2009, in the case of Loyal Pig) to carry forward more than five years into the future.

2. Irrigators’ allegation about Ecology’s past practice

In addition to their challenge of the PCHB decision on the Loyal Pig permit application, Irrigators also filed a rulemaking challenge with the superior court. Irrigators argued that Ecology previously followed a more generous process in approving past water rights change applications: They assert that, at some point in the past, Ecology did not perform an ACQ review more than once every five years, even though the statute requires ACQ for every water right change that “spreads” water. As evidence of past

agency practice, Irrigators offered the declaration of Darryl Olsen, a Conservancy Board member with experience in water rights, who stated that it was a “well-adopted axiom,” obvious to himself and other unnamed “members of Washington’s water rights community.” CP at 469. Olsen’s declaration provided no specific dates or specific examples of any approved change applications and instead simply asserted that the “res judicata practice” occurred for “some time.” CP at 471–72.

Olsen further asserted that Ecology’s current ACQ formula, which has been followed at least since 2004 (and was litigated in 2009), “deviated from long-standing practices by the state water conservancy boards and Eastern Washington water management consultants.” CP at 468. Although Olsen is a Conservancy Board member, he gave no dates, cases or examples of this res judicata practice. There is no evidence that “res judicata” or “grace period” was implemented in any final administrative decision by Ecology.

Dr. Olsen also submitted a legal memorandum from attorney Tom McDonald, which included a policy basis and legal argument for “res judicata” (admitted by the superior court over Ecology’s objection that it consisted only of legal argument). Despite his long-time experience in the field, however, Mr. McDonald did not describe “res judicata” or a “grace period” as a past practice of Ecology. CP at 478–84.

Likewise, Irrigators' declarant Tim Reiersen described a "general expectation in the regulated community" about rulemaking, but provided no details as to a past "res judicata" practice. While his declaration may be read to imply such a practice, he did not provide any sources or examples of the implementation of such a practice. CP at 458–61.

Declarant Mark Neilson, a Franklin Board member, said he had attended "at least one presentation in which Ecology staff emphasized that conservancy boards, like Ecology itself, are entitled to rely upon prior decisions through the judicial doctrine of 'res judicata.'" CP at 498–99. Mr. Nielson included no dates, examples, or names of Ecology staff who made these statements. *Id.* He also provided a policy argument in favor of applying a res judicata practice, which he claims would be less "expensive and time-consuming" than reconsidering water use history. But provided no examples of when he, his conservancy board, or Ecology had ever actually done so. *Id.*

The superior court ruled, on summary judgment, that Ecology violated the APA by implementing RCW 90.03.380 to require ACQ review without allowing a "grace period" after each ACQ determination. CP at 606.

V. ARGUMENT

Ecology follows the clear statutory language in applying RCW 90.03.380(1) to water right change applications that propose to add additional irrigated acreage:

A change in the place of use . . . to enable irrigation of additional acreage . . . may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, “annual 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). Because the statute is clear on its face, there is no requirement for Ecology to undergo rulemaking under RCW 34.05 in order to apply RCW 90.03.380(1). This is true whether or not, at some point in the past, Ecology issued decisions that did not apply the statute properly.

For this same reason, the PCHB did not err in upholding Ecology’s denial of Loyal Pig’s water right change application. The PCHB properly determined that the doctrine of res judicata did not apply to the 2014 ACQ determination. Moreover, Irrigators’ arguments that Ecology should adopt the 2014 ACQ determination conflicts with the plain terms of RCW 90.03.380(1). And Irrigators provide no legal or evidentiary support

for any exemption to the statute, or for their argument that a forward-looking “grace period” should apply.

A. The PCHB Properly Denied Loyal Pig’s Water Right Change Based on its Failure to Provide Water Use Information for the Most Recent Five-Year Period Preceding its Application

The PCHB correctly upheld Ecology’s denial of Loyal Pig’s water right change, finding no material issues of fact and issuing judgment as a matter of law. Ecology asks this Court to reverse the superior court and reinstate the PCHB’s decision.

1. Standard of review: This court reviews the PCHB’s decision de novo and Irrigators bear the burden of showing an error

In reviewing a decision of the PCHB, the Court of Appeals applies the standards of review set forth in the APA, RCW 34.05.570(3). “Agency action may be reversed where the agency has erroneously interpreted or applied the law, the agency’s order is not supported by substantial evidence, or the agency’s decision is arbitrary and capricious.” *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000); *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Under RCW 34.05.010, the “agency action” is the PCHB’s final order, which in this case affirms Ecology’s denial of Loyal Pig’s 2017 change application. “The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a). Thus, the Irrigators carry the

burden of showing that the PCHB's decision requiring an ACQ review of the "most recent five-year period" of water use from 2012 to 2016 was either unsupported by substantial evidence, arbitrary, or capricious.

