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**COURT OF APPEALS FOR DIVISION III
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,

**BRIEF OF RESPONDENTS LOYAL PIG, LLC and COLUMBIA
SNAKE RIVER IRRIGATORS ASSOCIATION**

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Introduction

Since 1917, when the Legislature first displaced the common law, Washington’s irrigators have gone through agency or judicial proceedings which result in the establishment or confirmation of the right to use a specified quantity of water in a specified location. Once that right is established, there is a continuing requirement of beneficial use, but the law has also always protected Washington’s irrigators from any loss of right for the first five years of non-use (and longer if the non-use was for particular reasons). *See, e.g.*, RCW 90.14.140. The Supreme Court calls this protection a “five-year grace period”.¹

Water rights remain appurtenant to particular lands specified in the instrument documenting the water right unless the holder of the right is granted permission by Appellant, the Washington State Department of Ecology, to change (or expand) those lands pursuant to RCW 90.03.380. This appeal first concerns whether the Franklin County Water Conservancy Board, following long-standing practice in the State’s water rights community, erred by giving effect to the five-year grace period set forth in RCW 90.14.140 when approving changes to a water right sought under RCW 90.03.380.

Respondent Loyal Pig, LLC (“Loyal Pig”) had most recently obtained from Ecology a declaration of the scope of its water right and the associated

¹ *In re Determination of Rights to Use of Surface Waters of Yakima River Drainage Basin*, 177 Wn.2d 299, 344 (2013).

lands in 2014, through Ecology's approval of a decision of the Benton County Water Conservancy Board. Three years later, within the five-year grace period, Loyal Pig sought a further change. The Franklin County Water Conservancy Board readily approved the change, preserving the 2014 quantity, both because it was protected by the five-year grace period, and because there had been no change in farming practices. (*See* Appendix, attached hereto, summarizing the two decisions.)

Ecology overturned the Franklin Board's findings and decision, insisting that RCW 90.03.380 requires it to ignore the five-year grace period, and now admits that this new interpretation is regularly applied, making it a "rule" within the meaning of the Administrative Procedure Act. The new interpretation is contrary to Supreme Court authority, the plain language of RCW 90.03.615, and Ecology's own formal, written policy giving effect to the grace period.

While the PCHB upheld Ecology's lawless conduct, primarily on the basis of unwarranted deference, the Superior Court easily reversed Ecology's decision, restoring the Franklin County Water Conservancy Board's decision, and the Superior Court further granted summary judgment in favor of Respondents, holding Ecology's lawless action to constitute an instance of an illegal agency rule, adopted without compliance with the procedural

requirements of the Administrative Procedure Act. Respondents ask this Court to uphold the decisions of the Superior Court.

ADDITIONAL ISSUES PRESENTED FOR REVIEW

Respondents believe two additional issues are raised by Ecology's First Assignment of Error:

1. Did the PCHB err in granting summary judgment in favor of Ecology where the 2014 order upon which Respondents relied included a plan for a "determined future development" within the meaning of RCW 90.14.140(2)(c), thereby establishing a specific exemption for relinquishment even before the expiration of the five-year grace period? (*See infra* Point I(C))

2. Did the PCHB err in granting summary judgment in favor of Ecology when, even assuming *arguendo* that Ecology had discretion to decline to apply the five-year grace period, Ecology acted arbitrarily and capriciously in violation of RCW 34.05.570(3)(i), and failed to explain its action as required by RCW 34.05.570(3)(h), in declining to follow POL 1120 and accept the Franklin Board's simplified determination of the quantity of water available for transfer? (*See infra* Point I(D).)

COUNTERSTATEMENT OF THE CASE

A. Statutory Context: The Fundamentals of Non-Relinquishment.

A fundamental pillar of Washington water law is Chapter 90.14 RCW. This Chapter provides that if a water rights holder “voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to divert or withdraw for any period of five successive years,” the rights are relinquished to the State. RCW 90.14.160. The general rule that only voluntary nonuse for five years will extinguish water rights is repeatedly expressed in Chapter 90.14 (*e.g.*, RCW 90.14.170; RCW 90.14.180; RCW 90.14.043(2)) and elsewhere (*e.g.*, RCW 90.03.380(1); RCW 90.03.615, RCW 90.42.080(10)). The Supreme Court has referred to this principle as a “five-year grace period,” admonishing against any attempt to “read the 5-year grace period out of the statute”. *In re Determination of Rights to Use of Surface Waters of Yakima River Drainage Basin*, 177 Wn.2d 299, 344 (2013).

While Ecology disputes the evidence advanced in support of this proposition (*see infra* Point II(B)), it was and is generally understood by Washington water practitioners that the five-year grace period commences after a decision which quantifies the water right, whether judicial or administrative. (C469; *see also* CP461.²) Water practitioners have come to refer to the generally-accepted practice of carrying forward the prior

² Citations in the form CP___ are to pages in the Clerk’s Papers.

quantification of the water right without “re-litigating” the history of usage as an application of *res judicata* (see C469); that is, giving effect to the decision quantifying the water right for at least the five-year grace period.

To provide further protection to water rights holders beyond the basic rule that voluntary nonuse for five full years will destroy the right, the Legislature enacted RCW 90.14.140, subsection (1) of which specifies a number of “sufficient causes” for nonuse. Each of these builds upon the basic five-year grace period to provide protection for “nonuse of all or a portion of the water by the owner of a water right for a period of five *or more* consecutive years”. RCW 90.14.140(1) (emphasis added). In other words, these specific excuses for nonuse *extend* the five-year grace period beyond five years whenever the “nonuse occurs as a result of” the reasons listed in RCW 90.14.140(1)(a)(l).³

Relevant general practices in implementing the Water Code were reduced to writing in Ecology’s formal policy POL 1120, effective August 30, 2004. (See CP471, CP500-05.) Ecology explained that:

“A simplified tentative determination [quantifying a water right] may be conducted when a tentative determination or other actions confirming beneficial use of the water right has recently occurred. Under these circumstances, *an investigation of the complete history of the water right is not required.*”

³ Subsection (2) of the statute also erects a number of independent barriers against relinquishment, providing an indefinitely long period of protection when nonuse is caused by one of the listed reasons. RCW 90.14.140(2).

“Instances where simplified tentative determinations can be conducted include:

“a. The existing water right has *had recent departmental action, such as the issuance of a change approval within the last 5 years*;

“b. The existing water right was confirmed as part of an adjudication or other court action that determined the extent and validity of the right within the last 5 years;”

(CP502 (emphasis added).) The Policy notes that the simplified procedure is “conducted on water rights where forfeiture of water is not an issue” (*id.*), such as when the five-year grace period is still in place.⁴

B. Regulatory History Relevant to the Dispute.

For some time, Ecology followed its POL-1120 and continued to apply the five-year grace period (and allowing conservancy boards to apply it) to simplify applications processed pursuant to RCW 90.03.380. As early as 2009, however, Ecology began to implement an illegal rule against application of the five-year grace period. (CP471-72.) Specifically, Ecology began to insist that principles of non-relinquishment had no application whatsoever in the context of change or transfer decisions made pursuant to RCW 90.03.380(1), and in particular that the formula in that provision for assessing

⁴ This is the same tentative determination process very recently addressed in this Court’s decision in *Crown W. West Realty, LLC v. PCHB*, 7 Wn. App.2d 710 (2019), noting that water to be transferred into the trust program is measured taking account of nonuse protected by RCW 90.14.140. *Id.* at 720; *see also* RCW 90.42.080(10). The Supreme Court upheld use of this simplified process against a challenge that it was *ultra vires* in *Cornelius v. Ecology*, 182 Wn.2d 574, 595 (2015).

