

FILED

JUN 11 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 286941

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

METHOW VALLEY IRRIGATION DISTRICT,

Petitioner/Appellant,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

and

OKANOGAN WILDERNESS LEAGUE,

Intervenor.

PETITIONER/APPELLANT MVID'S OPENING BRIEF

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I. INTRODUCTION

This case questions whether Ecology has the authority to regulate a statutory, quasi-municipal earthen-canal irrigation district out of existence based solely upon a single employee's creation of a "performance standard." This performance standard imposes upon the earthen canal irrigation district a performance level derived, in part, by averaging conveyance efficiencies of piped water delivery systems. This performance standard must be met in order for the district to demonstrate it is not wasting water. Simply stated, the question before the Court of Appeals is whether Ecology, by dint of regulation, can effectively outlaw earthen-canal irrigation delivery systems.

The Appellant Methow Valley Irrigation District (MVID) seeks review of a Pollution Control Hearing Board (PCHB) Findings of Fact, Conclusions of Law, and Order dated May 9, 2005 (*MVID 2*) (CP 520-578) affirming a waste Notice of Violation (NOV) issued by Ecology as Order DE 03WRCR-5904 (CP 276-279).

The Ecology Order, affirmed by the PCHB, reduced MVID's claimed, pre-surface water code, right to divert water from the Twisp River into its West Canal from 120 cubic feet per second (cfs) to 11 cfs and reduced MVID's Surface Water Certificate 945 for diversion from the Methow

River into MVID's East Canal from 150 cfs to 20 cfs only 8 cfs of which can be used by MVID.

MVID contends the diversion limitation figures are not supported by substantial evidence, are arbitrary and capricious, unconstitutional and not in accordance with statutory law or the requirement that state agencies deal scrupulously with its citizens.

II. ASSIGNMENTS OF ERROR

No. 1 The PCHB Erred In Allowing Evidence Supporting An Ecology Order Of Alleged Waste Of Water By An Irrigation District Where That Very Evidence Was Not Included In The Notice Of Violation Preceding The Hearing (Failure Of Due Process Of Law).

No. 2 The PCHB Erred In Failing To Address The Mandatory Prerequisite In RCW 90.03.605 Requiring Ecology, Before Issuance Of A Final Order Limiting An Irrigation District's Diversion And Usage Of Water, To First Offer In Writing Information And Technical Assistance Identifying One Or More Means To Accomplish Delivery Of The District's Water Users Constitutional, Protected Water Rights Within The Ordered Limitations (Failure To Comply With Statute).

No. 3 The Superior Court Erred In Not Granting Reconsideration Of Its Affirmance Of The PCHB's Order When New, Previously Non

Limiting Diversion And Usage, Could Not Be Achieved Within Funding Available To Accomplish The Necessary Capital Improvements.

No. 4 The PCHB Order Affirming Ecology's Determination Of Waste Of Water With Its Attendant Limitation Of Water Diversions And Usage Is Not Supported By Substantial Evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Questions of Law

Decided *De Novo*.

1. Did Ecology's Limiting MVID's Irrigation Water Diversion And Usage Based Upon An Undisclosed Engineering Report Establishing A New Measure "Performance Standard" For Determining Waste Of Water Deprive MVID Of Due Process Of Law (Lack Of Adequate Notice)?
2. Does An Order By The PCHB Directing Ecology To Take Additional Regulatory Enforcement Action Enable Or Authorize Ecology To Avoid Compliance With The Mandatory Directive In RCW 90.03.605 To First Notify MVID In Writing Of One Or More Ways To Comply Before Issuance Of The Final Order Limiting MVID's Water Diversions And Usage Of Water?
3. Did The Superior Court Err In Not Granting MVID's Motion For Reconsideration (CP 72-146) When Subsequent Facts Demonstrated That The "Implementation Of Capital Improvements," Which The PCHB Found Factually Necessary (FOF 26, CP 289) To Achieve Ecology's Diversion And Usage Limitations Could Not Be Achieved Within Available Funding?

B. Questions of Fact

1. Standard of Review

2. Are the Administrative Findings of Fact in *MVID 2* Supported by Substantial Evidence?
 - a. Does Ecology's New "Performance Standard" to Measure Waste of Water Comply with the Law and is it Related to MVID's Conveyance System?
 - b. Is MVID's Operation Consistent with Customary Practices?
 - c. Was Funding for "Targeted" Area of Improvement Without Which MVID Cannot Achieve Ecology's Ordered Diversion and Usage Limitations Available?
 - d. Is MVID Responsible for Barkley Ditch?

IV. STATEMENT OF THE CASE

A. Pre-Regulatory Enforcement History

In view of the record developed to date, through two PCHB hearings, MVID will quote selected prior Findings of Fact (FOF) from both PCHB decisions in order to avoid reploting debated factual positions.

The Methow Valley Irrigation District was formed in 1919 bringing life-supporting water for agricultural practices to the mid-portion of the Methow Valley. The irrigation works historically consisted of two, largely unlined open earthen canals running either side of the Methow River. (AR Ex. R-18, Appendix "1", A-1) The West Canal, a 12.5 mile stretch, diverts water from the Twisp River above the town of Twisp and channels it southward parallel to the Methow River. As evidenced in the

Declaration of Chris Johnson, the diversion has been redesigned by the USBR, the funding for which is on hold pending the results of MVID's appeals (CP 37-38). The East Canal, originally 15.5-miles long, is now 9 miles in length, following exclusion of over one-third of MVID's East Canal members. The East Canal originally diverted water from the Methow River through a wooden weir placed upstream of its confluence with the Twisp River. The old diversion weir has now been replaced by a modern, fish-friendly, concrete diversion structure designed and constructed by the United States Bureau of Reclamation (USBR). The MVID had modern fish screen complexes recently designed and installed by the U.S.G.S for both the East and West Canals (CP 39-41, Appendix "2", A-2 through A-4). The two modernizing projects cost over \$1.3 million. (AR Vol. III, p. 758, ll. 2-8)

"FOF No. 5 (CP 536): MVID holds Surface Water Right Claim No. 003935, filed with Ecology on April 1, 1971. This claim has a priority date preceding the enactment of the surface water code in 1917. The claim is for the right to divert 120 cubic feet per second (cfs) from the Twisp River, for the irrigation of 705 acres within the MVID lying west of the Methow River. Water from this diversion flows into the West Canal."

"FOF No. 6 (CP 537): MVID also holds Surface Water Certificate No. 945, dating from 1936. Certificate 945 authorizes the diversion of 150 cfs from the Methow River for the irrigation of up to 1,366.66 acres lying east of the Methow River. Water from this diversion flows into the East Canal. In this case, MVID is claiming total rights to divert 102.4 cfs and 24,922 acre-feet per year for irrigation purposes."

“FOF VIII (CP 241): In establishing the initial canal delivery system for the MVID, the District entered into an agreement with the Barkley Irrigating Company in April 1921. The agreement allowed MVID to use an existing irrigation canal in return for conveying water through the canal to Barkley water users. The Barkley lands are served by independent water rights held by the Barkley Irrigating Company and the Barkley parcels are separate and distinct from the lands located within MVID’s boundaries. The Barkley lands are not described in the water rights held by MVID.”

“FOF No. 11 (CP 538-539): Over the years, the MVID canal system was not adequately maintained and many portions of the distribution network fell into disrepair. As a result, many users at the end of the canal system were unable to obtain water from the district. In 1975, the U.S.D.A. Soil Conservation Service undertook a study of the MVID system and authorized a report entitled “Inventory and Evaluation, Methow Valley Irrigation District Okanogan County Washington.” The report characterized the West Canal system as “near failure” and observed that the East Canal was built in “sandy areas where seepage is high and banks are unstable.” The report suggested the open canal system be replaced with a pump system with trunk lines to carry pressurized water to each landowner. MVID took no action to modify the canal system in response to the Conservation Service report, so Ecology began indicating to the District that improvements to the distribution system would be needed.”

“FOF No. XIV (CP 244): While MVID apparently continued to support some form of conservation from an open canal system to individual groundwater wells, the District failed to implement any of the immediate water saving measures outlined in the Klohn Leonoff study. Due to the lack of any progress in reducing wasteful practices, the Yakama National filed a lawsuit against Ecology and MVID in 1991, seeking to compel Ecology’s enforcement of the Water Code and to enjoin MVID’s wasteful use of water. After the lawsuit was filed, MVID began to move forward with conservation planning efforts and began to release some members at the end of the canals from the District. Based on apparent progress toward a long-term

solution to the District's problems, the Yakama Nation agreed to drop its lawsuit in February 1994."

"FOF No. XVI (CP 245): The purpose of the Montgomery Group Water Supply Facility Plan (Montgomery Report—Ex. R-2) was to evaluate various strategies to improve the water use efficiency of the MVID. The goal of the planning process was "to reach a consensus on a preferred strategy for upgrading the MVID facilities which will substantially reduce the amount of surface water diverted from the Methow and Twisp Rivers." (Ex. R-2, p. 2). The scope of the study was comprehensive and included detailed work to map the district, identify water users, establish historic withdrawals, describe the existing system's condition and operation, determine irrigation water requirements for each reach of the district, develop and evaluate alternative water supply systems, select a preferred plan in meetings with the District, identify and describe effective management of such a system, and develop a financial program to operate the preferred plan on a long-term basis."

"FOF No. XIX (CP 246-247): The Montgomery Report also analyzed the irrigation water demand of the MVID district by considering the area and water needs of the crops, the efficiency of the water delivery system, and the efficiency of the field delivery systems. The data used in the Montgomery Report, covering 1989-1993, indicated MVID diverted an average instantaneous flow of 26.1 cfs of water and an annual average quantity of 8,235 acre-feet from the Twisp River via the West Canal to irrigate approximately 331 acres on the west side of the Methow River. As a result, during the measurement period, each year the District diverted 24.9 acre feet of water per acre irrigated. The Report showed MVID diverted an average instantaneous flow of 40.8 cfs from the Methow River and an annual average quantity of 13,507 acre-feet via the East Canal to irrigate approximately 445 acres on the east side of the Methow River. This rate of diversion works out to 28.1 acre-feet of water diverted for every acre irrigated."

"FOF No. XXIX (CP 251-252): In October 1998, MVID's Board adopted Resolution 98-15 approving the plan to convert to groundwater wells and a piped system. Funding contracts were executed with BPA committing to provide \$2.8 million dollars to fund the project, Ecology agreeing to commit \$2 million dollars

through Referendum 38 monies, and Washington Department of Fish and Wildlife providing \$275,000 for fish screen enhancements. Ecology continued to work with MVID to solidify MVID's commitment to place conserved water into the State Trust Water Program as a condition of state funding.”

“FOF No. XXX (CP 252): In furtherance of the restructuring, Ecology began processing some 115 change applications received from individuals wishing to be excluded from the District. The applications asked to transfer portions of the MVID water right to individual wells. In processing the change applications, Ecology performed a tentative determination of the extent and validity of the water right at issue. In the case of members asking to be excluded from the District, Ecology performed a tentative determination of the extent and validity of MVID's entire claim and certificate to establish the water eligible for change under RCW 90.03.380.”

“FOF No. XXXIV (CP 255): In April 2000, the MVID Board adopted Resolution 00-07, which formally excluded all lands below and south of Wagoner Road on the east side of the Methow River, and all lands below and south of Booth Canyon on the west side of the Methow from the District's boundaries. (MVID Ex. 1, Attachment P). This exclusion left approximately 881 acres of irrigable land served by the MVID canals. The exclusion had the further effect of causing a change in Board leadership. A majority of the MVID Board members in April 2000 were excluded from the District by the reconfiguration and change approvals. Those Board members were excused, and in May 2000, Okanogan County appointed two new Board members who were leaders of Canal Associates, the group opposing implementation of the preferred plan. Soon thereafter, the new Board notified Ecology it was withdrawing from the previous Board's commitment to the well conversion/pressurized pipe plan.”

The District through its new Board, in anticipation of excluding one-third of its assessment base, requested confirmation from Ecology and the Montgomery Group that there was a final plan in place and that the District could afford to operate a pressurized pipe system, requiring large electric

expenses for pumping stations, as originally represented to MVID members. At the meeting it was determined that the O&M power costs alone would be 2 to 3 times above the Montgomery's projections when MVID passed the resolution to adopt the plan. After the meeting, Ecology, through its then Yakima office manager, Mr. Bob Barwin, acknowledged that the assurances MVID sought were not forthcoming. As a result, the new Board, charged with operating a financially viable District, chose to look for improvements in the existing delivery system in reliance on Ecology's, Mr. Phillip's, representation that Ecology would commit, at a lower level, the remaining committed funding for open canal rehabilitation projects.