Where an original administrative decision was on summary judgment, the reviewing court overlays the APA standard of review with the summary judgment standard. *Skagit Cty. v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 318, 253 P.3d 1135 (2011). Under the "error of law" standard, the court reviews the PCHB's legal conclusions de novo. *Fort v. Dep't. of Ecology*, 133 Wn. App. 90, 95, 135 P.3d 515 (2006).

The parties agreed before the PCHB that there were no genuine issues of material fact and that this matter was appropriate for resolution on summary judgment. This Court should uphold the PCHB decision, and reverse the superior court.

2. Ecology cannot approve a 2017 change application to irrigate additional acres without reviewing water use between 2012 and 2016 (PCHB Issues 2, 3, 5, and 7)

The PCHB properly found that adopting the 2014 ACQ instead of performing a new one in 2017 would be contrary to the express terms of the governing statute. Like all agencies, Ecology "may only do that which it is authorized to do by the Legislature." *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993). Ecology administers state water rights under the authority of the water code, and cannot approve water rights

outside its plain statutory authority. *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 477, 362 P.3d 959 (2015).

When the Legislature amended the water code to allow “spreading,” it included a strict provision for analyzing ACQ, to ensure that no increase in consumptive water use will be allowed. Laws of 1997, ch. 442, § 801; RCW 90.03.380; *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 126, 969 P.2d 458 (1999). The plain language of RCW 90.03.380(1) thus limits Ecology’s ability to approve applications to spread water rights over additional irrigated acreage. Such applications “may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right.” RCW 90.03.380(1). The statute further requires Ecology to calculate ACQ by identifying past water use “*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). The ACQ analysis is necessary to ensure that adding irrigated acreage to a water right does not expand it or injure existing water rights. As the PCHB has explained in a prior decision, “[a]bsent compliance with RCW 90.03.380, expansion of a water right beyond the original intent of the appropriator is not allowed in the law.” *Simmons v. Dep't of Ecology*, PCHB No. 99-099, at 7 (Jan. 30, 2001).

This is necessary because, in order to determine whether a water right change will result in an increase of water use, Ecology must establish a baseline against which to compare. Water use often fluctuates over time, and ACQ defines the baseline as the average of the two highest years within the most recent five. As the PCHB found, the statute is not ambiguous about which five-year period should be reviewed: the phrase “most recent five-year period” describes the period before “[a] change . . . may be permitted.” RCW 90.03.380(1).

The law allows certain, listed exemptions to move the “most recent five-year period” earlier. RCW 90.03.615. This links the ACQ review period to the listed exemptions to “relinquishment.” RCW 90.14.140. Because relinquishment is the rule, Washington courts construe the relinquishment exemptions narrowly. Courts consistently uphold relinquishment where exemptions do not apply. *In re Yakima River Drainage Basin*, 177 Wn.2d 299, 344, 296 P.3d 835 (2013) (reversing trial court where exemption had been construed too broadly).

For purposes of calculating annual consumptive quantity as defined under RCW 90.03.380(1), if, within the most recent five-year period, the water right has been in the trust water rights program under chapter 90.38 or 90.42 RCW, or 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 (emphasis added).⁶

In adopting the single exception to the ACQ five-year review period, the Legislature made no mention of *future* protection upon approval of an ACQ calculation based on a five-year “grace period.” There is no suggestion that “most recent five-year period” means anything other than “most recent” to the applied-for change. This statute prescribes a specific process for extending the five-year period, and mentions no other.

Irrigators suggested below that, because ACQ is intended to prevent impairment, the burden is on Ecology to show actual impairment in fact, or else approve the change. They argue that Ecology cannot “continue to insist that the five-year formula set forth in RCW 90.03.380 for calculating ACQ must be applied mechanically in each and every year going forward.” CP at 396. But the statute limits Ecology’s authority to this exact “mechanical” process, which Ecology must follow regardless of whether impairment is shown or not by independent evidence.

⁶ Relinquishment is the process by which a water right reverts back to the state if it is not put to use by the legal user. In Washington, unused water rights relinquish after five years unless there is an exemption. RCW 90.14.140. Before RCW 90.03.615 was adopted in 2009, Ecology did not read the ACQ statute to include relinquishment exemptions, the matter was litigated, and the PCHB upheld Ecology’s decision. *Bickford v. Dep’t of Ecology*, PCHB No. 09-063 (Nov. 20, 2009). After the *Bickford* decision, the Legislature amended the statute to add RCW 90.03.615.