“annual consumptive quantity” must be applied without regard to whether any reductions in water use from the previously-determined quantities were protected from relinquishment.

The overriding concern of RCW 90.03.380 is that any approved changes in a water right not cause “detriment or injury to existing rights”. As the Supreme Court has long emphasized, while RCW 90.03.380 requires quantification of the water right in connection with a change or transfer,⁵ nonuse of the water right does not,

“in and of itself, mean that a change in diversion point may not be permitted under RCW 90.03.280 because ‘revival’ of the water right will adversely affect other water rights . . . The statute plainly refers to water beneficially used and to avoidance of harm to other water rights, not merely to nonuse for a period of time.”

Okanogan Wilderness League, Inc. v. Town of Twisp, 133 Wn.2d 769, 779

(1997). Put another way, an irrigator’s use of the full authorized amount of his or her water right that represents an increase from prior usage cannot cause an injury cognizable under RCW 90.03.380 where the prior reduction in usage is excused under law.

⁵ The Supreme Court explained why quantification of the right was necessary to assess potential impairment: “If a right has not been beneficially used to its full extent, or if the right has been abandoned, then issuance of a certificate of change, in the amount of the original right, could cause detriment or injury to other rights”. *Okanogan*, 133 Wn.2d at 779.

RCW 90.03.380 provides, in part, that water rights

“ . . . may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses 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).

Notwithstanding *Okanogan's* instruction and ordinary rules of statutory interpretation,⁶ Ecology took the extraordinary position that it could ignore Chapter 90.14 RCW entirely when evaluating water rights changes and transfers under RCW 90.03.380, asserting that were entirely separate analyses used for distinct purposes. Ecology convinced the PCHB of this position in

⁶ Inasmuch as Legislature has included critical provisions relating to relinquishment and water rights in RCW Chapters 90.03, 90.14, 90.42 and others, maxims of statutory construction call for construing all the statutes in *pari materia* “to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes”. *Hallauer v. Spectrum Properties, Inc.* 143 Wn.2d 126, 146 (2001) (quoting *State v. Houck*, 32 Wn.2d 681, 684-85 (1949)).

Bickford v. Ecology, PCHB No. 09-063, Order Granting Summary Judgment and Dismissal of Appeal, at 5-6 (Nov. 20, 2009).⁷

Before any court could intervene to explain that Chapter 90.03 and Chapter 90.14 RCW are not to be interpreted in isolation from each other, the Legislature promptly reversed Ecology's misinterpretation of the statutes (2009 Laws, ch. 283, § 7⁸), adopting RCW 90.03.615 and related amendments to RCW 90.03.380(1). (*See* CP472.)

RCW 90.03.615 provides:

“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.”

(Emphasis added.)

Through this amendment, the Legislature made it clear that full protection against relinquishment provided by RCW 90.14.140, including the five-year grace period embedded within it, would be given to prevent any

⁷ Available at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=291>.

⁸ Section 5 of the same bill also ensured that the five-year grace period would be given effect in calculating the scope of trust water donations. RCW 90.14.080(10)

reduction in transferrable quantities of water because of excused nonuse. (*See also* CP472.) In its 2011 *Orondo Fruit* decision, the PCHB itself acknowledged this legislative change, in holding that the law “now expressly exclude[s] the period of non-use that is excused from relinquishment” when doing annual consumptive quantity (“ACQ”) calculations under RCW 90.03.380.⁹

C. Water Conservancy Boards and Ecology Review.

As this Court has explained, the Legislature created Washington water conservancy boards, charged under Chapter 90.80 RCW to implement the foregoing statutes, to provide a “faster option” for water rights owners seeking to change or transfer their water rights. *Crown West*, 7 Wn. App.2d at 720. When irrigators seeking to change or transfer the use of water files an application with a conservancy board, the board then holds a public hearing after notice to interested parties. RCW 90.80.070(2)-(3). Conservancy Board decisions are then subject to review by Ecology. RCW 90.80.070(4); RCW 90.80.080. This provides a second level of administrative review before Ecology in which additional interested parties can appear. RCW 90.80.080(3).

⁹ *Orondo Fruit v. Ecology*, Findings of Fact, Conclusions of Law, and Order, at 30 n.7 (PCHB Case Nos. 10-164 & 165 Sept. 20, 2011) (available at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=154>)

D. The 2014 Decision Creating the Five-Year Grace Period.

In 2014, the Benton County Water Conservancy Board processed and approved an application to change the place of use of a portion of Loyal Pig's water right. (CP139-152.) The Benton Board conducted a full adjudicatory-type procedure as authorized under its enabling laws, Chapter 90.80 RCW. The Benton Board published the application, considered comments, advertised and held a hearing that provided an opportunity for testimony and argument (none was received), conducted a site visit, gathered evidence, and made a final decision that determined the ACQ for the requested change application based on the water use from 2009 to 2013. (*See* CP149-150.) As provided in RCW 90.80.055, the Benton Board issued a record of decision, documented by a report of examination. (CP139-152.)

The Benton Board made what is technically known¹⁰ as a “tentative determination on the extent and validity” of the water right. (CP143-45.) There is no dispute that, as Ecology told the Superior Court, “[i]n processing a water right change or transfer application, Ecology (or a conservancy board) conducts a tentative determination of the water right to find the total quantity of water available for transfer”. (CP510.) In its analysis, the Benton Board

¹⁰ We use the words “technically known” because in some sense, all water rights decisions remain “tentative” until a Superior Court adjudication has been had upholding Ecology decisions concerning water rights. *See* RCW 90.03.210(2)(b). This Court can take judicial notice that such adjudications are extremely rare, and typically employed to resolve a large number of competing rights in the first instance, not to reassess the continuing scope of a water right in the context of its transfer.

found that the water right had “a significant amount of decreased ground prior to the 2009 period, a reduction in water use not exempt from relinquishment under RCW 90.14.140”. (CP144; *see also id.* CP142.) The quantity available for transfer under the water right was therefore substantially reduced.

The purpose of the 2014 transfer was to use the water for a more productive (and efficient) use by utilizing part of it to grow wine grapes. (*See id.* CP142.) The Benton Board conducted the annual consumptive use analysis based on the ACQ criteria in RCW 90.03.380. (CP144-45.) The Benton Board identified the five-year period from 2009-2013 as the appropriate period for assessing “annual consumptive quantity” pursuant to RCW 90.03.380. (CP144.) Ecology reviewed the Benton Board’s final decision and approved a specified quantity of water. (CP82.)

Like any change/transfer decision, the Benton Board’s decision also reviewed and adopted a plan of development for the water right. The ROE included a review of “proposed project plans and specification”. (CP142.) The Benton Board set a development deadline of January 1, 2019. (CP150.) (Respondents contend that the Loyal Pig water right “is claimed for a determined future development to take place within fifteen years of . . . the most recent beneficial use of the water right” (RCW 90.14.140(2)(c)), giving rise to a second ground for application of non-relinquishment principles. (*See infra* Point I(C).)