“FOF No. XXXV (CP 255 & CP 254): Rather than pursuing the well and pressurized pipe system, the new Board indicated it would be maintaining an open canal gravity flow system. During the summer of 2000, MVID entered into negotiations with the Yakama Nation to develop an alternative rehabilitation plan. The negotiations yielded a fourteen-point list of agreed elements to be considered in formulating a rehabilitation project. In December 2000, Ecology was asked to participate in a facilitated negotiation process to see if a rehabilitation plan could be developed incorporating the fourteen points of agreement. A series of meetings followed during much of 2001.”

“FOF No. XXXVII (CP 254): As part of the effort to develop a new rehabilitation plan, MVID began working with IRZ Consulting, an engineering firm provided by the Northwest Power Planning Council and the BPA. IRZ developed a proposal involving creation of a pump station in the Methow River, which would be used to provide water to the west canal when waters in the Twisp River reached an agreed minimum stream flow. The nature and extent of any canal efficiency improvements to be incorporated into the plan were

unspecified. Further facilitated negotiations ultimately led to a revised rehabilitation project scope and budget.”

“FOF No. XXXVIII (CP 256): One of the outstanding issues for resolution continued to be the need for an agreement between Ecology and MVID regarding the District’s water rights. After extensive negotiations, an agreement on water rights was apparently reached in November 2001. A document reflecting the agreement was drafted and initialed by the negotiators and forwarded for action by the MVID Board. Ecology did not receive any message back from the Board regarding the negotiated water rights agreement. There is no evidence the Board ever acted on the water rights agreement.”

The Board did not believe Ecology should be quantifying the District’s water rights in contravention of the holding in *Rettkowski v. Ecology*, 122 Wn.2d 219, 227-228, 858 P.2d 232 (1993), particularly in light of the culmination of the two-year facilitation process providing for a process forward for major canal improvement projects. (AR Vol. II, p. 461, ll. 10-25, p. 462, ll. 1-19)

Two days before the final signing of the facilitation agreement, approved by the participants including the Yakama Tribe, NOAA, and the Washington Department of Fish and Wildlife, was to take place to move ahead with improvement projects, Ecology refused to sign off. Instead Ecology issues a Notice of Violation (NOV) DE 01WQCR-3425 dated December 27, 2001, limiting MVID to a combined 53 cfs diversion limitation. In spite of Ecology’s decision not to participate in the final facilitation agreement, MVID moved ahead on its own within its financial ability. (AR Vol. III, pp.

757-760, ll. 1-14) At about the same time and following, MVID implemented improvement projects to conserve water within its financial ability, including but not limited to: 1) sealing and reshaping 300 feet of canal; 2) sealing 1,000 feet of canal with cement liner; 3) lining another 300 feet of canal; 4) reshaping and sealing another 400 feet; 5) sealing another 2,000 feet of existing cement liner; and 6) repaired 150 feet of wooden flume (AR Vol. III, pp. 651-652).

MVID kept its part of the bargain by approving membership exclusions severely limiting its assessment base necessary for ongoing O&M operations, let alone rehab efforts. Ecology got what it wanted, but then diverted the approximate \$2,250,000 remaining funding, promised for upgrading MVID's open canals, to other projects leaving MVID twisting in the maelstrom.

B. Ecology's First Regulatory Enforcement Order (First Order)

Ecology issued a Notice of Violation (NOV) to MVID on December 27, 2001. The NOV cited both RCW 90.03.400 (Water Code) and RCW 90.48.120(1) (Water Pollution Control Act) as the basis for MVID's alleged violations. The NOV required MVID to respond within 30 days of receipt, specifying steps it was taking to control waste and pollution, or otherwise comply with Ecology's determination.

MVID filed a detailed 19-page response including 28 attachments addressing Ecology's NOV item by item. Without a response of any kind, phone, written, or in person, Ecology issued Administrative Order No. 02WRCR-3950 (First Order) on April 29, 2002 (CP 234-235), citing RCW 90.03 and RCW 90.48. The Order required MVID to limit its diversion of water from the Twisp River to a maximum instantaneous rate of 29 cfs and an annual quantity of 7,367 acre-feet, and to limit its diversion from the Methow River to a maximum instantaneous rate of 24 cfs, and an annual quantity of 5,829 acre-feet. The combined total diversion allowed was 53 cfs with a combined annual quantity of 13,196 acre-feet. MVID appealed.

C. PCHB's First Findings of Fact , Conclusions of Law and Order (MVID 1)

In the ensuing appeal, PCHB Nos. 02-071 & 02-074, the Board Order (*MVID 1*), issued August 20, 2003 (CP 237-274), affirmed Ecology's limitations. In addition, however, the Board directed Ecology to establish a "goal" of further restricting MVID's water diversions and usage:

"Ecology's Order DE 02WRCR-3950 issued to MVID is fully affirmed as a waste violation and MVID's appeal of its terms is denied. Ecology is further directed to re-examine the MVID irrigation system with the goal of issuing a supplemental order adequate to address excessive conveyance losses **in light of any funding options available**. Clarification of the Order should be made to assure any water being diverted by MVID for use on the Barkley lands is not also being diverted from the Barkley Irrigation Co. diversion." (our emphasis)

(CP 273-274)

D. Ecology's Second Regulatory Enforcement Order (Second Order)

Only four months following the PCHB Order in *MVID 1*, Ecology, without advance notice, and without compliance with RCW 90.03.605(1)(b), issued a new stand alone Violation Notice and Order DE 03WRCR-5904 (Second Order) (CP 276-279) dated December 19, 2003. Ecology's Second Order, following interim reduction limitations, reduced MVID's final diversions effective September 15, 2006, into the West Canal to a maximum instantaneous rate of 11 cfs and 2,716 acre-feet annually and limited the diversion into the East Canal to 20 cfs, only 8 cfs of which MVID could use, and 4,909 acre-feet annually. The final combined instantaneous diversions totaled 31 cfs and 7,625 acre feet annually. In addition, the Order required the MVID to measure and monitor the Barkley Ditch tail water flowing into MVID's East Canal.

The face of the Second Order (CP 276-279) did not list any facts supporting the lowered limits. Apart from deleting reference to RCW 90.48 (pollution), Ecology merely regurgitated the so called facts that appeared on the face page of its First Order (CP 234-235).

Facts 1.a and 1.b of the Second Order are really conclusions and track facts (2) and (3) of the First Order almost identically. These are the same

facts, which supported Ecology's determination that 53 cfs was not wasteful in the First Order.

Fact c. of the Second Order did not describe, in any manner, how the new more limited diversion figures were derived. Instead, Ecology's Second Order DE 5904, on page 2, sets forth the only basis supporting its issuance:

"3) In response to the PCHB's Order (*MVID 1*), Ecology conducted another review of the MVID's irrigation system. Ecology's subsequent investigation again showed that MVID's irrigation system is wasteful, improvements to the system are possible, and **funding is available** to make improvements to achieve reasonable system efficiencies." (our insert of *MVID 1*) (our emphasis)

(CP 277)

Fact 3 is not a factual determination, but rather a conclusion. Ecology, contrary to the above quote had conducted no subsequent investigation as to whether MVID's operation at the combined 53 cfs diversion figure, since issuance of the First Order, was wasteful or not. Ecology, had already determined that 53 cfs was not wasteful. In order to justify lower diversion limits, Ecology directed a staff engineer, Mr. Haller to "...implement the board's order." (AR Vol. I, p. 48, ll. 8-22). Mr. Haller, without any other direction from management as to any policy or parameters governing the directive from Mr. Barwin, his manager, to "...implement the board's order":

- 1) selected only statutorily created irrigation districts, Ex. R-33, all of which were either lined or piped, unlike MVID's earthen canal conveyance system, and without knowing specific information about these districts (AR Vol. I, p. 125, ll. 8-25 through p. 127), computed an "average" conveyance efficiency rating of 54 percent, which Mr. Haller decided would be a "performance standard," which MVID was required to achieve. (AR Vol. I, p. 175-187) (FOF 41, CP 553-554)
- 2) made a management or policy call that anything below a 54 percent conveyance efficiency figure would constitute waste. (FOF 38, CP 552)
- 3) without working with or contacting MVID, created five hypothetical computer generated rehabilitation models, Alternatives 1-5, ranging in cost from \$3.5 million to \$800,000 as possible upgrades for the West Canal. (AR Ex. R-15)
- 4) selected his own Alternative No. 5 as a "template" which, he believed, if constructed at his projected costs of \$800,000 to \$850,000 (FOF 47, CP 557), would allow MVID to achieve his new "performance standard" (FOF 46, CP 557).

- 5) determined that by “targeting” Alternative No. 5, MVID could lower the West Canal diversion to 11 cfs (FOF 46, CP 557; AR Ex. R-15).
- 6) without checking with anyone inside or outside of Ecology, assumed funding for any project to achieve his “performance standard” would have to be “all grant funded” (AR Vol. I, p. 464, ll. 18-25, p. 465, ll. 1-2).
- 7) had no factual information whether 100 percent grant funding for construction of his template or similar project was available to MVID other than to assume it would have to be grant funded (AR Vol. II, p. 318, ll. 12-17).

Mr. Haller completed his engineering analysis (AR Ex. R-1, CP 382-403) on December 16, 2003, three days before Ecology’s Second Order issued on December 19, 2003. Ecology’s Second Order setting interim and final diversion limits failed to incorporate Mr. Haller’s engineering report either by attachment or by reference. Neither did Ecology cite any aspect of AR Exhibits R-1, R-14, R-15, R-33, or any other information from Mr. Haller’s report as the factual basis for the new lower diversion and acre-foot usage limitations.

MVID having been provided no information in the Second Order or anything in writing with information or technical assistance about the new

diversion limitations, let alone identifying one or more means to accomplish compliance, all in violation of RCW 90.03.605(1)(b), again appealed to the PCHB.

E. PCHB Second Hearing and Order (MVID 2)

Ecology sat on Mr. Haller's AR Ex. R-1 report (CP 382-403), which served as the basis for Ecology's Second Order, for almost a year before listing it on its Exhibit list preceding the PCHB (*MVID 2*) hearing held in December of 2004.

Ecology led off the hearing with the testimony of Mr. Haller and identification of his report AR Ex. R-1 (CP 382-403). MVID objected on the basis that Ecology: (1) never provided Mr. Haller's Ex. R-1 with the Notice of Violation issued December 19, 2003; (2) did not provide Ex. R-1 to the District, as part of any consultation, in accordance with RCW 90.03.605(1)(b); and (3) did not provide it to the District until just prior to the PCHB hearing. (AR Vol. I, pp. 50-54) Judge Macleod admitted Ex. R-1 over MVID's objection (AR Vol. I, p. 54, ll. 16-25).

Having admitted Ex. R-1 and accepted the premises put forward therein, the PCHB affirmed Ecology's Second Order citing Ex. R-1 in support of 14 of its Findings of Fact.

F. Post *MVID 2* Conduct of the Parties

MVID appealed the matter to the Superior Court in Okanogan County. MVID's appeal resulted in a decision (CP 23-36), rendered on July 13, 2007, affirming the PCHB (*MVID 2*) Order (CP 534-578). However, no final judgment was entered.

Ecology recognized that MVID could not reasonably comply with its Second Order diversion and usage limitations without rehabilitation improvements, (FOF 26, CP 289) the funding for which was not available to MVID. Ecology, in light of these factors, chose to exercise its regulatory discretion by not enforcing the Second Order.

In order to apprise the Superior Court of the reason for delay in presenting a final order, the parties entered into a Stipulation to Supplement Administrative Record With Additional Evidence (CP 437-438) The Stipulation evidenced the efforts of the Honorable State Senator Linda Evans Parlette, working with MVID, to obtain State funding for Mr. Haller's "targeted" Alternative No. 5 as no other funding sources were available to MVID. In addition, Ecology entered into a Memorandum of Agreement with MVID to work together toward better water management to resolve contentious issues over the amount of water actually required to serve MVID's water users. (CP 443-445) Senator Parlette's efforts were successful. In 2006 the Legislature designated \$1.3 plus million of

Ecology's \$12,000,000 budget for piping or lining 30,943 feet of the lower seven miles of the West Canal in accordance with Alternative No. 5 of Mr. Haller's analysis (CP 440-441).