The Irrigators never offered a statutory exemption under RCW 90.03.615, nor explained how such an exemption, if applied, would allow Ecology to simply substitute a required 2017 ACQ determination with one from 2014. Importantly, the Report of Examination stated that water use had not changed since 2013. This means there could be no decrease in use. There is therefore no conceivable “nonuse” that would qualify for a relinquishment exemption. On its face, the Report of Examination supports no exemption under the water code that would move the five-year period. CP at 240–266.

The PCHB agreed with Ecology that it could not extend ACQ review beyond five years without a relinquishment exemption:

Appellants [Irrigators] cite no authority for their “grace period.” The plain language of the statute requires a consideration of the five years prior (looking backward) to the transfer application to determine if there has been any relinquishment or abandonment of the water right. RCW 90.03.380(1). The Franklin Board did not conduct this analysis.

CP at 349. The PCHB properly determined that Ecology’s POL-1120, which provides a simplified process for some situations, is discretionary and “is not a binding directive.” CP at 326. The PCHB therefore held Ecology could not lawfully rely upon the prior 2014 decision to assess ACQ for transfer in 2017.

The PCHB also appropriately held that no construction of the applicable statutes would permit a 2017 ACQ determination to simply be substituted with the 2014 ACQ based on an assumption that the water use had been generally the same during the times at issue. CP at 349. The PCHB also held that there is no support for this position in RCW 90.13.615, setting forth how relinquishment exemptions should be factored into determination of ACQ. *Id.*

Ecology simply does not have discretion to refer back longer than five years in identifying the “two highest years” of water use for ACQ, unless it determines that a specific exception to relinquishment is applicable during any of the five most recent years. Doing so would exceed Ecology’s statutory authority. In this case, the Franklin Board erred by not reviewing the five most recent years of use and making any determination that a relinquishment exception applied. The PCHB correctly interpreted and applied the statute in upholding Ecology’s denial of Loyal Pig’s water right change.

3. Res judicata does not bar statutorily required reviews (PCHB Issue 1)

In their appeal to the PCHB, Irrigators asserted an argument colloquially referred to as a “res judicata” protection. They argued that Ecology’s 2014 ACQ determination, in that water right change, bars

subsequent ACQ review on the 2017 water rights change, as though prior administrative decisions were a final judgment on the merits between adverse parties and the two changes were the identical issue or same cause of action.

For collateral estoppel⁷ to bar relitigation of a resolved issue, a party must show all of the following:

(1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice.

Schibel v. Eymann, 189 Wn.2d 93, 99, 399 P.3d 1129 (2017). A failure to establish any one of those factors is fatal to a collateral estoppel claim.

Dot Foods, Inc. v. Dep't of Rev., 185 Wn.2d 239, 254–55, 372 P.3d 747 (2016), *as amended on denial of reconsideration* (Apr. 28, 2016), *cert. denied*, 137 S. Ct. 2156, 198 L. Ed. 2d 231 (2017). Similarly, a res judicata analysis considers whether the prior judgment concerned the same subject matter, cause of action, persons and parties, and “the quality of the persons for or against whom the claim is made.” *City of Arlington v. Cent. Puget*

⁷ Although neither doctrine fits well enough for a satisfying analysis, Petitioners’ theory might be better framed as collateral estoppel, or issue preclusion, as Appellants argue about “a crucial issue or determinative fact,” and not an entire cause of action. See *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). The theories of res judicata and collateral estoppel are often used interchangeably, due to only slight differences in practical application.

Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768, 791–92, 193 P.3d 1077 (2008). The party asserting res judicata or collateral estoppel has the burden of proving the determinative issue was litigated in the former proceeding. *Luisi Truck Lines, Inc. v. Wash. Util. & Transp. Comm’n*, 72 Wn.2d 887, 894, 435 P.2d 654, (1967).

The PCHB rejected the “res judicata” or estoppel argument. It acknowledged that some administrative proceedings can have preclusive effect. CP at 343. The PCHB explained, however, that neither a conservancy board nor Ecology conduct administrative or adjudicative proceedings under the law. CP at 345. Rather, water conservancy boards are units of local state government and consist of county-appointed officials. RCW 90.80. While determinations of water conservancy boards are submitted to Ecology for review, neither the water conservancy board’s tentative decision, nor Ecology’s review of that determination constitute a judicial “adjudication of the right.” RCW 90.80.055(1)(b). The doctrines of res judicata and collateral estoppel thus do not apply in the first instance.