E. The 2017 Franklin County Water Conservancy Board Decision Giving Rise to the Appeal.

This appeal concerns the same water right adjudicated in 2014 by the Benton Board, but this time, the change/transfer request came before the Franklin Board. This change/transfer request was an additional and amended project that involved transferring a portion of the existing water right for more efficient use with additional irrigation systems on new irrigated acres. (CP168.) Once again, the project did not attract concern from any other water rights holder, agency, tribe or other interested party. (CP166, 175.)

The Franklin Board incorporated the 2014 decision into the record and found:

“The existing ACQ analysis established the [quantity of] available water for transfer in 2014. The current change/transfer is now (2017) beginning year 4 since the previous ACQ analysis period (2009-2013). The Water Board concludes that the 2014 ACQ analysis remains valid for the current change transfer decision.”

(CP171.) The Franklin Board further found that

“The proposed change/transfer will result in no increase in the annual quantity of water authorized and is consist with the requirements of RCW 90.03.380 and 90.14.140 (relinquishment), and other provision of the water code. The change/transfer request will not increase the allowed water right; the change/transfer will not increase allowed consumptive use from the designated source, as allowed by the water code.

“There will be no increase in water withdrawal on an annual basis. . .”

(CP174.) These findings implemented RCW 90.03.380's requirement that the change "may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right".

Although it did not prepare a detailed ACQ calculation for the 2012-2016 time period, the Franklin Board expressly found that the "existing crop rotations and water right crop irrigation use (center pivot application) has remained the same since the previous ACQ period." (CP171.) Consistent with POL-1120, the Franklin Board made a simplified determination relying upon the previously-determined quantity of water available for transfer. The Appendix hereto provides a simple overview of how the Franklin Board incorporated the Benton Board's decision.

F. Ecology's Reversal of the Franklin Board Decision and PCHB Review.

In a two-page letter (CP26-27), Ecology reversed the Franklin Board's decision on the simple basis that the Board had "failed to use the most recent 5 years of continuous beneficial use in calculating the annual consumptive quantity under the water right". (CP26.) Ecology also objected that the Franklin Board "failed to provide/evaluate any current water use data since the September 2014 change/transfer decision". (*Id.*)

Respondents timely appealed Ecology's reversal to the PCHB, where Respondents moved for summary judgment, anticipating that the PCHB

would continue to adhere to its 2011 *Orondo Fruit* decision (*see supra* p.10, n.9), allowing the exclusion of periods of excused non-use from the ACQ calculation. Ecology cross-moved for summary judgment, insisting that notwithstanding any other law, rule, or policy, RCW 90.03.380 required a full and formal ACQ calculation based on actual usage data from the “most recent five-year period”—here 2012-2016.

The PCHB upheld Ecology’s reversal of the PCHB decision. The PCHB focused upon a detailed analysis of the formal rules of *res judicata* and collateral estoppel to conclude that neither doctrine bound Ecology as a matter of law to the annual consumptive quantity established in the 2014 Benton County proceedings. (CP345-46.)

As for the Legislature’s attempt to override *Bickford* through RCW 90.03.615, the PCHB noted that the Franklin Board had not expressly relied upon the statute, mischaracterized the need to apply the statute as relating to a trust water issue of no importance to the appeal (*see infra* Point I(F)), and asserted that “without knowing the water use in th[e recent years], neither the Franklin Board nor Ecology could make an accurate determination regarding the potential for impairment of existing uses caused by the change/transfer”. (CP348.) Neither the PCHB nor Ecology offered any explanation how impairment might occur through authorization of the 2014 quantity within the five-year grace period.

Ultimately, the PCHB cast its decision in terms of deference: “Considering the lack of judicial or administrative interpretation and the ambiguity of the statute, the Board defers to Ecology’s interpretation under the facts of this case.” (CP349.) As for the fact that Ecology’s own POL 1120 was contrary to the newly-minted statutory interpretation, the PCHB held that it was “not a binding directive”. (CP350.)

G. The Superior Court’s Reversal of the PCHB Decision and Injunction Against Ecology.

Respondents then sought review of the PCHB’s decision in Superior Court; the operative pleading is their Amended Petition for Judicial Review, which contained two claims: a First Claim for review of the PCHB’s decision, and a Second Claim for injunctive relief against what Respondents contended was the continuing implementation of an unlawful rule, promulgated in violation of the requirements of the Administrative Procedure Act. (CP352-59.)

The First Claim was reviewed upon the certified record provided by the PCHB. The Superior Court granted summary judgment in favor of Respondents on the First Claim on August 2, 2018, reversing the PCHB decision and reinstating the Franklin County Conservancy Board decision. (CP440-42.)

As to the Second Claim, the parties filed declarations which focused primarily upon the question of whether Ecology had adopted an illegal rule

barring implementation of the five-year grace period; the remaining elements required for injunctive relief, namely the failure to follow rulemaking procedures, irreparable injury to Respondents, and a public interest in entering the injunction, were not contested.

Respondents re-presented evidence from the PCHB administrative record (some of which Appellants now object to), together with declarations from leading water practitioners in the State. Respondents' lead witness was Dr. Darryll Olsen, Ph.D, with expertise including:

“1) about 30 years of active work on Washington State water rights/policy, specifically focusing on new water rights and changes/transfers; 2) development of the statute creating Water Conservancy Boards in the State of Washington, Chapter 90.80 RCW (I prepared the initial draft bill and contributed to subsequent revisions); 3) quantifying water rights and determining their extent and validity; 4) preparation of hundreds of water right change/transfer documents, including reports of examination and public notices; 5) reviewing hundreds of water right documents, including materials prepared by Ecology; and 6) working with and supporting, in various capacities, many of the Eastern Washington Water Conservancy Boards.”

(CP467.)

Dr. Olsen explained that Ecology's action was not “enumerated in the RCW or WAC,” was “counter to the requirements of the written water code,” and “deviated from longstanding practices by state water conservancy boards and Eastern Washington water management consultants”. (CP468.) He further testified that the five-year grace period

“is known in the water rights community as the *Res Judicata* period for the water right, and this well-adopted axiom had been upheld in several legal opinions requested by the Water Conservancy Boards, including an opinion by Mr. Tom McDonald, the former head Assistant Attorney General for the Water Resources Program [of Ecology,] and former Chairman of the [PCHB].”

(CP469.) In particular, Dr. Olsen testified that

“When a water right is subject to some type of formal adjudication, either judicial or administrative, where it is re-quantified (recalibrated), it is not subject to further relinquishment review for five years. While the statutes creating the five-year grace period do not specify to the point in time when the period commences, it has always been obvious to me and other members of Washington’s water rights community that the period commences after one of these determinations, because the whole point of the exercise is to establish the scope of the water rights held, and then, in the course of doing so, provide that this scope, whether established in an initial certification process or in any other proceeding, is the right that now may be lost through failure to utilize it for five or more years.”

(CP469-70.)

Dr. Olsen recited a number of instances representing the consistent application of the five-year grace period, including a decision arising out of the adjudication concerning rights to the use of the Yakama River, *In re: Bugni*, No. 77-2-01484-5 (Yakama Cty. Jan. 21, 2005) (CP485-97), “previous Ecology instructions to the Water Conservancy Boards,” “on-the-ground practices by the Water Conservancy Boards and technical consultants,” previous joint Ecology review with the Water Conservancy Boards on water right change[s and] transfers,” and POL 1120. (CP470.)