Ecology worked with the USBR to design Mr. Haller's proposed Alternative No. 5. In Addition, Ecology, because the funding was part of its budget, managed the construction contract. For whatever reason, Ecology claims higher pipe prices, only approximately one mile, 5,280 feet, of segmented pipe, was able to be installed rather than the 30,943 linear feet of piping/lining specified in the legislation. Ecology claims it actually spent over \$2.4 million for the work. Post construction MVID has experienced no water savings to lessen the 29 cfs diversion into the West Canal approved in Ecology's First Order. Ecology acknowledges the rehab, as constructed, does not match the "template" used to arrive at its new 54 percent conveyance efficiency "performance standard" requirement. Ecology does, however, maintain the work might have lessened the West Canal diversion requirement by 4 cfs. (29 cfs First Order minus 4 cfs equals 25 cfs) This still leaves Ecology's First Order as the correct order to remain in place until additional funding becomes available.

Although the parties continued to negotiate a resolution to resolve the discrepancies between Ecology's Second Order and MVID's actual

requirements, the efforts failed in November 2009. Ecology noted presentation of a final order affirming *MVID 2*. MVID filed a Motion for Reconsideration (CP 72-146) based on the failure of Alternative No. 5 to be built as modeled and “targeted” by Ecology’s Second Order at anywhere near the projected cost. MVID requested remand to the PCHB to consider adjustment of Ecology’s Second Order in light of the fact that the PCHB’s, *MVID 2*, Findings of Fact 39-41 (CP 553-554) and Conclusions of Law (COL) 22 through 25 (CP 572-574) were no longer valid. First, Ecology’s \$800,000 projected cost for the “targeted” improvement (COL 23, CP 572) turned out, in fact, to be severely under projected; and second, the “targeted West Canal improvements...” (COL 25, CP 573-574) were not achieved. Even at three times the projected cost only one-sixth (1/6th) of the targeted rehab was constructed. The Findings of Fact (FOF 26, CP 546) establish that without the completion of Alternative No. 5, the final diversion limits of Order 5904 (CP 276-279) cannot be achieved and are no longer valid.

On December 4, 2009, the Superior Court entered a final judgment affirming *MVID 2*. MVID’s Motion for Reconsideration was denied on December 14, 2009 (CP 72-146). A subsequent Motion for Stay was denied by the Court on February 11, 2010 (CP 450-451).

MVID appeals Ecology's latest unsupported and unlawful restrictions set forth in DE 03 WRCR-5904 (Second Order) (CP 276-279) as affirmed by the PCHB in Order No. 04-005 (*MVID 2*), which issued on May 9, 2005 (CP 534-578) and was affirmed by the Superior Court of the State of Washington for Okanogan County in Cause No. 05-2-00283-4, December 4, 2009 (CP 68-71). MVID also appeals from the Superior Courts denial of its Motion for Reconsideration (CP 431-433), in light of the failure of the "targeted" rehab Alternative No. 5 to be constructed as contemplated. Without the targeted improvement, MVID cannot achieve the West Canal 11 cfs diversion limitation (FOF 26, CP 546). MVID requested the matter be remanded back to the PCHB for further consideration in light of the wealth of new information not known to or available to the parties at the time of the Order in *MVID 2*.

VI. ARGUMENT

A. Question of Law

Challenged conclusions of law are reviewed under an "error of law" standard. RCW 34.05.570(3)(d). Under this standard, review is *de novo*, however, the Court should give substantial weight to an agency's interpretation of statutes and rules that the agency is charged with implementing. *Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep't of Ecology*,

146 Wn.2d 778, 790, 51 P.3d 744 (2002). Ecology's interpretation is not at issue with regard to MVID's constitutional challenge.

1. MVID was Deprived of Due Process of Law Rendering Ecology's "Second Order" Void and of No Force and Effect

We begin with the legal principal that water rights are a property right both real and personal *Madison v. McNeil*, 171 Wash. 669, 674; 19 P.2d 97 (1993); *DOE V. USBR.*, 118 Wn.2d at p. 767 (1992);

“ ‘It has long been settled in this state that property owners have a vested interest in their water rights to the extent that the water is beneficial; used on the land.’ Included in the vested rights is the right to diversion, **delivery** and application ‘according to the usual methods of artificial irrigation employed in the vicinity where such land is situated.’ ” (our emphasis)
(*Ecology v. Grimes*, 121 Wn.2d 459, 477, 852 P.2d 1044 (1993))

MVID's right to divert water from the Twisp River into the West Canal and from the Methow River into the East Canal is afforded constitutional protection of which it cannot be deprived without due process of law. *Sheep Mtn Cattle Co. v. DOE*, 45 Wn.App. 427, 430-431, 726 P.2d 55 (1986).

Notice and opportunity to be heard constitute the essence of due process. *State v. Rogers*, 127 Wn.2d 270, 898 P.2d 294 (1995); *State v. Hotrum*, 120 Wash. App. 681, 87 P.3d 766 (2004).

“Due process requires that notice be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action...’ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950), ...”

(*Wenatchee Reclamation Dist. v. Mustell*, 102 Wn.2d 721, 728, 684 P.2d 1275 (1984))

In addressing the matter of notice, this Court in *State v. Hotrum, Id.*, although determining that a hearing was not required in the circumstances of that case, noted as follows:

“ ‘[D]ue process is flexible and calls for such procedural protections as the particular situation demands.’ “ *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). “An essential ingredient of due process is notice.” *In re Pers. Restraint of Cashaw*, 68 Wn.App. 112, 124, 839 P.2d 332 (1992), *aff’d*, 123 Wn.2d 138, 866 P.2d 8 (1994).”

(*State v. Hotrum, Id.*, at 685)

In determining what constitutes proper notice under due process, the Court should weigh the individual interests at stake in relation to the State’s interest. *Duskin v. Carlson*, 136 Wn.2d 550, 965 P.2d 611 (1995).

The State’s interest in this case, to reduce wasteful practices to the maximum extent practicable (RCW 90.03.005), was and is well protected. Ecology’s First Order had reduced MVID’s more recent combined diversion from 65 cfs (FOF XIX, CP 246-247) to 53 cfs thereby increasing its combined conveyance efficiency from 31 percent to 41 percent. In addition, MVID has accomplished major rehab of its East Canal diversion structure. Plans are ready for rehab of the West Canal diversion structure; however, construction must abide the results of this appeal (CP 38). As

for fish, the National Oceanic and Atmospheric Agency (NOAA) is satisfied with MVID's efforts, now completed, in having new fish friendly screening being built for both the East and West Canals (CP 37-41). MVID also removed a Coffey Dam, historically spanning the entire width of the Methow River, as part of its East Canal diversion upgrading to enhance fish migration (CP 42).

MVID's interest is to protect its members constitutionally protected water rights. *DOE v. Grimes, Id.* at 121. In light of the importance to land owners to have irrigation water in an arid region, the loss of which would subject the value of their real estate to drop dramatically and prevent use of the water for alfalfa, pasture, some orchard with attendant income and fire protection, and other beneficial uses, Ecology was required to provide notice of the new performance standard and how it was developed in order for MVID to have a meaningful opportunity, at the hearing, to respond. The MVID found out in the *MVID 2* hearing that Ecology had departed from the issue of excessive seepage in *MVID 1* and developed a new "performance standard," based on conveyance efficiency. The new 54 percent conveyance efficiency "performance standard" was derived by averaging canal efficiencies from lined and piped canals in conjunction with a rehabilitation "template" selected from one of Mr. Haller's five alternative computer generated rehab models as reported in Ecology's AR

Exhibits R-1, R-14, and R-15 (AR Vol. I, p. 48). None of this information was included or referenced in Ecology's Second Order.

When MVID objected to Ecology's introduction of AR Ex. R-1 (AR Vol. I, pp. 50-55), counsel for the State stated:

"Mr. Haller's work is very important to this Board's understanding why that order should in fact be affirmed, and there is no evidentiary basis to keep it out."

(AR Vol. I, p. 54, ll. 5-14)

There may have been no evidentiary basis, but there was and is a constitutional due process basis, statutory basis, and principal of fair dealing. By way of *voir dire*, Mr. Haller admitted that his work in developing the "template," that established 11 cfs as the new West Canal diversion limitation, was only prepared for trial and not for sharing with MVID:

"Q. Was this (Ex. R-15 the 5-6 Alternatives) ever provided to the District until today or when the exhibit lists were exchanged? (our insertion)

A. I prepared it for this trial, (PCHB Hearing) so the exhibit list I believe would be the first time this was shared with the District as to Exhibit 15." (our insertion)

(AR Vol. I, p. 135, ll. 18-25, p. 136, ll. 1-2)

On cross examination Mr. Jolley, MVID Board President, when questioned about Mr. Haller's five or six alternative plans, and funding for any of them, noted that he had never seen them prior to the exchange of

evidence preceding the *MVID 2* hearing. (AR Vol. III, p. 761, ll. 20-25; p. 762, ll. 1-8) That testimony confirmed that Ecology's working up five different hypothetical rehabilitation plans was not an effort to work with the District, as required by RCW 90.03.605(1)(b) or to assist it in lessening its seepage conveyance rate through a new major rehab project, but rather was solely for purposes of establishing a new, undisclosed to MVID, "performance standard" that without funding, or even with funding, as it turned out, was not achievable.

From various colloquies between Ecology's counsel and MVID's counsel it appears to be the position of Ecology that it was MVID's duty to go on a fishing expedition to find out how Ecology came up with the new draconian diversion limitations (AR Vol. I, p. 53, ll. 12-25, p. 54, ll. 1-4). In contrast it is MVID's position that it was and is a constitutional requirement that Ecology provide adequate notice in advance and carry its burden of proof to establish compliance with the legal prerequisite of RCW 90.03.605(1)(b) before issuing the Order in question.

In affirming Ecology's Second Order, the PCHB specifically noted:

"Ecology's Order in response to the Board's remand was based on an ecology engineering analysis prepared by Daniel Haller (Ex. R-1)"

(Finding of Fact 27, CP 289)

The PCHB cited AR Ex. R-1 (CP 382-403) in 14 of its Findings of Fact to support its Order affirming Ecology's Second Order.

Without AR Ex. R-1, R-15, and R-33 being incorporated into Ecology's Second Order, as the factual basis for the Order, MVID's expert witnesses prepared their testimony in *MVID 2* based on the pre-existing Klohn Leonoff, Montgomery, and USGS. studies and their own personal working knowledge of the operational challenges of MVID's existing delivery system.

MVID was left at the hearing without the opportunity for its expert witnesses Mr. Kauffman and Dr. Wattenburger to have focused their hearing preparation analysis and testimony on the credibility of the very report Ecology relied upon and the PCHB accepted to support the Order in question. As noted by Mr. Kauffman in trying to respond on cross-examination to Ecology's AR Ex. R-33, he had little time to review it. (AR Vol. III, p. 745, ll. 8-14) The PCHB's admitting AR Ex. R-33 along with AR Ex. R-1 was a "manifest" error as MVID was actually prejudiced by there being withheld by Ecology until the hearing.

If Mr. Haller's work, AR Ex. R-1, was so important to the PCHB's understanding the Second Order, as asserted by Ecology's counsel, why was not it shared with MVID? Why did Ecology not work with MVID

toward achieving the newly developed “performance standard” rather than withholding the reports for use in an appeal of its Order?

An order is void as being violative of due process where it is based on a hearing for which there was no adequate notice. *RR Gable Inc .v. Burrows*, 32 Wash.App. 749, 649 P.2d 177 (1982) *rev. den.* 98 Wn.2d 1008, *cert. den.* 103 S. Ct. 2429, 461 U.S. 957, 77 L. Ed. 2d 1316. Without AR Ex. R-1, R-15 and R-33 being incorporated in Ecology’s Second Order, DE 5904 (CP 276-279) is void. *RR Gable Inc., Id.*

A corollary to due process is the principal in Washington State that the State and its agencies must deal scrupulously with its citizens:

“[4] We noted in *State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965), that:

The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on the commitment, the official should not be permitted to revoke that commitment.”

(*Shafer v. State*, 83 Wn.2d 618, 524, 521 P.2d 736 (1974))

Withholding the critical information supporting Order 5904 (CP 276-279) from MVID and springing it on MVID during the PCHB hearing (*MVID* 2), which was MVID’s first and only opportunity to establish a record fails the requirement for the State to deal scrupulously with MVID. This

corollary supports MVID's assertion that the Second Order was inadequate to satisfy due process.