Moreover, even if the doctrines applied as a theoretical matter, a 2017 change application involves a different proceeding requiring a new inquiry than the previous decision on an earlier 2014 application. Therefore, the first decision cannot estop the subsequent one. As explained by the PCHB:

Even if the Franklin Board or Ecology proceedings could be considered quasi-judicial, a 2014 decision by the Benton Board would be a completely different proceeding than the 2017 review by the Franklin Board and issue and claim preclusion would still not apply.

CP at 346.

The PCHB held that what Irrigators call “res judicata” would in fact extend Ecology’s authority far beyond the statute: Once an ACQ calculation averaged two high years, those two high years would carry forward, in perpetuity, through all subsequent changes—far beyond the five-year period originally used. The PCHB did not err in refusing to adopt this interpretation in conflict with the plain terms of RCW 90.03.380, and the PCHB’s decision should be upheld by this Court.

4. The trust exemption does not operate to move the ACQ review period (PCHB Issue 4)

The PCHB also ruled that the “trust exemption” to relinquishment should not extend the ACQ period for the 2017 change any earlier than the most recent five-year period of 2012–2016. CP at 350.

The ACQ period may be moved “if, within the most recent five-year period, the water right has been in the trust water rights program under chapter 90.38 or 90.42 RCW . . .” or if there is a relinquishment exemption.⁸ This exemption may serve to move the ACQ period “to the most recent five-

⁸ . A water right is exempt from relinquishment “[i]f such right is a trust water right . . .” RCW 90.14.140(2)(h).

year period of continuous beneficial use preceding the date where the excuse for nonuse under RCW 90.14.140 was established” RCW 90.03.615.

In its 2014 decision, Ecology noted that some water may be placed into temporary trust in the future. CP at 245. Ecology authorized this trust transfer on May 26, 2017. CP at 237. Until that time, as stated in the Report of Examination, water use remained the same. CP at 256.

The law allows for relinquishment exemptions, such as trust donations, to change the ACQ period. But the 2017 trust donation was made the same year as the change application, and can move it no earlier. In fact, the Report of Examination provided by Loyal Pig in its application claimed no relinquishment exemption for the trust donation. There is no explanation as to how or why a trust donation in 2017 should change the years of ACQ calculation. Because Loyal Pig stated that water use remained unchanged in its change application, water use could not have decreased. Therefore, there is no “nonuse” to be excused. Ecology’s review of the Report of Examination determined as follows:

[O]n May 26, 2017, a portion of the Columbia East water right was placed into the Washington State Trust Water Rights Program until 2057. The FCWCB [Franklin Board] failed to evaluate the quantities of water diverted pursuant to the water right between the September 2014 change/transfer authorization and the May 2017 enrollment of the portion of the water right placed into trust. For this reason, we

determined that amount of water placed into the Trust Water Rights Program should not be used in calculating the ACQ for the 2017 application.

CP at 237.

All exemptions to relinquishment are to be construed narrowly, and the trust exemption does not apply here. The PCHB properly ruled on summary judgment in Ecology's favor that there was not sufficient information to explain how water transferred into trust in 2017 could change the five-year period for "continuous beneficial use" under RCW 90.03.615. The PCHB did not err in its conclusion, and this Court should uphold the PCHB.

B. Ecology Need Not Undertake Rulemaking to Apply the Express Terms of RCW 90.03.380.

Ecology appeals from the superior court's order on the "rulemaking" claim, denying Ecology's motion for summary judgment and granting summary judgment in favor of Irrigators on its Second Claim for Relief.

Irrigators alleged that Ecology promulgated an unlawful rule without complying with statutory rule-making procedures in violation of RCW 34.04.570(2). CP at 356–58. Ecology does not deny that it regularly applies the ACQ formula as it was applied to Loyal Pig's application, and agrees that it has not undertaken rulemaking prior to doing so. The superior

court ruled that this is a violation of the APA, and enjoined Ecology from continuing to apply the ACQ statute in this manner. The superior court's determination that Ecology adopted a "phantom rule" without going through a rulemaking process is erroneous and should be reversed.

As explained above, Ecology's process applies the express terms of RCW 90.03.380(1). Irrigators allege that, "[f]or many years, Ecology followed a formal policy of giving preclusive effect to water rights decisions made in administrative proceedings." CP at 356. Even if their evidence showed such a policy, which it does not, such a practice would have been outside Ecology's statutory authority. Abandoning such a practice—far from constituting unlawful rulemaking—would have been required.