Another expert, Timothy Reiersen, P.E., with “22 years of experience in full-time employment as private consultant specialist on water right matters in Washington, assisting the regulated community and interfacing directly with Ecology”—and seven years of experience before that as an Ecology employee working on water rights (CP458-59)—corroborated Dr. Olsen’s testimony concerning Ecology’s determination “do[ing] away with the five-year grace period” (CP460-61). He characterized Ecology’s position of refusing to apply the five-year grace period as “improper and inconsistent with the general expectation in the regulated community”. (CP461.)

Mr. Reiersen provided further testimony concerning the “legitimate need” of the regulated community “to receive consistent treatment under the law,” with “a predictable environment, conducive to both short- and long-term decisionmaking”. (CP459.) He warned that water rights holders can only “make deliberate water use decisions to preserve their water rights—an increasingly scarce asset—if the rules relating to loss of rights due to non-use (relinquishment) are known”. (*Id.*)

Mr. Mark Nielson, the Clerk to the Board of the Franklin County Water Conservancy Board and its lead technical staff person since 1999, as well as the District Manager of the Franklin Conservation District, detailed practical impacts arising from Ecology’s position:

“It is expensive and time-consuming to reconsider the entire history of water use in connection with applications before conservancy boards,

and use of the doctrine, makes the change/transfer process more efficient and economical for all concerned. By relying upon former administrative decisions of Ecology or the conservancy boards (or sometimes on judicial decrees), conservancy boards need not revisit the details of the prior decision, but can find, as a matter of law, that applicants have water rights in specified quantities based on that decision.”

(CP499; *see also* CP472 (Dr. Olsen confirms that the new Ecology rule “makes water right decisionmaking far more complex and expensive”); CP480 (Former PCHB Chair McDonald notes that failure to rely upon prior decisions would be contrary to the Legislature’s desire to expedite water rights transfer processes).

Mr. Nelson also corroborated the recent change by Ecology from prior practice and explained that Ecology’s position “interferes with statutory policies favoring the transfer of water rights to achieve the maximum public benefit from limited supplies of water”. (CP499; *see also* CP472 (Dr. Olsen confirms that the new Ecology rule “frustrates the Legislative intent to facilitate the change and transfer of water rights”).) Mr. Nielson also reported that he had attended a presentation at “which Ecology staff emphasized that conservancy boards, like Ecology itself, are entitled to rely upon prior decisions through the judicial doctrine of *res judicata*”. (CP499.)

The Superior Court carefully considered detailed evidentiary objections lodged by Ecology against the testimony of Dr. Olsen and Messrs. Reiersen, Nielsen and McDonald, granting Ecology’s motions to strike some

testimony (not presented herein), and denying the balance of the motion while explaining that the Court would simply “disregard any ultimate conclusions of law”. (CP634.) The Court determined to permit statements concerning the general understanding of Washington water rights practitioners under ER 803(20) as “customs affecting lands in the community” (CP635); statements of Ecology contrary to its present position were admitted as statements of a party opponent (ER 801(d)(2)).

The “Environmental Specialist 4” ultimately responsible for Ecology’s reversal, Mr. Herman Spangle, flatly stated: “Because the change proposed in FRAN-17-01 [the Franklin Board decision] would result in additional acres to the water right, I determined that an ACQ analysis was required using the most recent five years of continuous use”. (CP236; *see also id.* at CP237 (both he and supervisor, Mr. Stoffel, agreed); CP291-92 (Stoffel testimony).) The record does not show that Mr. Spangle or his supervisor considered the issue of non-relinquishment or the requirements of RCW 90.03.615. Nor was any explanation offered how a mechanical insistence on the “most recent five years” was required to advance any policy confided to Ecology’s administration.

Ecology provided a third declaration from another staff member who had nothing to do with the decision, Mark Schuppe; he was, in substance Ecology’s expert. His testimony sought to implement the strategy Ecology

had successfully employed before the PCHB of focusing attention upon the doctrine of *res judicata*, rather than the fundamental relationship between statutory protections against relinquishment and the amended language of the change/transfer provisions of the code. Thus, Ecology now emphasizes Mr. Schuppe's testimony that he was not familiar with a "bar, 'lock in' or 'res judicata'" and had not "advised my staff to follow 'res judicata'". (CP529-30.)

Like the PCHB, he discounted POL 1120 as a matter "within the discretion of a permit writer and approving manager" (CP529), so that it did not flatly "bar an ACQ analysis within five years of a previous analysis". (CP529.) Mr. Schuppe's testimony was consistent with Respondents' position insofar as he testified that "*as a general practice,*" he would not approve a change in water right without use of the most recent five-year period (CP529; emphasis added)—he did not rule out the possibility of applying the five-year grace period where, as here, a prior determination started it running.

Indeed, unlike Messrs. Spangle and Stoffel, Mr. Schuppe testified that he was aware of the entire development of law in the wake of *Bickford*, and therefore "would consider whether a relinquishment exemption allowed for extension of ACQ beyond the 'most recent five-year period' . . .". (CP530.) He even stated that he "cannot rule out the possibility" that Ecology staff took contrary positions on the use of *res judicata* in the past. (*Id.*)

On this record, the Superior Court granted summary judgment in favor of Respondents on the Second Claim for Relief on November 27, 2018, finding that Ecology’s “general refusal to apply a five-year grace period protecting transferrable quantities after change/transfer decisions constitutes a rule within the meaning of the Administrative Procedure Act.” (CP605-06.) The Court’s detailed oral on the motion to strike were subsequently memorialized at length in an order entered January 4, 2019 (CP633-38).

Final Judgment was entered November 29, 2018 (CP607-08), and Ecology’s appeal followed.

Summary of Argument

The five-year grace period is universally applied in Washington water law, most recently by this Court in *Crown West*, explaining that the law “determines relinquishment at the time of expiration of the five years of nonuse”. *Crown West*, 7 Wn. App.2d at 734. Prior to that time, there is no relinquishment and all nonusage of water is excused under RCW 90.14.140 and otherwise. Ecology’s attempt to impose relinquishment during the initial five years lacks any support in statute, regulation or policy.

Ecology insists that it must ignore all other law and policy, including RCW 90.03.615, and implement only the sentence within RCW 90.03.380(1) which refers to the “most recent five years” formula for calculating annual consumptive quantity (ACQ), arguing that “the statute is clear on its face”.

(App. Br. 15.) But no form of deference can uphold Ecology's peculiar insistence upon seizing upon one sentence in a complex statutory scheme to the exclusion of all others, including the Legislature's modification override of the language in question. Ecology's insistence upon disregarding RCW 90.03.615 and its own POL 1120 makes its decision, at the least, arbitrary and capricious, such that the PCHB's affirmance should not be reinstated.

As for the rulemaking claim, the only item in dispute is Ecology's insistence that even though no RCW, WAC or other written authority supported its decision, the Superior Court erred by finding it to have illegally enforced an unlawful rule through its admitted and continuing refusal to implement the five-year grace period. Respondents adequately established, with admissible evidence, that Ecology's insistence that the statute could only be interpreted override the five-year grace period was a "rule," and Ecology's evidence did not raise any material issue of fact sufficient for the Superior Court to deny summary judgment.