2. The PCHB Cannot Direct Ecology to Act in Contravention of Statutory Governance Directives (RCW 90.03.605) (Conclusion of Law No. 3)

Following *MVID I*, Ecology did not merely supplement or amend the First Order (3950, CP 234-235), it issued a completely new stand-alone Second Order (5904, CP 276-279). The only jurisdictional authority for Ecology to issue an Order concerning a claimed violation was to follow the statutory directives in either RCW 90.03.400 or alternatively RCW 90.03.605(1)(b). In enacting RCW 90.03.605 the legislature recognized water rights as an important property right entitled to constitutional protection. Before that right is limited, Ecology was and is required to first work with the water user, as a cooperative arm of the government, to ensure that citizens' water rights are fully protected. *Sheep Mountain, Id.*

Mr. Barwin, of Ecology, who signed the new Second Order, acknowledged that it was issued pursuant to Ecology's statutory authority found in RCW 90.03.605. (AR Vol. III, pp. 617-619)

“Q. (BY MR. PRICE) Right. Alternatively being if you don't pursue the misdemeanor route then alternatively you would pursue 605; correct?”

A. That's the choice provided in this section, yes.

Q. And did you follow that section?

A. I believe I did.”

(AR Vol. III, p. 619, 11. 10-16)

RCW 90.03.605(1) requires in part:

(b) “When the department determines that a violation has occurred or is about to occur, it **shall** first attempt to achieve voluntary compliance. As part of this first response, the department **shall** offer information and technical assistance to the person in writing identifying one or more means to accomplish the person’s purposes within the framework of the law;” (our emphasis)

The term “shall,” as used in RCW 90.05.605(1)(b), is mandatory. Had Ecology complied, MVID would have received a Notice of Violation in accordance with RCW 43.27A.190 and would have been afforded the opportunity to work with Ecology toward an achievable resolution.

Ecology, instead of determining waste in the first instance, assumed the PCHB’s Order required it to make a determination of waste over and above its First Order. Ecology, since it had already determined that 29 cfs and 24 cfs for the West and East Canals, respectively, in its First Order 3950 (CP 234-235), were not excessive, was left with a dilemma. Ecology’s answer to this dilemma was to direct Mr. Haller, a staff engineer, to “...prepare an engineering analysis to implement the Board’s Order.” (AR Vol. I, p. 48, 11. 8-22)

Mr. Haller, on his own, set about developing a new “performance standard,” that MVID would be required to achieve (FOF 41, CP 553-554).

Mr. Haller had never personally observed MVID in operation nor walked any portion of it (AR Vol. I. p. 175, ll. 23-25 through p. 180, ll. 1-19). Instead of actually investigating MVID's system in conjunction with the other customary open earthen canal water delivery systems in the Methow Valley vicinity, he selected piped and lined delivery systems elsewhere in the Central Washington region and derived an "average" conveyance efficiency figure (AR Vol. I, p. 123-125, Ex. R-33). This was done without knowing anything about the systems he selected to compute the average. On *voir dire* MVID established that, of the delivery systems chosen for comparison, Mr. Haller limited his selection to statutorily created districts, which eliminated all earthen canal delivery systems particularly those commonly in use in the Methow Valley. Mr. Haller did not know the configuration of the systems, he selected, in terms of having any relation to MVID. Ex. R-33 was admitted over MVID's objection (AR Vol. I, p. 125-130). Neither did Mr. Haller take into consideration the velocity flows of MVID's headgates to satisfy MVID's consent decree with the National Marine Fishery Service (NMFS) as established by Fish and Wildlife guidelines (AR Vol. I, p. 229-230). Neither had Mr. Haller been out to evaluate personally MVID's system operation (AR Vol. I, p. 230-231), nor did he check with anybody at MVID regarding operation of MVID's diversions (AR Vol. I, p. 230, ll. 19). The reports Mr. Haller relied upon

were from the 1990s (AR Vol. I, p. 230, ll. 14-25; p. 231, ll. 1-4). Neither did Mr. Haller know the number of days for MVID's established water delivery season in order to compute acre feet usage (AR Vol. I. p. 175, ll. 23-25 through p. 180, ll. 1-19).

Without any communication or notice to MVID, Mr. Haller developed five alternative computer generated rehabilitation models. (AR Ex. R-15). From these five models, Mr. Haller selected Alternative No. 5, which had the lowest conveyance efficiency, as the "template," which if constructed or some similar project was constructed, at his projected cost of \$800,000 to \$850,000, would allow MVID to limit diversions to 11 cfs for the West Canal and 20 cfs of diversion and 8 cfs of usage for the East Canal (FOF 38-40 and 47, CP 552-553 and 557) (AR Vol. I, p. 155, ll. 15-25; p. 156, ll. 5-12; AR Ex. R-15).

By first establishing an average conveyance efficiency figure, albeit unrelated to earthen canal delivery systems, which MVID had to achieve, Mr. Haller got it backwards. Waste is a function of common methods of water delivery in the vicinity and the availability of funding with which to make reasonably practical (cost/benefit) improvements. Any water distribution system can presumably achieve greater conveyance efficiency through improvements. *Grimes, Id.* That is not what Ecology was required to do. The analysis was to determine whether MVID's conveyance seepage

(seepage) was excessive in light of funding availability (CP 534-578). Earthen canal delivery systems are legal methods of water delivery in Washington. They are found throughout the State. Importantly, 12 of them are located in the same valley (vicinity) as MVID (AR Ex. R-1, Table 1, CP 384). Instead of selecting any of these comparable earthen canal delivery systems to arrive at “average” conveyance efficiency, Mr. Haller chose piped and lined irrigation “Districts” systems exclusively. (AR Vol. III, p. 745, ll. 8-25, p. 746, ll. 1-22; AR Ex. R-33) Mr. Haller could not “implement the Board’s Order” by comparing MVID’s efficiency to other delivery systems “common in the vicinity” because MVID ranks at the top of canal conveyance efficiency ratings of comparable systems in the vicinity (AR Vol. I, p. 54; AR Ex. R-1, Tables 1-5; CP 384-388).

Instead of offering the new performance standard, including five alternatives to MVID in advance, as Ecology is required to do pursuant to RCW 90.03.605(1)(b), the critical information was held and undisclosed to MVID. Mr. Barwin having admitted that the Order under review was issued pursuant to RCW 90.03.605 was then asked to admit that Ecology had not followed the provisions of subsection (1)(b). The Board sustained Ecology and OWL’s objections on the basis that MVID had not referenced RCW 90.03.605 in the paperwork leading up to the hearing. (AR Vol. III, pp. 617-623) MVID noted for the record that its Notice of Appeal necessarily

incorporated the challenge. It was Ecology's burden of proof in the first instance to establish that its Second Order issued in compliance with the law. The PCHB cannot nullify or waive Ecology's statutory duty in order to arrive at a decision it favors.

MVID was never provided "in writing" any "information and technical assistance" "identifying one or more means to accomplish the person's purpose within the framework of the law" before the Second Order issued. MVID did not know that five specific hypothetical alternative improvement projects had been developed by Ecology or that any one of the alternatives had been selected as a "template" to achieve a new "performance standard," which performance standard was declared by *fiat*, to be the new measure for determining waste. The Board at Conclusion of Law No. 3 (CP 561-562) concluded that it would have been prejudicial to the parties to allow a new legal issue or theory to be included at that stage of the proceedings. MVID contended and contends that RCW 90.03.605(1)(b) is implicit in MVID's Notice of Appeal. What was, in fact, prejudicial was Ecology's development of a whole new basis for determining waste and holding it in reserve until the hearing.

The Board's allowing Ecology to put on evidence of a new "performance standard," while at the same time rejecting consideration of the statutory directive requiring Ecology to provide that very information to MVID in a

working relationship, constituted an error of law requiring reinstatement of Ecology's First Order. (AR Vol. I, pp. 50-56)

Had Ecology followed the law, instead of working up computer models (AR Ex. R-15) and saving them for an appeal hearing, it could have, in accordance with .605(1)(b), approached the District in a cooperative effort and the "template" used to justify lower diversions, which turned out not to be completed, might have been successfully constructed almost three years earlier due to lower prices.

3. Court Erred in Not Granting Motion for Reconsideration

As all parties now know, in connection with MVID's Motion, Reply, and Declarations regarding Reconsideration (CP 01, 37, 43, 45, 51, 72) that the template "targeted" by Ecology, which was required to be implemented before MVID could achieve operation of the West Canal at only 11 cfs to meet the new performance standard (FOF 26, CP 546) was not constructed as designed, such that the contemplated water savings cannot be achieved. To restrict MVID to diversion limitations, which Ecology admits cannot be currently achieved, confronts Washington taxpayers with the loss of \$1.3 million in legislatively authorized funding and an additional \$1.0 million of taxpayer money, spent on the lower seven-mile project, as the canal will be lost to use due to insufficient conveyance water for it to operate. This is without consideration for the millions associated with the diversion

improvements and major fish screen improvements. The facts now available support Reconsideration:

Haller:

“Q. Is it appropriate to use actual data in an engineering analysis?”

A. It would be preferred.”

(AR Vol. III, p. 786, ll. 19-21)

We now have, after *MVID 2*, actual information proving that without completion of “targeted” Alternative No. 5 (FOF 40, CP 553) the limitations in Ecology’s Second Order cannot be met. MVID’s Motion for Reconsideration to Remand the case back to the PCHB for further consideration should have been granted.

B. Questions of Fact

1. Standard of Review

Under the APA, the burden of proving invalidity of agency action rests on the challenging party. RCW 34.05.570(1)(a). The challenging party must establish invalidity of agency action according to the standards of judicial review set forth in the APA. RCW 34.05.570(1)(b); *Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). The APA provides the exclusive means for a party to obtain judicial review of an agency decision. RCW 34.05.510.

There are two standards by which to judge the invalidity of an agency action. First, the court reviews an agency decision under the substantial evidence standard of RCW 34.05.570(3)(e). *Robertson v. May*, 153 Wn.App. 57 (Oct. 2009). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. *Orca Logistics v. L&I*, 152 Wn.App. 457 (June 2009).

The substantial evidence standard requires the court to:

“[V]iew the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.”

(*Freeburg v. City of Seattle*, 71 Wn.App. 367, 371-72, 859 P.2d 610 (1993))

However, whether a finding is supported by substantial evidence is determined by considering the record as a whole. *Patrolman’s Ass’n v. City of Yakima*, 153 Wn.App. 541 (2009)

Secondly, validity of an agency action is reviewed in terms of whether or not it is arbitrary and capricious within the meaning of RCW 34.05.570(3)(i). *Seymour v. Dep’t of Health*, 152 Wn.App. 156 (Sept. 2009). An agency decision is arbitrary and capricious if it is made without consideration and in disregard of the facts and circumstances. *Seymour*, *Id.* at 172.

After concluding judicial review, the Court may affirm, reverse, or remand the Board's decision. RCW 34.05.574(1). The Court may modify the Board's decisions only if "remand is impracticable or would cause unnecessary delay." *Id.*

When reviewing mixed questions of law and fact, the court: (1) accepts the unchallenged factual findings made by the agency, or, if the petitioner challenges the findings of fact, applies the substantial evidence standard to findings of fact; (2) determines the applicable law; and (3) applies the law to the agency's facts. The application of the law to the facts is *de novo*. *Dermond v. Empl. Sec. Dep't*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

2. Administrative Findings of Fact Not Supported by Substantial Evidence

a. **Ecology's "Performance Standard" is Not Germane to MVID's Conveyance System**

FOF 15-22 (CP 541-543): Findings of Fact 15-22 do not address Ecology's Second Order DE 5904 (CP 276-279). Although relevant to *MVID I*, they are not material to a completely different approach utilized by Ecology as support for a new stand-alone Second Order. Ecology's Second Order is not premised on prior conveyance improvement activity or lack thereof by MVID. The genesis for Ecology's Second Order is the PCHB's order in *MVID I* to wit: revisit MVID "...with the goal of issuing a

supplemental order adequate to address excessive conveyance losses in light of available funding.”

A serious legal question arises as to whether the PCHB has jurisdiction to direct Ecology how to carry out its discretionary regulatory enforcement authority. MVID finds no regulatory authority in the statutory scheme underpinning the PCHB’s jurisdiction to direct Ecology to “set goals.” (RCWs 34.05.010(11)(a) and 43.21B.110) Regulatory enforcement is strictly an Ecology function.

The issue for Ecology and PCHB in the second go around was not whether there had been money for rehab projects in the past or whether Ecology had walked away from a two-year facilitation process, but rather, after considering (1) relative efficiency of systems in common use in the vicinity; (2) the cost-benefit ratio of improvements; and (3) availability of funding; public and private, for improvement projects considered reasonable under the cost/benefit analysis, were MVID’s conveyance losses excessive. (*Ecology v. Grimes*, 121 Wn.2d 459, 477, 852 P.2d 1044 (1993)) Rather than evaluate MVID’s operation against the *Grimes* standard, Ecology instead, by using conveyance systems not common in MVID’s vicinity, developed, through a single engineer’s formula, a “performance standard” (FOF 41, CP 553-554) and decreed by *fiat* that anything below that standard is waste.