1. The standard of review on the rulemaking claim is de novo

Review of a summary judgment order is de novo. "Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Sudar v. Dep't of Fish and Wildlife Comm'n*, 187 Wn. App. 22, 29, 347 P.3d 1090 (2015); *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 12 P.3d 144 (2000), affirming 96 Wn. App. 804, 981 P.2d 459 (1999). Ecology's current practice does not require rulemaking, even if

it departed from past practice, because it simply applies the statute as written.

a. Ecology's current practice is not a "rule"

The superior court erroneously ruled that Ecology must undertake rulemaking in order to require a five-year review for sequential ACQ determinations when a prior ACQ was performed within the same time period.

Ecology need not undertake rulemaking to apply a statute as written. For rulemaking requirements to apply, an agency action must meet the APA definition of a "rule" as "any agency order, directive, or regulation of general applicability" which "establishes, alters, or revokes any procedure, practice, or requirement relating to the enjoyment of benefits or privileges conferred by law." RCW 34.05.010(16). The Supreme Court has explained that if any agency action meets this definition of a rule, then rulemaking procedures must be followed. *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994).

An agency practice is *not* a rule, however, when the agency "did not create any new standard, formula or requirement, but simply applied and interpreted . . ." the statute. *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 896, 31 P.3d 1174, (2001).

In *Budget Rent A Car*, the statute at issue required the Department of Licensing to assess vehicle registration fees based on each rental company's "total number passenger cars in the fleet." RCW 46.87 (International Registration Plan, or IRP). The agency applied this statutory formula to the total cars purchased by the company. The rental company appealed, arguing that applying the statutory definition constituted an unlawful rule. The Supreme Court upheld the agency action, ruling that the agency's interpretation was not a rule because "there were no additional requirements added to the IRP [statute] by the DOL." Although DOL interpreted "total passenger cars" to mean "all cars purchased," and not only active vehicles, this did not constitute rulemaking:

DOL, by giving its interpretation of the phrase "total fleet," cannot reasonably be said to have "establishe[d], alter[ed], or revoke[d] any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law." The requirement arose from the terms of the IRP [statute], not by action of DOL.

Budget Rent A Car, 144 Wn.2d at 898 (internal citations omitted).

When an agency does not prescribe a process, but simply outlines factors based on "reasonableness," it has not engaged in impermissible rulemaking. *McGee Guest Home*, 142 Wn.2d 316, (agency may set and adjust health care reimbursement rates without rulemaking because the statute only requires rates to be "reasonable.") Where the plain meaning of

the statute is clear, “the issue is not one of agency policy subject to rule making.” *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). This is because “rules or regulations cannot amend or change legislative enactments.” *Theodoratus*, 135 Wn.2d at 600.

Here, Ecology’s decision to require updated information for an ACQ review, such as on Loyal Pig’s change application, relies on the express terms of RCW 90.03.380(1), defining ACQ to include the average of the two highest years of water usage in the “five most recent years of continuous use.” As in *Budget Rent a Car*, Ecology does not add another requirement to this statute when conducting a five-year review; it simply applies the statute as written. This procedure does not constitute unlawful rulemaking.

b. Ecology’s prior practice was not a rule, and departure from it to comply with statute does not require rulemaking

Irrigators argue that Ecology, at one time, followed a more generous ACQ formula than is prescribed by statute. Irrigators assert that, instead of reviewing the “most recent five-year period” for every change requiring ACQ, Ecology used to process changes without new water use data if there had been a prior ACQ within the past five years, and would instead allow the “two highest years” of water use to fall earlier than the five-year statutory review period. CP at 390–91.

But even if Irrigators' assertions about Ecology's past practice were supported by admissible evidence (they are not), this prior practice would not constitute a "rule" under the APA, nor provide grounds for ignoring the express terms of RCW 90.03.380(1). An agency policy or practice is not a rule unless it provides "authoritative instructions and specific orders." *Sudar*, 187 Wn. App. at 31. A policy that "provides only a presumptive management framework" and does not impose "an independent regulatory mechanism that operates with the force of law" is not a rule, and not reviewable under APA rule-making standards. *Id.*

The two policies cited by Irrigators provide, at best, a management framework and thus do not qualify as "rules" under the APA. The first policy, POL-1120 (Tentative Determinations) includes a description of a *process* for a "simplified tentative determination" for determining the extent and validity of a water right. CP at 533. It is not an independent regulatory mechanism as required to qualify as a "rule." As explained by the PCHB, "Ecology could choose, as it did in this case, to not follow the simplified process." CP at 350. Further, the policy does not directly apply to calculations of ACQ. CP at 533.