Argument

I. THE SUPERIOR COURT PROPERLY REVERSED THE PCHB'S SUMMARY JUDGMENT UPHOLDING ECOLOGY'S DECISION TO REVERSE THE FRANKLIN COUNTY CONSERVANCY BOARD.

Ecology correctly recites much of the *de novo* standard of review applicable to judicial review of PCHB decisions in this context, acknowledging that it is the duty of the court to reverse where "the agency has

erroneously interpreted or applied the law” (App. Br. 16 (quoting RCW 34.05.570(3).) That is the case here.

A. The 2009 Statutory Amendments Confirm That Ecology Cannot Force Relinquishment by Application of RCW 90.03.380.

As noted above, the Supreme Court in *Okanogan* had already instructed Ecology that RCW 90.03.380 required that any finding of injury to other rights holders must arise from something more than merely exercising a water right after a period of excused nonuse. When Ecology ignored the Supreme Court’s holding and departed from the general practice, documented in POL 1120, to obtain the *Bickford* ruling, the Legislature promptly overrode Ecology with RCW 90.03.615.

The plain language of RCW 90.03.615 says that *if*

“ . . . *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). There is no dispute that Loyal Pig’s non-use of the 2014 authorized quantities is protected from relinquishment under RCW 90.14.140.

The obvious intent of the Legislature in referring to circumstances where “nonuse of the water right has been excused from relinquishment under RCW 90.14.140” was to ensure that the five-year grace period *and* any

extended protections against relinquishment detailed in subsections (1) and (2) of the statute would be given full force and effect to stop Ecology from whittling away quantities otherwise available for transfer. It defies credulity to suggest that the Legislature, merely because it did not make specific reference to the “five-year grace period” (*cf.* App. Br. 20), intended to destroy this bedrock principle of Washington water law.

Attempting to overcome the plain language of RCW 90.03.615, Ecology begins by referring to Washington court cases that have narrowly construed some of the specific exemptions set forth in RCW 90.14.140. But that body of law has no application to the five-year grace period, which is unambiguous and requires no such construction.¹¹ Nor would it make sense to construe RCW 90.03.615 narrowly given the legislative purpose of the amendment—the specific exemptions can be adequately policed through narrow construction of each of them, rather than concatenating narrow construction of RCW 90.14.140 upon narrow construction of RCW 90.14.140 in a fashion that would undermine the Legislative goals.

¹¹ Respondents also note that the Legislature has repeatedly amended the relinquishment statute to extend the circumstances forbidding relinquishment and overcome unreasonably limiting interpretations. 2012 Laws, ch. 7, § 1 (adding RCW 90.14.140(1)(l)); 2009 Laws, ch. 183, § 14 (adding RCW 90.14.140(2)(i)); 2001 Laws, ch. 240 § 1 (adding RCW 90.14.140(1)(g)-(k)); 2001 Laws, ch. 237, § 27 (adding RCW 90.03.380(2)(h) & (3)); 2001 Laws, ch. 69, § 5 (adding RCW 90.14.140(2)(g)); 1998 Laws, ch. 258 § 1 (adding RCW 90.14.140(1)(e)); 1987 Laws, ch. 125, § 1 (expanding RCW 90.14.140(1)(f)). This history counsels less deference to limiting interpretations asserted by Ecology.

Ecology also emphasizes the Legislature’s intent to assure that “no increase in consumptive water use will be allowed” in the water rights change or transfer process (App. Br. 18), but this begs the question of whether the Legislature ever intended that an “increase” was to arise from fluctuations in an irrigator’s water use from year to year within the bounds of his or her determined rights. The issue is vital and obvious, for as Mr. Reiersen explained to the Superior Court, even a “farm with row crops in rotation . . . can have substantially different requirements for the different crops year to year; *i.e.*, a wheat crop compared to a double crop of peas followed by sweet corn within the same year”. (CP460.)

B. No Deference Is Due Ecology in this Case.

Insisting that excused nonuse does not change the five-year period for calculating ACQ is simply wrong. This Court can thus confidently ignore this statutory interpretation now urged by Ecology under the longstanding rule that “an agency’s view of the statute will not be accorded deference if it conflicts with the statute”. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77 (2000). The PCHB’s adoption of Ecology’s position fails to give effect to the plain language of RCW 90.03.615.

Ecology nonetheless asserts that it would “exceed Ecology’s statutory authority” to interpret the statute as Respondents assert. Notably, the PCHB held no such thing, instead finding the statute “ambiguous”—plainly allowing

Respondents' interpretation—but the PCHB deferred to Ecology's construction of the statute. (CP371.)

Before turning to that construction, Respondents note that it has long been the law of Washington that

“If an agency is asserting that its interpretation of an ambiguous statute is entitled to great weight it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy. It need not be by formal adoption equivalent to an agency rule, but it must represent a policy decision by the person or persons responsible.

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815 (1992); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (noting cases declining to give deference to agency's litigation positions “wholly unsupported by regulations, rulings or administrative practice”). None of Ecology's witnesses were policy makers, and the only formal policy is to the contrary. The history discussed above makes it clear that Ecology “attempts to bootstrap a legal argument into the place of agency interpretation.” *Cowiche*, 118 Wn.2d at 815.

C. There Is No Requirement That Specific Exempted Causes Be Demonstrated within the Five-Year Grace Period.

Ecology now contends that rather than apply the five-year grace period, it would like to rewrite RCW 90.03.615 so that water is forfeit instantly whenever the irrigator fails to use every drop of his or her water rights every year—unless a specific statutory exception can be invoked and

proven immediately. (App. Br. 22.) That is plainly not what the Legislature intended, and such an interpretation would in fact undermine the very policies the Legislature has sought to advance.

Ensuring that the quantities approved for transfer by Ecology remain available for at least five more years is important to vindicate express policies of the Water Code. Indeed, a key purpose of Chapter 90.14 RCW was to provide the “certainty of ownership” necessary so that water rights can “become more freely transferable, thereby increasing the economic value of the uses to which they are put . . .”. RCW 90.14.020. As the Legislature has explained, “because it is increasingly difficult for water users to acquire new water rights, transfers are a valuable and necessary water management tool.” Laws of Washington 2011, ch. 112. Respondents’ experts testified at length concerning the degree to which the interpretation offered by Ecology would undermine the certainty of the five-year grace period and other purposes of the Water Code, and Ecology offered no rebuttal or response to this testimony.

Ecology asserts, erroneously, that Respondents “never offered a [specific] statutory exemption under RCW 90.03.615” (App. Br. 21), meaning that they never pointed out particular subsections of RCW 90.14.140(1) or (2) which could be invoked after the 2014 Benton County decision. Respondents contended in the first instance that such an exercise was unnecessary because the second application was still within the five-year grace period.

Before the PCHB, Respondents did take the position that at least one specific exemption in RCW 90.14.140(1) would be available. (CP126.) RCW 90.14.140(2)(c) bars any relinquishment where a water right “is claimed for a determined future development to take place within fifteen years of July 1, 1967, or the most recent claimed beneficial use of the water right, whichever is later”.