FOF 25 (CP 545-546): The statement in the second to the last sentence is not a Finding, but a Conclusion. The PCHB does not incorporate or reference what “additional” data went into Ecology’s Second Order calculations justifying lower Qi and Qa limits. The last sentence is totally unsupported by the evidence. Mr. Haller knew nothing of MVID’s management practices except from publications in the 1990’s before MVID was required to and did change its operating practices to meet the limited Qi and Qa figures in Ecology’s First Order. Mr. Haller had never observed any part of the system, except on one occasion from his car, nor discussed operation with the Directors or Ditch Master. There is no testimony or evidence to support that Mr. Haller determined in any regard MVID’s operating practices between issuance of the First Order approving 53 cfs and the Second Order limiting MVID to 31 cfs. Statements by Mr. Haller that, “they do it in my district” is not evidence. There is no evidence of Mr. Haller’s knowledge of earthen gravity flow water distribution systems let alone the type of water conveyance system used in Mr. Haller’s district.

FOF 26 (CP 546): Finding of Fact 26 establishes that MVID could not operate at the final combined diversion limits in Ecology’s Second Order without capital improvements to “targeted” aspects of the irrigation system:

“The MVID would have to make capital improvements to targeted aspects of its irrigation system to achieve the final diversion limits. (Ex. R-1)”

(CP 546)

FOF 26 sets the stage for evaluating the remaining findings of fact.

Management at Ecology did not have a plan or method in place that would facilitate another review of MVID’s system that would come up with different limitation figures than the combined 53 cfs of the First Order.

Instead, Bob Montgomery, manager of Ecology’s Yakima Office for the Eastern Washington region, told state engineer, Mr. Daniel Haller, to “...prepare an engineering analysis to implement the Board’s Order. (AR Vol. I., p. 48, ll. 8-22)

FOF 27 (CP 546): One of the basic tenants for Mr. Haller’s revision of the first order was his reliance on the USGS study and USBR figures establishing that MVID’s conveyance (seepage) rate per mile was the lowest of the 13 delivery systems studied in the vicinity. (AR Vol. I, p. 189, l. 25; p. 90, ll. 1-24). However, at the end of his testimony, Mr. Haller questioned the efficacy of the USGS study as it did not support his decision that MVID should be subjected to more restrictive diversion limitations (AR Vol. II, p. 310, ll. 1-15). In challenging the efficacy of the favorable USGS measurement of MVID canal seepage, Mr. Haller testified that the reach studied by the USGS “is the best reach in the entire

district.” (AR Vol. II, p. 308, ll. 11-25; p. 309; AR Ex. R-1, Table 1, CP 384). (AR Vol. I, p. 83, ll. 5-25; p. 84, ll. 1-24; AR Ex. R-1, Table 3, CP 386). This point is critical because it was this USGS, low seepage figure upon which Mr. Haller relied, in part, to support his adjustment of MVID’s diversion limitations downward (AR Vol. I, pp. 86-93). For the PCHB to find that “Mr. Haller exercised his ‘professional judgment’ in evaluating the data sources...” without noting what consideration was given to his inconsistent testimony was arbitrary and capricious. *Pierce Cy Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) The PCHB’s reliance on Mr. Haller’s “professional judgment” to the exclusion of Dr. Wattenburger and Mr. Kauffman was arbitrary and capricious. As noted previously, Mr. Haller’s lack of information regarding MVID’s operation since *MVID 1* and instead reliance on 1990s reports left him at a disadvantage in terms of MVID’s current operations. In contrast, Dr. Wattenburger, who testified to 54.1 cfs as the combined diversion necessary to operate MVID, had walked most every inch of the canals. More importantly, he considered reach by reach the number of turnouts, acreage to be irrigated, distance between turnouts, etc. Dr. Wattenburger was in a position to exercise “professional judgment” and yet the PCHB chose assumptions (Haller Testimony) over factual information (Wattenburger Testimony) (AR Vol. I, pp. 349-354). Again, the PCHB

chose not to address the incongruity of Ecology in comparing MVID to piped and lined systems (AR Ex. R-33). The PCHB ignored Mr. Kauffman's testimony discrediting AR Ex. R-33 as not being an appropriate document to derive a conveyance efficiency "average" figure. He noted all the "Districts," not ditches, in AR Ex. R-33 were piped or concrete lined (AR Vol. I, p. 745, ll. 8-25; pp. 746-747). In addition, with the short time he had to review AR Ex. R-33, he testified that many other systems exceed the water duty utilized by Mr. Haller in AR Ex. R-33 (AR Vol. I, p. 748; p. 749, ll. 1-4).

FOF 30 (CP 547-548): The PCHB, after noting MVID has the lowest seepage rate per mile for "unlined" ditches, discounts the information because some identified ditches have made improvements to try to reduce conveyance losses. However, the PCHB fails to note that MVID was a leader in the custom of making improvements to upgrade delivery systems and conserve water (AR Vol. III, p. 583, ll. 11-21; p. 584, ll. 2-25; and p. 585, ll. 1-2, *see* FOF 36, at pp. 46-49 below).

Efforts by other ditch companies to try to improve in order to achieve MVID's low seepage rate of 1.5 cfs per mile and high conveyance efficiency ratings by reach does not establish or support waste of water by MVID at 53 cfs. The evidence supports MVID's position that its management and operation was not only customary, but exceeded the

efforts of other comparable conveyance systems “in the vicinity” to improve. The PCHB’s failure to consider this evidence was arbitrary and capricious.

FOF 31 (CP 548-549): The PCHB, although noting MVID’s very high conveyance efficiency ratings for the various reaches of the canal, except for two (AR Ex. R-1, Tables 2 and 3, CP 385-386) gives greater weight to the two lowest rated reaches. Finding 31 does not support poor management or waste. Table 3 evidences MVID as having higher efficiency ratings than all but one of the other 10 irrigation canal entities in the vicinity that were evaluated. The PCHB failed to note that Table 3 is the only comparison of MVID’s conveyance efficiency with other unlined earthen canal conveyance systems. To not consider MVID’s better efficiency rating in the vicinity, with like canal systems, and instead accept Ecology’s use of lined and piped canal systems to develop a non-conforming “average” “performance standard” was arbitrary and capricious and demonstrates a bias to disregard facts and circumstances favorable to MVID. *Seymour, Id.*

FOF 32 (CP 549): The PCHB notes that Mr. Haller revised the First Order efficiency figures through the use of “additional” data. However, there is no evidence of additional data in the record regarding MVID’s existing system operating in compliance with the First Order 53 cfs limit.

Mr. Haller could not have used the Montgomery and Klohn Leonoff Reports identifying the two lower reaches of the West Side Canal as the least efficient in MVID's system because he had that information in computing the First Order (53 cfs) limitations. He could not have used the USGS seepage rates for the West Canal because, MVID is operating with the least canal seepage of all the 13 comparable earthen conveyance entities in the vicinity, (AR Ex. R-1, Table 1, CP 384) and with the best conveyance efficiency as measured by reach (AR Ex. R-1, Tables 2 and 3, CP 385-386). The only "additional" data was Mr. Haller's computing an "average" conveyance efficiency figure derived from lined and or piped "irrigation districts" (AR Ex. R-33) which had no relationship to MVID's customary unlined delivery system in the vicinity. To allow Ecology to require MVID to achieve delivery efficiencies comparable to lined and piped systems not in the vicinity was arbitrary and capricious and does not constitute substantial evidence to support Ecology's Second Order.

Importantly, Dr. Wattenburger noted that conveyance efficiency in and of itself does not, in and of itself, allow one to determine whether or not a water delivery system is being operated reasonably or efficiently (AR Vol. II, p. 380, ll. 11-20). The PCHB's refusal to consider evidence supporting MVID's non-waste position was arbitrary and capricious.

FOF 33 (CP 549-550): The PCHB relies on Mr. Haller’s reporting of adjudications of other irrigation systems (AR Ex. R-33) without any foundation as to their comparison (configuration) to MVID or other conveyance systems in the Methow Valley. The PCHB allowed this testimony over MVID’s objection (AR Vol. I, pp. 99-101, ll. 1-9).

The PCHB acknowledges in FOF 33 that “...each District has unique characteristics...” However, it found Ecology’s use of AR Ex. R-33 as appropriate because other “regional” irrigation systems have “...similar soil types, weather and crops grown.” That information, however, does not provide information as to the type of conveyance system, i.e. earthen canal, piped, lined, long ditches, short ditches, pressurized system, etc. Mr. Haller did not know the configuration of any of the delivery systems used in his AR Ex. R-33 as to whether they had any comparison to MVID’s system in arriving at his “average” conveyance efficiency rating, which he adopted as MVID’s required performance standard (AR Vol. I, p. 185-187).

Finding that MVID’s water duty is one of the highest is because Mr. Haller measured MVID against piped, lined, and pressurized delivery systems in the Central Washington region (AR Ex. R-33), rather than customary earthen canal delivery systems in the Methow Valley and around the State. MVID’s water duty, high or low, does not detract from

its highly favorable (low) conveyance losses per mile and high conveyance efficiency ratings per reach as noted in Tables 1, 3, and 4 of AR Ex. R-1 (CP 384, 386 and 387).

FOF 34 (CP 550): Wolf Creek Reclamation District, used by Ecology for comparison purposes, was recently converted to a newly piped and pressurized system. The PCHB failed to consider that a major difference. In addition, it was the only system of its type at the time in the vicinity.

Dr. Wattenburger, testified as to his working with Ecology in connection with Ecology's efforts to remedy the de-watering of Big and Little Twin Lakes as well as disappearance of Barnsley Lake, following the conversion of Wolf Creek Irrigation District from an open canal system to a piped system, in order to ameliorate the detrimental effects of losing the historic canal seepage as an integral part of that area's aquifer (AR Vol. II, p. 376-79; p. 380, ll. 1-10). The PCHB's rejection of MVID's evidence and purposeful intent to ignore the beneficial affect of a certain amount of seepage as being critical to aquifer recharge in the vicinity was arbitrary and capricious in light of the Wolf Creek Conversion debacle. Without consideration of canal seepage to augment the aquifer, not only for fish passage later in the irrigation season, but for others using the aquifer, constitutes arbitrary and capricious conduct.

FOF 35 (CP 550-551): Of the adjudications relied upon by Mr. Haller (AR Vol. I, pp. 107-118), they establish that .02 cfs for on-farm usage is an accepted figure. The PCHB failed to note or consider in its findings that MVID's experts agreed and used that same figure in arriving at their computations of 51.4 and 54 cfs as being non-wasteful diversions for the existing system. In addition, both Dr. Wattenburger and Mr. Kauffman used the accepted 15 percent, 1.5 cfs, per mile conveyance seepage in their respective calculations.

b. MVID Operates Within Lawful Customary Practices

FOF 36 (CP 551): Finding 36 concerning practices of conversion to wells as evidence of the customary availability of public funds to convert from ditches to other means of irrigation water conveyance is not supported by substantial evidence.

OWL's (Mr. Bernheisel) Exhibits "16 through 19," relating to small delivery systems converting to wells, were not comparable to MVID's 21 miles of canal and 300 members.

Furthermore, Ecology did not rely on OWL's Exhibit "22." Every system identified by the PCHB was, on cross-examination, determined to have no canals or very short canals involving very small acreages, and serving one to two water users. (AR Vol. III, pp. 594-600 11. 1-2):

"Q: (by Mr. Price) "Mr. Barwin, did you utilize the Appleby Legend

map (Ex. OWL 22) in issuance of Order 5940?

A: Do you mean – is it 5904, the order from December 2003?

Q: Correct.

A: No.

Q: Thank you.”

(AR Vol. III, p. 599, ll. 21-25; p. 600, ll. 1-2).

Mr. Barwin did, however, agree that MVID’s efforts to conserve water was consistent with or exceeded the custom in the area in terms of its upgrading efforts by way of excluding more members, more conversion to well withdrawal, eliminating more acreage, and spending more to upgrade its system.

“Q. (BY MR. PRICE) Let’s talk about the physical changes in the first sense. You’re having trouble with that, let me try another question.

“Has any other canal or ditch or open delivery system eliminated the number of miles of canal than has the Methow Valley Irrigation District?”

.....