The second policy, POL-1210 (ACQ), that provides guidance to Ecology staff when making ACQ determinations such as the ones in question here, does *not* describe any process for a "simplified" ACQ

calculation. CP at 538. The ACQ policy itself includes no shortcuts, grace periods or res judicata formula. Only by ignoring the ACQ policy, referring to a different policy, and construing it as a mandate can Irrigators imply that Ecology can *only* do simplified ACQ calculations instead of following the statute.

Irrigators' evidence (analyzed below) indicates at most a misunderstanding that, if it is accurately reported here, may have arisen from statements by Ecology staff. Even if it were possible that Ecology erroneously approved a change without performing a required statutory ACQ (a fact not in evidence), such a mistake does not require rulemaking to fix.

Any such past practice, and correction of an erroneous practice to comply with the statute, would not be an "independent regulatory mechanism" as required by *Sudar*. *Sudar*, 187 Wn. App. at 33. The regulatory mechanism in question is the language of the statute.

In sum, under the superior court's logic, no agency could administer its statutory responsibilities without first going through rulemaking. Ecology asks this Court to reverse.

- c. If this court reaches the question of Ecology's past practice, it should find that the superior court erred and abused its discretion in finding a universal practice of "res judicata"**

Even if Ecology's past practice were relevant, however, the trial court erred in admitting evidence in the form of legal analysis and hearsay. Even if such evidence were admissible, there was not sufficient, competent evidence to conclude that Ecology's past practice was universal.

2. Standard of review on evidentiary rulings

If this Court reaches the question of Ecology's past practice in calculating ACQ, Ecology asks that this Court revisit the superior court's evidentiary rulings regarding Ecology's past practice. The trial court erroneously relied on inadmissible legal opinions and hearsay evidence in the form of declarations and a legal opinion memorandum submitted by Irrigators in support of their motion for summary judgment.

Errors of law on hearsay exceptions are reviewed de novo; trial courts do not have discretion to admit inadmissible evidence. *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 688–89, 370 P.3d 989 (2016). *State v. Hudlow*, 182 Wn. App. 266, 281, 331 P.3d 90 (2014)⁹. The superior court's error is reversible error only if it results in prejudice, and is harmless if the outcome was not materially affected or it was of minor significance

⁹ To the extent the trial court exercised its discretion in applying evidentiary factors, this Court reviews for abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001). Because of the clear prejudice resulting here from admission of hearsay, the superior court's evidentiary rulings should be reversed under either standard.

in reference to the overall evidence as a whole. *Gonzalez*, 193 Wn.App. at 689.

The superior court erroneously determined that Ecology unlawfully applied the statutory ACQ formula to Loyal Pig's water right change application because of Ecology's purported past practice, which Loyal Pig claimed prevented Ecology from making a new ACQ calculation. Almost all of the evidence submitted by Irrigators was hearsay; without such evidence, there would be only one or two declarants who held the personal belief about Ecology's past practice, and their personal beliefs have no basis in evidence.

3. The superior court allowed inadmissible evidence

Trial courts may not consider inadmissible evidence in ruling on motions for summary judgment. *See, e.g., Cano-Garcia v. King Cty.*, 168 Wn. App. 233, 249, 277 P.3d 34 (2012); *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 746, 87 P.3d 774 (2004); CR 56(c). Despite this, Irrigators offered inadmissible evidence in support of its motion for summary judgment. Specifically, evidence of Ecology's purported past practice of calculating ACQ was offered via declarations from Timothy Reiersen, P.E. and Darryll Olsen, Ph.D., with exhibits including the Legal Opinion Memorandum of Tom McDonald, and the Declaration of Mark Nielson. CP at 458–61, 465, 478, 498.

Ecology objected to the admission of these declarations and the legal opinion memorandum as inadmissible legal opinions and hearsay evidence and moved to strike. CP at 567. The trial court overruled Ecology's objections and admitted these materials almost in their entirety. CP at 633.

a. Inadmissible legal opinions were prejudicial and irrelevant

Under CR 56(e), affidavits and declarations submitted in summary judgment proceedings must be based on factual allegations that are admissible in evidence and that are made on personal knowledge. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 30, 84 P.3d 899 (2004). Experts may not offer opinions of law in the guise of expert testimony. A trial court errs if it considers legal opinions expressed in affidavits. *Terrell*, 120 Wn. App. at 30. A trial court's acceptance of legal testimony is reviewed for abuse of discretion. *Id.* It is the responsibility of the court to interpret and apply the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993).

Irrigators submitted extensive opinions of law within the declarations supporting its motion for summary judgment. In particular, the Olsen Declaration is rife with legal conclusions as to whether Ecology's practice is "unlawful rulemaking" and extensive opinion about the statutory framework. CP at 580–89 (proposed redactions to Olsen Declaration).