As Respondents advised the PCHB, the 2014 Benton County decision sought to implement a “determined future development,” which is documented in the change decision itself. This specific exemption demonstrates the “harmonious” nature of the “total statutory scheme” (*Hallauer*, 143 Wn.2d at 146); the very process of securing a change for a new or modified project triggers a protection that may extend beyond five years, but five years is the minimum.¹² But for the simpler alternative of simply invoking the five-year grace period, Loyal Pig could use the plain language of RCW 90.03.615 to exclude years in which the right was claimed for determined future development.¹³

¹² Case law even permits the water right holder to “determine” or “fix” the development after the change and “before the expiration of five years of nonuse”. See *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 143 (1999).

¹³ More generally, RCW 90.14.140(1) contains numerous farm-related exemptions such as reductions in water use due to weather (subsection (g)) or crop rotation (subsection (k)). Use of the five-year grace period also avoids tedious and expensive exercises to establish the availability of these exemptions through the simplified determination.

D. Ecology's Decision to Overturn the Franklin Board Decision Was, at the Least, Arbitrary and Capricious.

While Ecology now contends that the law *requires* it to ignore the five-year grace period, the PCHB found the statute ambiguous, and Ecology's own expert witness testified that POL 1120 "does allow for 'simplified tentative determinations' in some circumstances" which he understood "to be within the discretion of the permit-writer and approving manager". (CP529.) (Those circumstances, of course, include "issuance of a change approval within the last 5 years". (CP534.))

Respondents thus suggest that an additional issue raised by the underlying assignment of error concerning whether the PCHB properly upheld Ecology in striking down the Franklin Board's decision, is whether the permit writer and approving manager were arbitrary and capricious in declining to apply the five-year grace period. As noted above, their affidavit testimony (CP234-38; CP291-92), in which they describe their reasoning in overturning the Franklin Board's decision, ignores entirely both RCW 90.03.615 and POL 1120.

That alone establishes arbitrary and capricious conduct within the meaning of RCW 34.05.570(3)(i). *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem"). More specifically, RCW

34.05.570(3)(h) requires a court to set aside an order when “inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency”. As argued in Point II, POL 1120 documents the rule followed until Ecology changed it and triggered this appeal.

Ecology has offered no explanation whatsoever for the change, other than to insist that other than to insist that the statutes can only be read Ecology’s way, so there could be no discretion. What makes the decision even more arbitrary and capricious is the degree to which it frustrates the underlying purposes of the Water Code, as explained above.

E. The Red Herring of *Res Judicata*.

Acknowledging that Respondents only “colloquially referred” to the five-year grace period “as a ‘res judicata’ protection” (App. Br. 22), Ecology nonetheless reviews the law of *res judicata* and collateral estoppel at length to conclude that the 2014 Benton County decision did not bind it (or Franklin County) as a matter of law. Ecology notes that its review of conservancy board decisions does not constitute an “adjudication of the right,” and that the administrative quantification will not bind a court in any subsequent general adjudication of rights.

Washington employs a flexible test for *res judicata* that looks at “(1) whether the agency acted within its competence, (2) the differences between

procedures in the administrative proceeding and court procedures, and (3) public policy considerations”. *Christensen v. Grant County Hospital*, 152 Wn.2d 299, 308 (2004). There is no dispute that in reviewing and modifying the Benton County Conservancy Board’s decision in 2014, which was the product of public notice and comment and formal Board proceedings, Ecology acted within its asserted area of competence, under procedures that gave Ecology every right it needed to get the decision right. Ecology’s approval of the change/transfer in 2014 was as quasi-judicial as any of the other sorts of administrative decisions (*e.g.*, land use) that are given *res judicata* effect. *E.g.*, *Miller v. Port Angeles*, 38 Wn. App. 904, 908 (1984) (“A decision to grant, deny or impose conditions upon a proposed plat is administrative or quasi judicial in nature”), *rev. den.*, 99 Wn.2d 1005 (1985); *see generally* CP478-84.

While the technical considerations in applying the law of administrative *res judicata* or collateral estoppel are interesting,¹⁴

¹⁴ They are explained in further detail in a legal opinion from Mr. Tom McDonald, the former Chairman of the PCHB (and lead Assistant Attorney General for the Water Resources Program), opining that the *res judicata* doctrine was appropriately invoked in the Franklin County Board’s decision. (CP478-84.)

Among other observations, Mr. McDonald explicitly referred to the *In re Bugni* case (CP485-97), arising in the general adjudication for the Yakima River, where Ecology was admonished by the Superior Court of Yakima County to leave the water right grace period of five years alone, when making changes/transfers per RCW 90.03.380. The *Bugni* court reached this conclusion even though only a “conditional” order was involved in establishing the quantity of the right.

this Court need not delve in them to uphold Superior Court's rulings.

The question whether or not the tentative determinations of scope bind a *court* in any subsequent general adjudication, has nothing to do with the fundamental question of whether Ecology may lawfully ignore the five-year grace period (and its own POL 1120) when conducting a second, simplified tentative determination within five years of the first one. The principles of nonrelinquishment discussed above, confirmed through RCW 90.03.615, operate without regard to the technical doctrines of *res judicata* or collateral estoppel. Respondents do not seek any rule of *res judicata* or collateral estoppel that would lock in an ACQ determination “through all subsequent changes” (App. Br. 25); they merely seek the rule of law created by the Legislature that gives effect to administrative quantifications of rights for at least five years.

F. The Red Herring of Trust Water Rights.

Respondents have never contended that water transferred into trust in 2017 could somehow affect 2016 or prior years, or any ACQ analysis. The issue came into the case through a red herring raised by Mr. Spangle, who stated in Ecology's reversal of the Franklin Board's decision that “[t]he amount of water placed into trust should not be used in calculating an annual consumptive quantity for the 2017 application” (CP27.) He did not say the Franklin Board had done so; it hadn't.

Ecology then induced the PCHB to hold that “Franklin Board did not properly assess the effect of the 2014 transfer into trust” (CP350), which made no sense whatsoever because the transfer was not until 2017 (CP237). The issue is entirely moot given a lawful implementation of the five-year grace period.

II. THE SUPERIOR COURT PROPERLY ENJOINED ECOLOGY TO GIVE EFFECT TO THE FIVE-YEAR GRACE PERIOD IN ITS DECISIONMAKING UNDER RCW 90.03.380.

The Supreme Court has declared: “We have been vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures.” *McGee Guest Home, Inc. v. Department of Soc. & Health Servs.*, 142 Wn.2d 316, 322 (2000). The APA provides specific requirements before an agency may promulgate a rule, including notice requirements under RCW 34.05.320. The agency must publish in the state register specified information including a description of the rule's purpose and an explanation of the rule, its purpose, and its anticipated effects. RCW 34.05.320(1)(a), (c).

As the Supreme Court has previously explained in striking down Ecology action for illegal rulemaking, “[t]he purpose of such rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them” and emphasized that “[i]n enacting the 1988 APA, the Legislature intended to

provide greater public access to administrative decisionmaking”. *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 649 (1992) (citing Anderson, *The 1988 Washington Administrative Procedure Act -- An Introduction*, 64 Wash. L. Rev. 781, 791 (1989)). Justice William O. Douglas has noted that “[p]ublic airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.” *National Labor Relations Board v. Wyman*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting).