A. I cannot think of a ditch that’s been abandoned that was longer than six miles in length in the Methow Valley.

Q. (BY MR. PRICE) And of any of the ditches to which you’ve testified here to today, have any of them eliminated as many members or persons entitled to withdraw water as has the Methow Valley Irrigation District?

A. I would say those excluded members do represent a larger volume of water and are a greater number of people than the other ditches.

Q. And do you know the approximate amount of money, both public and private, that has been expended by the Methow Valley Irrigation District or on its behalf in connection with the lateral improvement program?

A. Yes.

Q. And what would that figure be?

A. My recollection, it was 6 – or \$700,000.

Q. The things I have just asked you about I believe fall within the custom that you testified to of districts or canals in the Methow Valley attempting to make improvements to conserve water and upgrade their systems; is that correct?

A. Yes.

Q. Thank you.”

(AR Vol. III, p. 583, ll. 11-16; p. 584, ll. 2-25; and p. 585, ll. 1-2)

For the PCHB to totally ignore the fact that the systems cited by Mr. Bernheisel were not related to MVID’s system, that Ecology did not rely on that information, and to ignore Mr. Barwin’s testimony that MVID was operating consistent with and better than the **customary practices to conserve water** in the area demonstrates arbitrary and capricious action by the PCHB in FOF 36 (CP 551). (AR Vol. III, p. 584, ll. 20-25, p. 585, ll. 1-2)

FOF 37 (CP 551-552): Finding 37 is erroneous. The only “...literature in the field” from which “...Mr. Haller concluded that further action was required is the same literature utilized by Ecology to arrive at the combined 53 cfs figure, limitation figure, in its First Order 3950 (CP 234-235), i.e. Klohn Leonoff, Montgomery, and the USGS and USBR reports. That field literature does nothing to alter or discredit the information relied upon in the First Order. The quote that a “...revised understanding of the current canal system,...” leads to lower diversion limits is incongruous. Ecology had the same information for its First Order in terms of MVID’s conveyance efficiency. However, since MVID’s compliance with the First Order, the only change was that its conveyance efficiency rose from 31 percent to 41 percent, a good thing. If Ecology wants to change the ground rules, it is required to first give notice to MVID and work with it in terms of alternatives to achieve the new rules. RCW 90.03.605(1)(b). The quote in FOF 37 from AR Ex. R-1 that, “...This degree of conveyance loss remains significantly higher than those reported in the literature....” is not supported by the evidence. The PCHB in FOF 37 does not relate or address how the literature relates to MVID’s conveyance system. Regardless of literature, all the Tables 1, 3 and 4 in AR Ex. R-1 (CP 384, 386, and 387) establish MVID with the lowest seepage rate per mile in the Methow Valley and with the highest conveyance efficiency, except for

one other ditch in the Methow Valley. The PCHB's citing Mr. Haller's conclusionary statement in his report to the exclusion of the "field" facts favorable to MVID, Tables 1-5 (CP 384-388), in his AR Ex. R-1 report was arbitrary and capricious and evidences a bias against MVID.

FOF 38 (CP 552): Development of new construction alternatives as a method of establishing waste required Ecology to follow RCW 90.03.605(1)(b). To allow a single individual to establish, a standard non-wasteful conveyance efficiency figure for earthen canal delivery systems does not square with the law or due process of law. Will the same "performance standard" of 54 percent (FOF 41, CP 553-554) apply to any other conveyance system in the Methow Valley or the Central Washington region? If not, why not? Why are the other 13 conveyance systems cited in the studies not being held to the same performance standard?

FOF 41 (CP 553-554): If Ecology wants to establish a "performance standard," it will have to follow administrative law requirements including hearings and formal adoption of guidelines applicable to all irrigation entities of similar kind. Ecology has not been given authority by the legislature to adopt "performance standards," for irrigation districts. A single employee's methodology of what he or she believes is an acceptable conveyance efficiency is not a standard with the force of law. Unless defined or unless parameters are established by statute or

administrative rule, a single staff engineer's "performance standard" is without force of law and is arbitrary and capricious. It is subject to change for the next irrigation district or by the next Ecology employee for the same irrigation district.

c. Funding for "Targeted" Area of Improvement Without Which MVID Cannot Achieve Specified "Performance Standard" Not Available

We begin with the given that 11 cfs for the West Canal could only be achieved if the "template," Alternative No. 5 (FOF 46, CP 557), could be entirely "grant-funded" (AR Vol. I., p. 318, ll. 12-17). Ecology's Second order rises or falls on whether such funding was "available" to MVID. A fair-minded person, after considering the whole record, would not conclude that public or private funding was available to MVID to achieve the new performance standard, let alone construction of Alternative No. 5.

In response to Board member Lynch's question about what funding was contemplated by Mr. Haller for implementation of his Alternative No. 5, Mr. Haller responded that all, or most all, would have to come from public grants:

"Q. So your recommendation is primarily based upon anticipating that the District would be able to attain – to obtain all or substantially all public funding to do the capital upgrades.

A. Yes. If you look at the initial package that was put together, it was entirely grant funding...."

(AR Vol. II, p. 318, ll. 12-17)

The problem with Mr. Haller's answer is that it did not address the question. Neither Mr. Haller nor anybody else at Ecology made any inquiry or "investigation" as to whether "...the District would be able to attain...all or substantially all public funding...." In fact, there was no grant funding "available" to MVID in the amounts necessary to achieve a rehab akin to template Alternative No. 5. That is why MVID had to turn to the Washington State legislature as a last resort.

FOF 39 (CP 553): Mr. Haller did not know what public funding was available. He just assumed public grant money would be available. Mr. Haller did not check with Ray Newkirk, Ecology's project manager in charge of state funding sources for MVID projects, as to whether funding was available for his template. (AR Vol. II, p. 464, ll. 23-25 through p. 466)

Mr. Ray Newkirk had been with the Department since 1980. His job duties at the time in question involved administering the state's Referendum 38 program, which provides financial assistance to irrigation districts around the state to upgrade their distribution systems (AR Vol. II, p. 442; p. 443, ll. 1-6). At the time of the Second PCHB hearing (*MVID 2*), Mr. Newkirk was Ecology's program manager for the MVID project (AR Vol. II, p. 448, ll. 17-24). As project manager in coordinating funding, it was Mr. Newkirk's

job to write the grant agreements for public works contracts (AR Vol. II, p. 450, ll. 1-19).

From the time the Montgomery Preferred Plan was unable to be brought to fruition until the hearing in *MVID 2*, Mr. Newkirk continued to attend virtually every monthly Board meeting of MVID. He considered himself an ex-officio member of MVID's Board (AR Vol. II, p. 459, ll. 9-18; p. 460, ll. 1-18) (AR Vol. III, p. 578, ll. 6-12). At no time from the year 2000 until the hearing in December of 2004 did Mr. Newkirk ever offer financial assistance through Ecology to MVID for a "targeted" rehab project (AR Vol. III, p. 759, ll. 21-25; p. 760, ll. 1-14). To the contrary, he always advised MVID at the Board meetings that there was no Referendum 38 money available to the Methow Valley Irrigation District (AR Vol. III, p. 759, ll. 21-25; p. 760, ll. 1-14).

Mr. Newkirk, on cross-examination, admitted that AR Ex. R-27, being the purported grant of \$150,000, wasn't even in existence at the time Ecology issued its Second Order in 2003. (AR Vol. II, p. 457, ll. 13-18). AR Ex. R-27 relates to the District's request to Ecology for assistance with funding in accordance with its own efforts to line and improve the lower seven miles of the West Side Canal. Mr. Newkirk's letter or document dated November 23, 2004, approving the State's participation at the level of \$150,000 was the maximum that it was able to offer for funding from

Referendum 38 funds or other sources towards the total project cost of \$1,000,000. In acknowledging why the District had not signed the contract document, Mr. Newkirk acknowledged that the District did not have, either itself, or through other funding sources, the other \$700,000 cost share it would have to come up with in order to obtain that grant. This evidence directly contradicts FOF 48 (CP 557-558) to the effect that other Referendum 38 money could be reallocated to canal improvements. (AR Vol. II, p. 457, ll. 24-25; p. 458) Mr. Newkirk acknowledges one of the reasons why the District had not responded to his letter of November 23rd was not only the fact that MVID did not have the matching money, but that the Board's regularly scheduled meeting had not occurred since the issuance of his letter and before the PCHB *MVID 2* hearing.

Mr. Newkirk acknowledged that there was no money available to MVID for any one of Mr. Haller's five alternatives (AR Vol. II, p. 461, ll. 3-18; p. 464, ll. 23-25; p. 465, ll. 1-2; p. 466).

Mr. Newkirk acknowledged that he did not work on any of Mr. Haller's Alternatives 1-5 in terms of trying to assist MVID to obtain funding for them (AR Vol. II, p. 467, ll. 16-24).

Most telling, Mr. Newkirk was not even familiar with Mr. Haller's five alternatives when the Second Order issued (AR Vol. II, p. 465, ll. 17-19).

Mr. Newkirk acknowledged that neither Mr. Barwin nor any others in authority checked with him about the propriety of issuing the Second Order in terms of funding “availability.” (AR Vol. II, p. 464, ll. 13-22)

Even though Mr. Newkirk sees his only responsibility as the Montgomery Project, which was terminated in 1998 (AR Vol. II, p. 469, ll. 19-25; p. 470, ll. 1-5), he continued to attend almost every board. Mr. Barwin admitted on cross-examination that even though Mr. Newkirk attends every MVID board meeting there were no Referendum 38 projects underway. (AR Vol. III, p. 578; p. 579, ll. 18). However, because of Mr. Newkirk’s attendance at MVID board meetings he was able to testify to MVID’s ongoing search for rehab funding on its own, including putting together a program with the BPA for new fish screens, as well as pursuing other funding resources:

“Q. I guess my question was intended to go as to the District put that funding together in coordination with the BPA, correct?

A. Correct.

Q. And it is true that the District with respect to the funds that have been available has continued to make efforts to employ rehab efforts as money has become available, correct?

A. Correct.”

(AR Vol. II, p. 471, ll. 19-25; p. 472, ll. 1-2)

In spite of Mr. Phillip's, an Ecology administrator, promise that Ecology would support continuation of the open canal delivery system, with the \$2,250,000 remaining following termination of the Montgomery Plan in the late 1990's, Mr. Newkirk acknowledged that the funds were diverted to other projects. This occurred without MVID's knowledge. In this regard, the State failed its duty to deal scrupulously with its citizens. *Schafer v. State, Id.* MVID kept its part of the bargain by approving membership exclusions severely limiting its assessment base necessary for ongoing O&M operations, let alone rehab efforts. Ecology got what it wanted, but then diverted the approximate \$2,250,000 remaining funding promised for upgrading the open canals to other projects leaving MVID in a "catch 22."

Mr. Haller knowing the \$2,250,000 had been diverted to other projects still considered it was available to MVID for his Alternative No. 5 project:

"A. I guess my point is the funding program still exists. The funding has been allocated elsewhere, but the funding program exists and fisheries projects are currently being funded to address these issues.

Q. We'll take those one at a time. Let's just stick with alternative number 1. I just want to make sure the Board isn't misled here in terms of funding availability. The funding that was originally allocated for preferred plan A (Montgomery Plan) is no longer available, that particular funding, is it?

A. It has been allocated to other projects.

Q. And isn't that the same thing as saying it's no longer available?

A. I don't believe it is."

(AR Vol. I, p. 169, ll. 20-25; p. 170, ll. 1-8)

Mr. Newkirk was not permitted to answer additional questions concerning what happened to the promised \$2,250,000 following a colloquy between MVID's counsel and the Judge. (AR Vol. II, p. 472, ll. 12-25; p. 473)

Again, an item which MVID believes is critical to the failure of Ecology to prove available funding and the error of PCHB in Finding of Facts 46-49 (CP 557-559) that funding "could be obtained" was Mr. Newkirk's testimony that as of December 13, 2004, he did not know whether or not there was any funding available to the District. (AR Vol. II, pp. 474-476):

"Q. I'm not asking if they applied for it. I am asking was there any other funding available to the District on December 19th, 2003, at the time this Order issued?

A. I don't know."

(AR Vol. II, p. 475, ll. 13-17)

It was Mr. Newkirk's responsibility to know. He was assigned by Ecology as MVID's project manager and was the man with knowledge about funding availability.

At the same time, Mr. Newkirk admitted he had not offered any funding assistance through other funding sources (AR Vol. II, p. 478, ll. 1-15, and AR Vol. II, p. 495, ll. 18-25 through p. 498, ll. 1-13).