Irrigators also submitted, as an exhibit, a memorandum opinion from attorney Tom McDonald, submitted under the authority that Mr. McDonald is “the former head Assistant Attorney General for the Water Resources Program, Ecology, and former Chairman of the Pollution Control Hearings Board.” CP at 469. This memorandum provides a legal analysis of administrative res judicata. CP 478–84. The declarations of Mark Nielson and Tim Reiersen also included some short statements of legal opinions. CP at 591, 578–79.

It is the responsibility of the trial court to interpret the Water Code, particularly RCW 90.03.380, .615, and RCW 90.14.140, and determine whether Ecology can or must adopt a “res judicata” bar on sequential ACQ calculations. The superior court admitted all legal conclusions, including the McDonald legal advice memorandum, but stated it would “disregard any ultimate conclusions of law.”

The inclusion of this evidence—over ten pages of legal analysis—led to prejudice and error in this matter. This is especially true given Olsen’s role as an “expert” both in water law and in the past practice of Ecology, which should be exclusively a question of fact. Presenting Mr. McDonald as an expert in water law introduced an inference that he was testifying about past agency practice (which he did not): During oral argument, Irrigators’ counsel referred to “testimony from four experts and four

experienced water professionals,” including “the former chair of the PCHB” that “this is how things were done.” VRP 71:21–25, Nov. 9, 2018. In light of the very tenuous evidence of past practice, and comments by the superior court that Ecology’s past practice was relevant to the determination of unlawful rulemaking (oral arg. transcript), the McDonald memorandum caused prejudice to Ecology.

b. Inadmissible hearsay: 803(20) exception does not allow declarant testimony about “customs pertaining to land”

Irrigators also submitted inadmissible hearsay in support of their motion for summary judgment. Ecology objected, and the court ruled that, while the statements in questions were hearsay, most were allowable under ER 803(20), “customs affecting lands in the community.” CP at 634–36.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless it fits within an exception. ER 802. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006); *Ebel v. Fairwood Park II Homeowners’ Ass’n*, 136 Wn. App. 787, 792, 150 P.3d 1163 (2007) (striking inadmissible hearsay for declarations offered in support of summary judgment).

Under ER 803(20), reputation in a community, arising before the controversy, as to boundaries of or customs, affecting land in the

community is not excluded by the hearsay rule, even if the declarant is available. There is limited case law concerning the application of ER 803(20) in land disputes. Other states have a similar hearsay exception for boundaries or customs affecting land. This case law, while not binding in this Court, suggests that ER 803(20) is limited to evidence of reputation and does not authorize the admission of statements by one person that simply assert a fact concerning a boundary or general history. *Goodover v. Lindsey's, Inc.*, 232 Mont. 302, 757 P.2d 1290 (1988). *Pueblo of Jemez v. United States*, 366 F. Supp. 3d 1234 (D.N.M. 2018). The testimony “must report a general consensus in the community, an assertion of the group . . . if the statement is the personal assertion of a single declarant, it will not be admitted under Rule 803(20).” *Pueblo of Jemez*, 366 F. Supp. 3d at 1244-45. This exception is generally used for “historical events of general interest,” under the rationale that such evidence is needed “because of the likelihood that other evidence cannot be obtained.” *Id.* at 1245.

Witness Olsen’s declaration includes statements about the understanding of the water rights community. He personally offered this as a “general consensus” without providing any context. He does not explain why “other evidence cannot be obtained,” and though he refers to “members of Washington’s water rights community,” he does not offer any names to corroborate his personal belief. This is all essentially his personal assertion:

- “It has always been obvious to me and other members of Washington’s water rights community that the period commences after one of these [past ACQ] determinations.” CP at 584–85.
- “Other authority making the five-year grace period clear may be found in . . . previous Ecology instructions to the Water Conservancy Boards . . . previous joint Ecology review with the Water Conservancy Boards.” CP at 585. No examples, names, or dates were provided.
- “In the case of Ice Harbor Farms . . . the Office of Columbia River (which was handling review of this application) agreed three times in detailed discussions, that the application of res judicata was fully appropriate under the water code.” CP at 588. [Evidence submitted by Office of Columbia River staff refuted this statement. CP at 530].

Likewise, the Reiersen Declaration includes statements that Ecology’s ACQ process “is not known as an established, legitimate rule for the administration of water rights.” CP at 459. Reiersen’s testimony is generalized and includes no details as to how, when, or from whom he heard of such a practice.

Notably, these declarations were offered during the course of litigation and were the only evidence offered by Irrigators to support their assertion that Ecology had deviated from a purported past practice of calculating ACQ contrary to the statutory formula required in RCW 90.03.380. There is no evidence in the record that this purported practice was “arising before the controversy,” as required under ER 803(20).