APA procedures must be followed whenever any “rule” within the meaning of the APA is involved. The APA contains a very broad definition of “rule”:

“‘Rule’ means *any agency order, directive, or regulation of general applicability* (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) *which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law*; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.”

RCW 34.05.010(16) (emphasis added).

Respondents challenge Ecology’s shift in its policy “of general applicability” from giving effect to the five-year grace period after prior water

rights decisionmaking to not giving effect to it. This change in policy manifestly “revokes a[] qualification . . . relating to the enjoyment of benefits or privileges conferred by law” (*id.*)—the benefits of the five year grace period to Washington irrigators.

This case is controlled by *Hillis v. Department of Ecology*, 131 Wn.2d 373 (1997), in which the Supreme Court again struck down an example of Ecology’s illegal rulemaking. As the Supreme Court explained, because water rights holders had the “right under the statute to have their application investigated and decided upon . . . when Ecology sets out priorities and establishes prerequisites to those decisions, the agency should engage in rule making so the public has some input into those decisions”. *Hillis*, 131 Wn.2d at 399. This case, in which Ecology’s refusal to give effect to the five-year grace period has powerful and negative *substantive* effects on Washington irrigators, even more clearly involves the operation of an illegal “rule”.

A. Ecology’s Refusal to Give Effect to the Five-Year Grace Period Constituted a “Rule”.

Ecology frankly admits that it now “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”. (App. Br. 27.) Ecology’s primary defense depends upon the proposition that the plain language of RCW 90.03.380(1) *requires* it to take the position it now takes, and that its prior conduct consistent with Respondents’ position was all illegal. (App. Br. 28.)

As set forth above, that proposition is indefensible, making Ecology's case authority irrelevant. If the statute does not compel the interpretation sought by Respondents, it is, at the least, as the PCHB held, ambiguous. The abandonment of POL 1120 and the rule of law understood throughout the water rights community in favor of a new denial of the five-year grace period clearly meets the definition of a rule.

Perhaps realizing the weakness of its "compelled interpretation" defense, Ecology makes additional arguments, all of which lack merit. First, Ecology cites *Sudar v. Fish & Wildlife Comm'n*, 187 Wn. App. 22 (2015), to argue that the shift in application of the grace period constitutes only a "presumptive management framework". (App. Br. 32.) The "rule" challenged in *Sudar* was a policy statement, Policy C-3620, which merely "outline[d] a number of objectives, including phasing out the use of nonselective gill nets in nontribal commercial fisheries in the Columbia River's mainstem and the transition of gill net use to off-channel areas". *Sudar*, 187 Wn. App. at 27. The policy was then implemented through further specific fishing regulations, adopted in compliance with rulemaking procedures, some of which were consistent with Policy C-3620 and some of which were not. *Id.* Here, Ecology admits it is regularly applying its implementation of RCW 90.03.380, without exception.

Nor was Ecology's POL-1210 was followed by further rulemaking; rather, it was the rule itself, which guided staff in making specific water rights decisions. Whether or not it was by its terms binding on staff members, Respondents presented evidence that giving effect to the five-year grace period was a policy "of general application," and indeed a bedrock principle of Washington Water law. This is no simple "misunderstanding" (App. Br. 33); this was a policy shift of a magnitude that invokes each and every policy of importance in requiring rulemaking proceedings.

Ecology directs the Court's attention to CP235-38 and CP528-31 which it claims show that "management did not follow this practice (and knew no one who did so)" (App. Br. 43.) *The testimony makes no reference to any knowledge of the five-year grace period or its application in the change/transfer context prior to the adoption of the illegal rule.*

CP235-38, the Spangle Declaration, merely reports what the staffer and his manager did in response to Loyal Pig's application. CP528-31, the Schuppe Declaration, contains carefully crafted assertions that POL 1120 is not binding, and that Mr. Schuppe had not been "trained on this kind of bar, 'lock in,' or 'res judicata'" or directed to "follow 'res judicata'". (CP529.) He does testify that since 2011, his office has not been doing "anything that approximates Petitioners' description of this practice" (CP530), testimony that

supports Respondents' general claim that the illegal rule has been applied at least since 2009, when Ecology won the *Bickford* case.

Ironically, Mr. Schuppe knows full well that the five-year grace period should apply to changes and transfers under RCW 90.03.380, for although he quibbles with the term "res judicata," he "agreed three times [with Dr. Olsen]" that use of the grace period to simplify decisionmaking was appropriate. (*See* CP473 (Olsen testimony); CP636 (Superior Court accepts representation that the testimony refers to Mr. Schuppe)¹⁵.) The Superior Court struck from the record Dr. Olsen's somewhat colorful testimony about what happened to Mr. Schuppe and his office after these admissions. (CP636).

It is important to remember that Respondents challenge Ecology's *adoption* of a "rule" rendered illegal for want of proper procedure before adoption. It is thus not directly relevant whether Ecology's prior practice was uniformly contrary to the new rule or inconsistent from case to case. What matters is that Ecology's conduct crystallized into an "agency order, directive, or regulation of general applicability" (RCW 34.05.010(16)), and that is not seriously disputed.

¹⁵ Dr. Olsen had attended the summary judgment hearing, and confirmed without objection that the testimony referred to statements by Mr. Schuppe. (*See* VRP, Nov. 9, 2018, at 59; *see also id.* at 60-61 (Ecology counsel confirms identification).)

B. The Superior Court Did Not Abuse Its Discretion in Admitting Evidence to Establish Prior Practice.

From that perspective, the Court need not wade into the evidentiary issues. To the extent it does, it is important to remember that “whether an agency's action is rule making, despite bearing some other label, is determined under the APA”. *McGee*, 142 Wn.2d at 322. Respondents contend, therefore, that the Superior Court was entitled as a matter of law to consider the entire certified administrative record for the specific Loyal Pig decision before the Court in addition to the specific testimony advanced by sworn statement.

That certified record includes two of the items they now move to strike: the legal opinion of Tom McDonald, former Chair of the Pollution Control Hearings Board (CP185-91 (& CP478-84)) and the Declaration of Mark Nielsen (CP211-12 (& CP498-99)). It also contains an earlier Declaration of Dr. Darryll Olsen (CP133-37), which contains much of the same information Ecology now moves to strike. Ecology has not merely waived any objections to these materials; the Attorney General affirmatively filed them with the Court for consideration in this lawsuit.

With regard to additional material submitted by affidavit to the Superior Court, Ecology fails to demonstrate that the Superior Court abused its discretion or any resulting prejudice. The two general complaints are that the testimony included legal opinions and that testimony about Ecology's past practices consisted of inadmissible hearsay.

With regard to the complaint about legal opinions, ER 702 provides that if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Dr. Olsen, Mr. Reiersen, Mr. Neilson and Mr. McDonald are all qualified experts on water law and practice.

Washington law expressly approves of the procedure the Superior Court followed, which was to reach its own ultimate legal conclusions without discarding the affidavits. *Orion Corp. v. State*, 102 Wn.2d 44, 461-62 (1985). This was not a jury trial, and Ecology offers no reason to believe that the Superior Court did not properly exercise independent legal judgment on the ultimate question of whether or not Ecology’s shift in policy constituted a “rule”—all other elements of the claim being in substance conceded.