Before issuing the Order in question Mr. Barwin never discussed with Ray Newkirk, anything about funding in connection with Mr. Haller's alternatives: (AR Vol. II, p. 464-465)

Mr. Barwin when asked if MVID had any private funds for matching money responded, "I am not aware." (AR Vol. III, p. 576, ll. 20-23)

It is clear from the record that the facts do not support FOF 46-49 (CP 557-558). Ecology's unwillingness to "investigate" or even have discussions or coordination between its Yakima office, where the new rehab proposals were being designed, and Mr. Newkirk its funding project manager for MVID, to know whether funding was even a possibility, let alone "available," undercuts any finding that funding was "available" to MVID. It is noteworthy that the PCHB in FOF 46-48 (CP 557-558) avoids any reference to specific funding sources for Alternatives 1-5 being available. Instead, FOF 46-48 (CP 557-558) are couched in vague, and more often than not, conclusory terms such as: "...funding is offered through...different sources." (FOF 46, CP 557). The term "available" is defined in Black's Law Dictionary, Fifth Edition, as "suitable, usable, accessible, obtainable, present or ready for immediate use." The evidence establishes that, apart from the fact that funding agencies exist, there was no evidence funding was "available", to MVID in the amounts necessary to accomplish any one of

Ecology's five alternatives or any other project to bring MVID'S diversion needs within the parameters of the Second Order.

The testimony establishes that the District was assessing its members at the high end of assessment rates and yet it still had to borrow to pursue the drafting of plans for priority rehab projects. The evidence establishes that the District had insufficient matching monies to match any possible funding to address seepage losses. (AR Vol. II, p. 475, ll. 13-25; p. 476, l. 1)

FOF 46 (CP 557): Finding 46 is erroneous. Mr. Baldi, called by Ecology, testified he worked for the Washington Environmental Council (AR Vol. I, p. 196, ll. 1-4). Mr. Baldi is the policy director working with Ecology on agricultural water conservation issues before the legislature (AR Vol. I, p. 197, ll. 2-12). Mr. Baldi testified at length, pp. 197-202, as to a totally unrelated voluntary program called the Manastach Restoration Project designed to restore fish passage to the Manastach Creek. Even though this was a voluntary program supported by Ecology and the Environmental Council, it took three years working "across both aisles" to actually obtain funding in the capital budget (AR Vol. I, p. 201, ll. 1-18). No testimony was elicited from Mr. Baldi regarding the Council's support for any MVID project funding. In cross-examination Mr. Baldi begrudgingly admitted that, with his knowledge of the environmental communities interest in agricultural projects in the Methow Valley, he

knew that there was no support from the environmental community for any MVID rehab project money.

“Q. Mr. Baldi, my question was is the environmental community at the present time with your ear to it supporting any rehabilitation project money for the Methow Valley Irrigation District?

A. Not to my knowledge.”

(AR Vol. I, p. 207, ll. 4-8)

Mr. Baldi also acknowledged that no one from Ecology had approached the Council as to support for funding for rehab projects for the MVID (AR Vol. I, p. 207, ll. 4-16; p. 213, l. 25; p. 214, ll. 1-8).

The most surprising part of his testimony was that the irrigation in the Manastach project utilized a variety of irrigation methods including some **flood irrigation** as well as sprinkler (AR Vol. I, p. 208, ll. 9-16). Mr. Haller, it should be noted, did not include the Manastach system conveyance efficiencies in his AR Ex. R-33 used to develop his “average” conveyance efficiency “performance standard.” (FOF 41, CP 553-554).

Mr. Baldi also noted that as part of the Manastach project Ecology was involved in the study of the interaction between using surface water to augment the aquifer in order to hydrate the creek in the late summer and fall (AR Vol. I, p. 209, ll. 24-25; p. 210, ll. 1-9). This is an important aspect of any order attempting to constrict conveyance as noted by Dr. Wattenburger.

Before Ecology effects another Twin Lakes dewatering debacle, the matter of the dewatering the highest population density area in of the Methow Valley needs to be addressed by way of an environmental impact review, which did not accompany Ecology's Second Order DE 5904 (CP 276-279). It is particularly acute in the MVID operating area as the communities in that area have developed and do rely, in part, on MVID supplementing the area aquifer, through canal seepage, for over 90 years. It was error for the PCHB to discount and limit MVID's evidence concerning the beneficial effects of capturing canal seepage water for storage in the aquifer during the spring freshet runoff, which nature later release into the Methow River later in the year during a critical fish passage time period.

FOF 47 (CP 557): Finding 47 obscures the fact that no substantial evidence existed as to the availability of public or private funding for a million dollar project that would allow MVID to limit its water usage consistent with Ecology's Second Order. Evidence of MVID's efforts to obtain funding proves that MVID wants to and continues to move ahead with rehabilitation efforts, as funding becomes available (AR Vol. III, pp. 757-760).

FOF 48 (CP 557-558): The finding that some Referendum 38 funds could be moved to canal improvements, which is refuted in the record, supports nothing about funding availability for a project the size necessary to

reduce MVID's combined diversion requirements to 31 cfs. Mr. Newkirk, testified that any Referendum 38 money that might become available is nowhere near enough to allow MVID to proceed with any of Mr. Haller's alternatives let alone Alternative No. 5. (AR Vol. II, p. 465, ll. 17-25; and p. 466)

The one agency specifically not supporting MVID's efforts in obtaining funding for improvements for the West Canal prior to issuance of the Second Order was Ecology (AR Vol. III, pp. 607, ll. 10-24, p. 608, ll. 10-25; p. 609, ll. 1-6; p. 614, ll. 21-25; p. 615, l. 1 & 8-13; p. 647, ll. 20-25; p. 648, ll. 1-24).

In terms of MVID's assessment rate charged to its members as compared with other irrigation districts in the vicinity, Mr. Newkirk acknowledged that MVID's assessment rate was on the high side. (AR Vol. II, p. 450, ll. 20-25; p. 451, ll. 1-10) Both Mr. Newkirk and Mr. Barwin acknowledge MVID's efforts within its limited "available" resources to move ahead with water conservation improvements on its own. Ecology's evidence regarding available funding such as "I assumed" and "I did not know" and "I did not check does not substitute for substantial evidence. Without funding being available, Ecology's Second Order is invalid.

d. MVID Not Responsible for Barkley Ditch

FOF 49 (CP 558): The Finding is accurate to the extent that the MVID was to develop a management plan "...in cooperation with the Barkley Irrigation District Company" to monitor Barkley Ditch spills into MVID's East Canal. However, the only testimony and the only evidence is that Barkley Irrigation Company would not cooperate with the MVID in developing a management plan. (AR Vol. III, p. 600, ll. 3-11 and ll. 16-25; p. 601, ll. 1-8) The assertion that a one-time measurement by the USBR of the Barkley spill on a given date, late in the year, measuring 13.3 cfs, as being "not insignificant" is unfounded. A one-time spill without any facts as to a specific time of year, number of water users in the Barkley using water or determining what water was needed below the Barkley Spill to meet Barkley water users' needs, who take water out of MVID's East Canal below the spill (light green shaded area on map, (AR Ex. R-18, Appendix "1", A-1) renders the Finding erroneous. For all anybody knows, the 13.3 cfs being spilled into the MVID East Canal, on the day it was measured, may well have been necessary in conjunction with whatever the Barkley water users needs were below the Barkley spill.

Whether Barkley's spills into MVID's East Side Canal are significant would require a competent study over time taking into consideration the time of year and the amounts being spilled and the demands and rights of

Barkley's downstream users. MVID has no power or control over operation of the Barkley Irrigation District. On the other hand, MVID does have a contractual obligation to deliver water to Barkley water users below the spill out of MVID's East Side Canal (FOF VIII, CP 241). The PCHB places no obligation upon Barkley to monitor or manage its operations so as to regulate the amount of water it spills into MVID's East Side Ditch. Instead, Ecology without legal authority imposes an obligation on MVID to pay for, install, monitor, and regulate its own diversion one and one-half (1 ½) miles upstream to somehow account for Barkley's spills into MVID's canal. The *MVID I* directive was that Barkley was to cooperate with MVID in developing a management plan. The evidence established that Barkley chose not to cooperate rendering any obligation on MVID from a legal or administrative standpoint void. (AR Vol. III, p. 600, ll. 3-25; p. 601, ll. 1-23) Ecology's order to force MVID to carry out Barkley's obligations is unlawful.

FOF 50-51 (CP 559): The PCHB's FOF 50 and 51, literally, ignore MVID's inability to obtain cooperation from the Barkley Ditch Company as being a problem. Such findings are arbitrary and capricious and contrary to Ecology's Second Order requiring MVID to develop a management plan "in cooperation" with the Barkley Irrigation Company.

FOF 51 asserting that Ecology's witness established a method for measurement cannot and does not substitute for the requirement that MVID establish a plan in cooperation with the Barkley Ditch. The cooperation required did not happen.

FOF 52 (CP 559): Finding of Fact No. 52 is erroneous in the statement that Barkley water could be accounted for by adjusting the diversions at the head gate. The PCHB without any testimony of Ecology on the ground observations or understanding of the operation of the MVID system, vis a vis Barkley, dismissed MVID's proof that a four hour delay would occur between the time of any adjustment at MVID's head gate and the time that adjustment would have any effect at the Barkley spill, which spill amount changes from minute to minute. The delay would render any such adjustment futile and meaningless. Substantial evidence does not support FOF 52. (AR Vol. III, pp. 604-607, ll. 1-8)

With respect to FOF 52, there was no evidence of "pattern of spills from the Barkley Ditch," The PCHB, because somebody said an adjustment strategy was possible, assumed, without supporting evidence, that it could be done. Mr. Haller, when questioned about how it could be accomplished, couldn't answer other than to say "they do it in my irrigation district". Mr. Haller laid no foundation as to how his irrigation district relates to the Methow Valley Irrigation District in terms of open canal vs. piped or lined

canal, length of delivery system, any spills from other ditches or delivery systems being added to the conveyance water, etc. Be that as it may there was no evidence to support a Finding of Fact that a "...meaningful diversion adjustment strategy" could be devised without the cooperation of Barkley Ditch, let alone if such a meaningful strategy were devised, how it would be operated. Again, Ecology's compliance with RCW 90.03.605(1)(b) is necessary before such an order can be sustained.

VII. CONCLUSION

"Under RCW 34.05.570(3), a reviewing court may reverse an agency order if (1) the order is based on an error of law, (2) the order is based on findings unsupported by substantial evidence, (3) the order is arbitrary and capricious, (4) the order violates the constitution, (5) the order is beyond statutory authority, or (6) the agency engaged in an unlawful procedure or decision making process or failed to follow a prescribed procedure."

(Decertification of Martin, 154 Wn.App. 252 (Dec. 2009))

MVID respectfully asserts that the PCHB Order in MVID affirming Ecology's Second Order should be reversed thereby reinstating Order 3950 (CP 234-235) in that:

1. MVID's constitutional right of due process of law was manifestly violated by not receiving notice adequate to have allowed MVID to prepare a response addressing the basis for Ecology's Order DE 5904 (CP 276-279) rendering the order void.

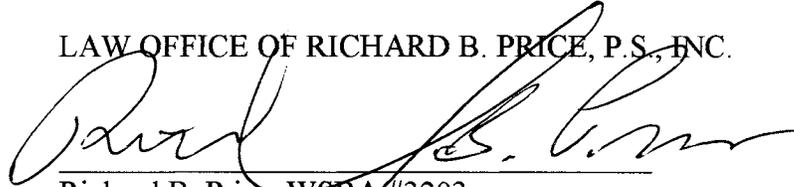
2. Ecology failed to abide by the statutory prerequisite of RCW 90.03.605(1)(b) before the order issued rendering the order invalid and of no force of law.
3. Considering the record as a whole, a fair-minded person would not be convinced that MVID, operating with the lowest seepage per mile and the highest conveyance efficiency of all but one other comparable open canal irrigation water delivery system in the vicinity, is wasting water.

In addition, the development of new information proving that the template supporting the 31 combined cfs diversion limitation figure in the Order in question was not able to be achieved, by virtue of under projected costs and cost overruns beyond MVID's control, necessarily requires reconsideration in light of FOF 26 that "the MVID would have to make capital improvements to targeted aspects of its irrigation system to achieve the final diversion limits" (CP 546). Without the targeted capital improvement coming to fruition, MVID, according to PCHB FOF 26 (CP 546) and the evidence, cannot operate at the 31-combined cfs limitation. MVID's Motion for Reconsideration should have been granted. Ecology's First Order should be reinstated while the parties move forward with projects as funding becomes available to MVID.