Only two declarants—Olsen and Reiersen—testified about “past practice.” Mr. Nielson testified that he learned in a presentation that *res judicata* was appropriate, and his declaration included a policy perspective about why this is preferable, but he did not describe any situation where it occurred, or where he heard it had occurred. CP at 498–99. Furthermore, any such decision would be final agency actions and a matter of public record. Hearsay evidence about the “community practice” is not necessary to show how a twenty-first century regulatory agency makes its final decisions. If this practice were widespread, water experts and conservancy board members would surely be able to produce at least one example where it in fact happened. The rumors and conclusions submitted by Irrigators’ declarants do not constitute “widespread” evidence of the kind contemplated by the ER 803(20) exception to hearsay.

The superior court erred in allowing these declarations as an exception to hearsay under ER 803(20). CP at 634.

c. Inadmissible hearsay: The trial court erred in allowing an unattributed statement as an admission of party opponent

The superior court also admitted an attestation as an “admission of party opponent,” ruling this was not hearsay, without any information as to who made the statement or whether that person was authorized by Ecology. Declarant Neilson testified, “I have attended at least one presentation in which Ecology staff emphasized that conservancy boards, like Ecology itself, are entitled to rely upon prior decisions through the judicial doctrine of *res judicata*.” CP at 499. The superior court allowed this as an admission of a party opponent under ER 801(d)(2). CP at 637.

A statement of a party opponent is not hearsay only “if offered against a party and is . . . (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party’s agent or servant acting within the scope of the authority to make the statement for the party” ER 801(d)(2). But “[i]n order for a statement to satisfy these requirements, the declarant must be authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party.” *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 262, 744 P.2d 605 (1987).

Mr. Nielson’s statement includes no information to determine whether the speaker was an authorized agent of Ecology. The trial court concluded that, because it “sufficiently identifies a training by Ecology . . .” the speaker “would have been authorized to make the statements.” VRP 62:19–21, Nov. 9, 2018. But Irrigators were unable to identify the speaker, the date of any presentation, the location, or who else if anyone might have been present. Without this information, the superior court erred in admitting this as a statement of a party opponent.

4. The superior court abused its discretion in concluding that Ecology had adopted a universal past practice of “res judicata”

Even if all evidence were admissible, it would be an abuse of discretion for the superior court find “unlawful rulemaking” because Ecology deviated from a universal past practice. The evidence simply does not support such a finding.

Irrigators’ evidence, at most, provides that Ecology said this was the formula “at least one time” at a presentation, and that the water resources community believed this to be the practice. Ecology’s evidence, to the contrary, shows that management during this timeframe did not follow this practice (and knew no one who did so). CP at 528–31, 235–38. Moreover, POL-1120 (2004 “Tentative Determinations” policy) which Irrigators cite as evidence for a “simplified” process, does not apply to ACQ calculations;

those fall under POL-1210 (2004 “ACQ” policy), which had no simplified process.

Taken as a whole, the “res judicata” or “grace period” method was clearly not a universally adopted, much less a widespread, official practice. The only evidence consists of hearsay declarations by Irrigators, who submit no decisions, publications or other direct evidence of Ecology using a “res judicata” approach in the past on sequential ACQ calculations. The weight of the evidence cannot support a finding that Ecology, at some point in the past, followed any process other than the one required by statute.

VI. CONCLUSION

On the First Claim for Relief in this case, Ecology asks this Court to rule that, as Ecology’s ACQ practice directly applies the statutory formula as written, the PCHB did not err in upholding Ecology’s decision to deny Loyal Pig’s water right change application. Ecology asks this Court to reverse the superior court and reinstate the ruling of the PCHB.

With respect to the Second Claim for Relief, APA rulemaking is not required for Ecology to apply RCW 90.03.380(1) to require a review of the most recent five-year period before sequential water right change applications. This is true regardless of whether Ecology deviated from the express statutory formula at some point in the past. If the Court entertains the argument that Ecology’s past practice is relevant to the rule-making

inquiry, Ecology asks the Court to find that the superior court erred in considering evidence about Ecology's past practice and abused its discretion in concluding that Ecology's past practice was widespread.

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 injunction.

RESPECTFULLY SUBMITTED this 22nd day of May 2019.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Robin G. McPherson", written in a cursive style.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 22, 2019, I caused to be served a copy of Appellant State of Washington, Department of Ecology' Brief in the above-captioned matter upon the parties herein via the Appellant Courts' Portal filing system, which will send electronic notifications of such filing to the following:

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