Within its argument concerning legal opinion testimony, Ecology asserts, without specific citation, that remarks by the Superior Court as to the importance of past practice proved prejudice from the testimony (App. Br. 38.) Apparently, Ecology is referring to a portion of the transcript where the Superior Court asked counsel for Ecology whether it was “fair to say” that its present application of RCW 90.03.380 “is different than it—than its

application before . . . [Is t]hat true or not true?” (VRP, Nov. 9, 2018, at 81.) The only “prejudice” to Ecology—not legally cognizable prejudice—arose from Ecology’s refusal to answer that question directly. (*See id.*)

With respect to the testimony concerning Ecology’s prior practice with respect to the five-year grace period, it was precisely a witness’ recounting of “an assertion of the group”—the entire Washington water rights community—required under the foreign case law cited by Ecology. (App. Br. 39.) Ecology objects that the testimony was “personal belief,” but it was the personal belief of each and every witness in that community testifying for Respondents—even Ecology admits that “it’s certainly true that some members of the regulated community had that impression”. (VRP, Nov. 9, 2018, at 81.)

Ecology now objects that Respondents did not provide case-by-case testimony concerning its former practices, explaining multiple water right change and transfer decisions in painful detail to the Superior Court to support the testimony of the multiple witnesses. But neither did Ecology. Its carefully-crafted affidavit attacked “res judicata” *without squarely addressing the question of how the five-year grace period had been applied in the past*, entirely failing to controvert Respondents’ evidence. (*See also* VRP, Nov. 9, 2018, at 82 (Ecology counsel notes only limited evidence presented).) The prior testimony of the prior practice, corroborated by written formal policy

instrument documenting the prior practice, was admissible—and superfluous given Ecology’s admissions.

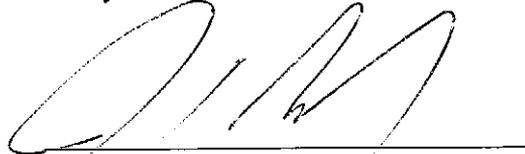
There is no reason for this Court to second-guess the discretion of the Superior Court and remand to require a case-by-case presentation of Ecology’s past water rights decisions, some of which could take hours to explain. Ecology’s suggestion that this Court direct the Superior Court to enter summary judgment for Ecology on the Second Claim (App. Br. 44) would only make sense if this Court were to conclude that Ecology lacked any discretion to interpret the statute, such that any application of the five-year grace period in this context would be illegal—contrary to the testimony of Ecology’s own expert who testifies that POL 1120 gives staff discretion in this area.

Ecology also complains that the Superior Court allowed testimony that Ecology itself *trained* conservancy board representatives to use the five-year grace period, using the term “*res judicata*”. (CP499.) Ecology objects that the witness did not identify the particular Ecology representative involved. It was entirely reasonable for the Superior Court to conclude that those training conservancy board representatives on how to authorize changes and transfers under RCW 90.03.380 were authorized to conduct the training, and acting within the scope of their authority, when they made the statements. (*Cf.* App. Br. 42 (citing ER 801(d)(2)).)

Conclusion

For the foregoing reasons, the judgment of the Superior Court should be upheld.

Respectfully submitted this 21st day of June 2019.



James L. Buchal, WSB No. 31369
Attorney for Respondents

Figure 1.

The Application of Res Judicata to Loyal Pig (CG3-01349CA) Change/Transfer, With RCW 90.03.380 (ACQ) Evaluation Fully Integrated into the FCWCB Decision

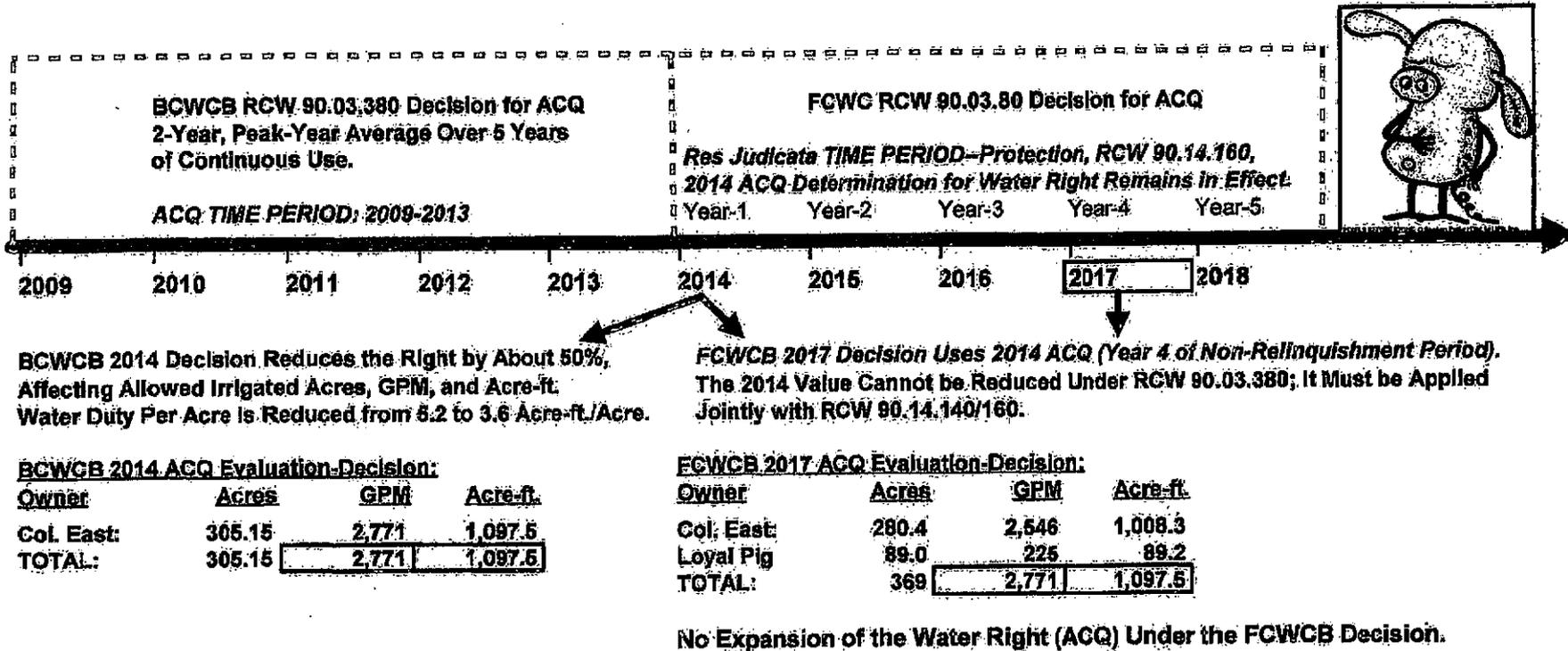


Figure 1 Prepared by CSRIA (July 2018).

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CERTIFICATE OF SERVICE

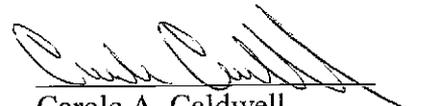
I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of Oregon that on June 21, 2019, I caused to be served a copy of Respondent Loyal Pig, LLC and Columbia Snake River Irrigators Association Brief in the above-caption matter upon the parties herein via the Appellant Courts' Portal filing system, which will send electronic notifications of such filing to the following:

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MURPHY & BUCHAL LLP

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