MVID respectfully requests the Court to declare Ecology's Second Order void and in the alternative remand to the PCHB to reconsider its decision in light of the new information not previously available.

RESPECTFULLY SUBMITTED this 10th day of June 2010.

LAW OFFICE OF RICHARD B. PRICE, P.S., INC.

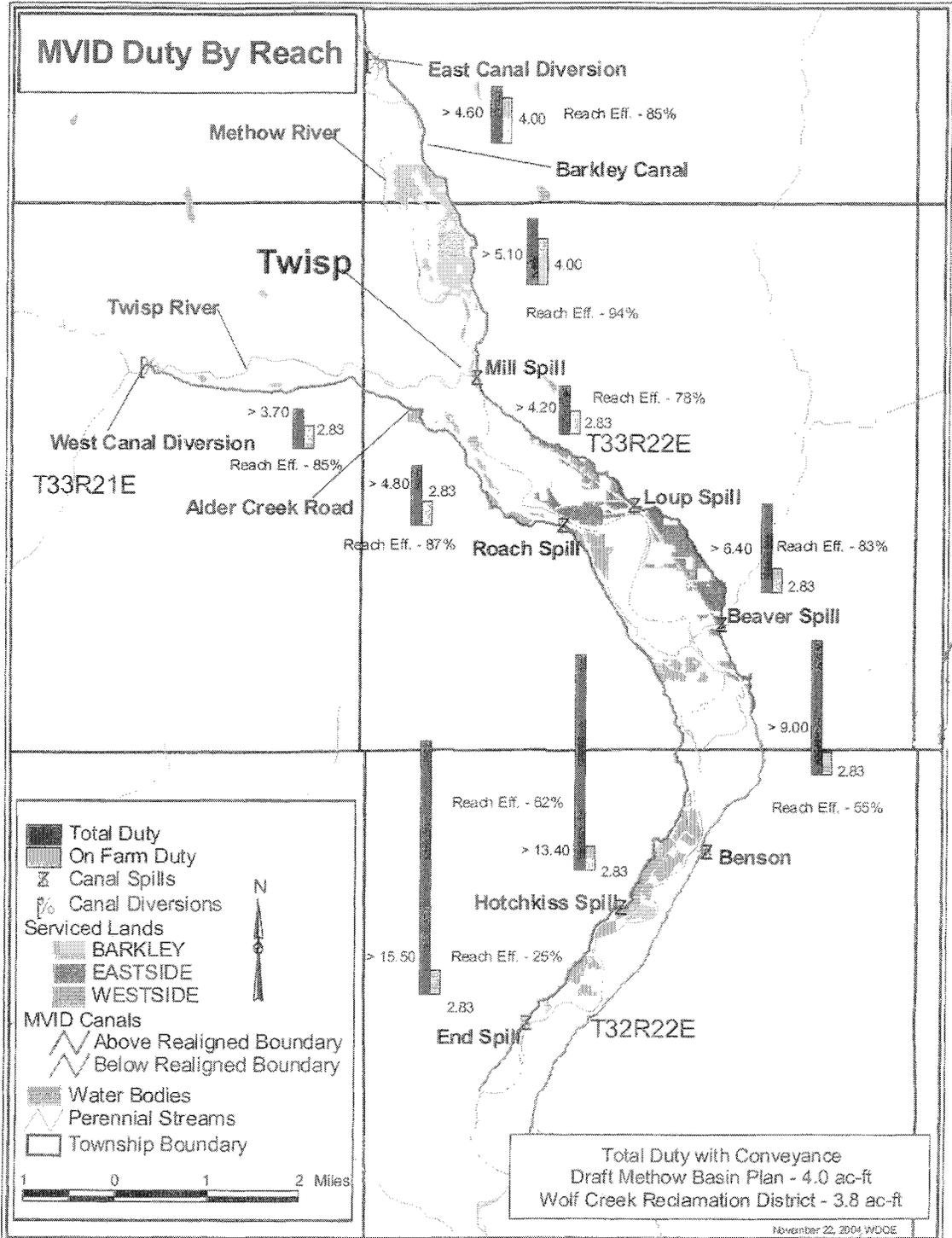
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Richard B. Price, WSB#3203
Attorney for Petitioner/Appellant

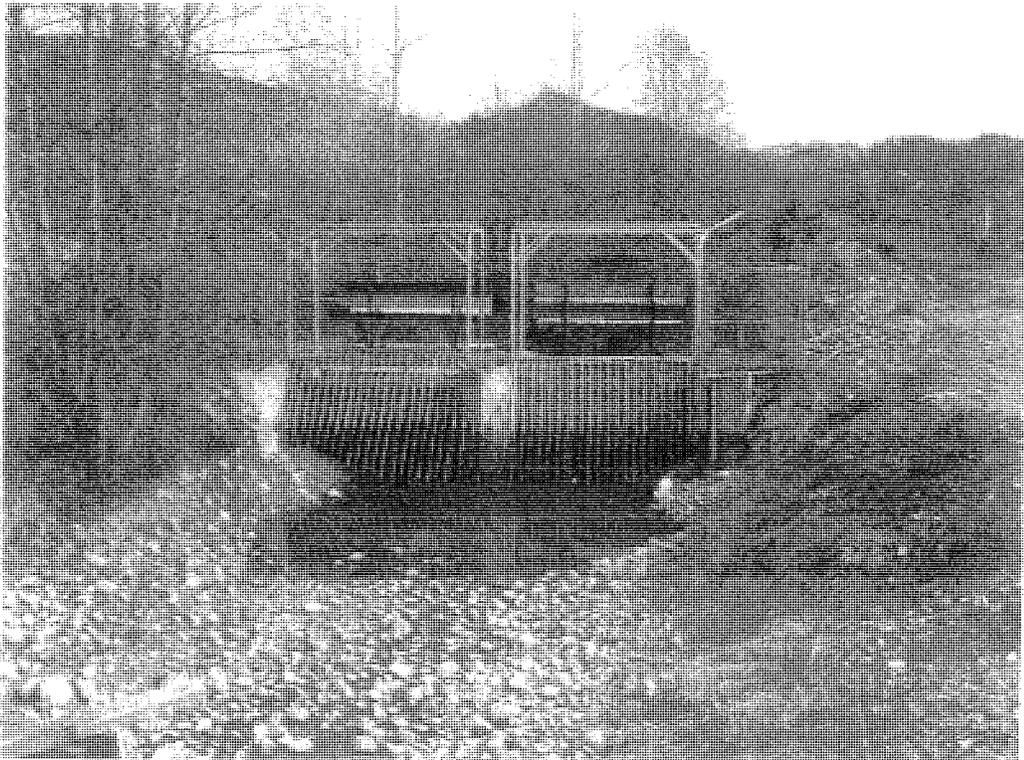
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VII. APPENDIX

APPENDIX "1"

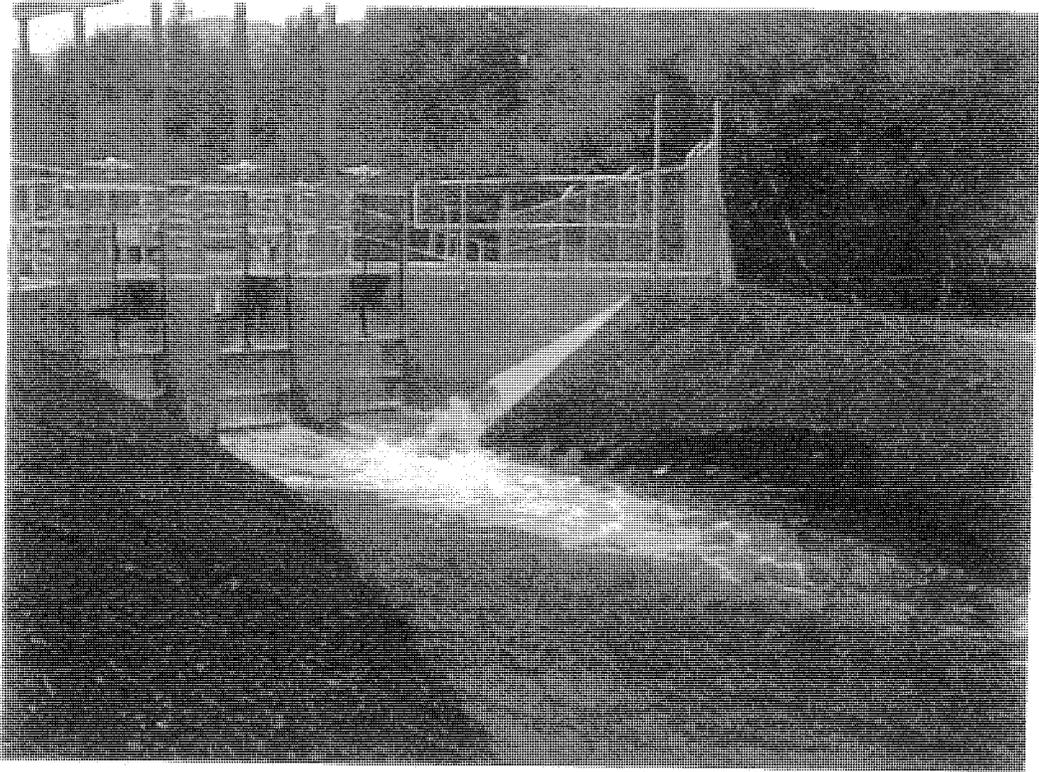


APPENDIX "2"



MVID East Old Screens

(CP39)



MVID East After New Screens

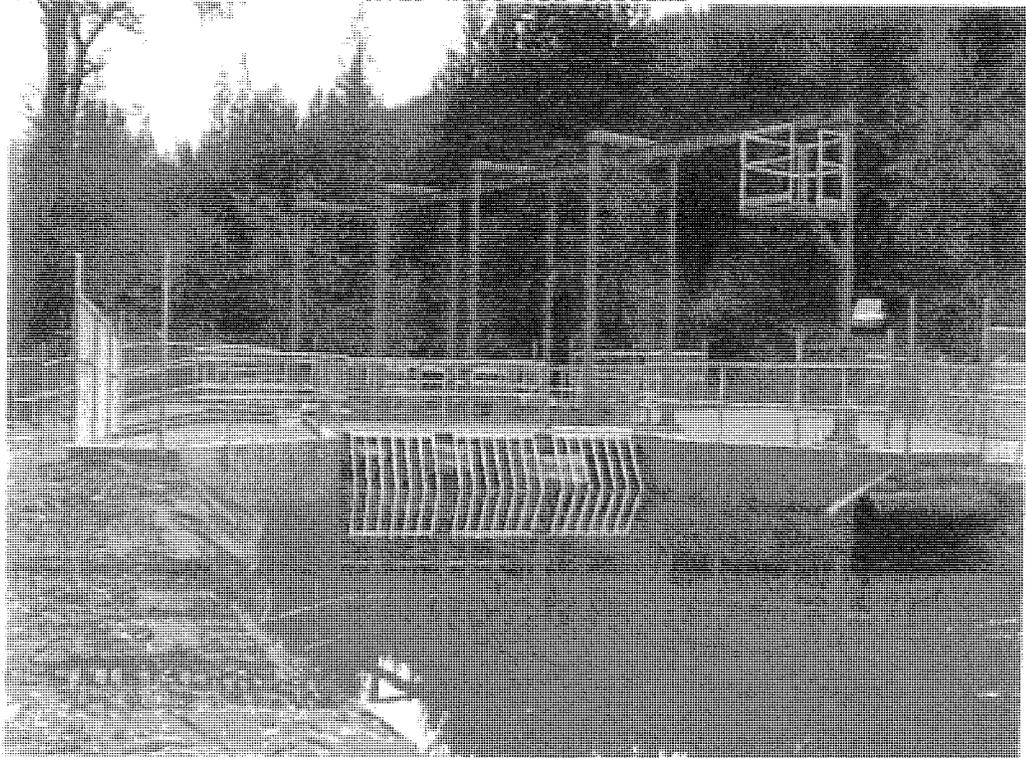


(CP40)

A-3



MVID West Old Screens



MVID West After New Screens

(CP41)

FILED

JUN 11 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I mailed a copy of the foregoing to the undersigned by placing the same in a postage prepaid envelope and depositing in the U.S.

Mail to:

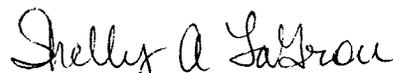
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Dated at Omak, Washington, this 10th day of June, 2010.



Shelly A. LaGrou