

**FILED**

SEP 29 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 286941

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

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METHOW VALLEY IRRIGATION DISTRICT,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

and

OKANOGAN WILDERNESS LEAGUE,

Intervenor.

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**RESPONDENT BRIEF OF STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY**

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## I. INTRODUCTION

Washington's Water Code, RCW 90.03, requires the Department of Ecology (Ecology) to reduce wasteful water use practices to the maximum extent practicable. For decades, the Methow Valley Irrigation District (MVID or District) has operated a significantly wasteful water delivery system in the Methow River valley. Carrying out the Water Code's mandate, in 2003 Ecology issued an administrative order (2003 Order) to MVID requiring the District to cease its wasteful practices and reduce its diversion of water from the Twisp and Methow Rivers.

The Pollution Control Hearings Board (PCHB) affirmed Ecology's order, concluding that Ecology had the legal authority to require MVID to reduce its wasteful practices and finding that the diversion limits established in the 2003 Order were supported by the evidence presented. The Okanogan County Superior Court affirmed the PCHB's decision. Because the record contains substantial evidence establishing that MVID's system is wasteful, Ecology appropriately issued the 2003 Order requiring MVID to cease its waste of water. MVID's arguments regarding RCW 90.03.605 and due process are untimely and without merit. The Court should therefore affirm the PCHB and superior court decisions upholding Ecology's 2003 Order issued to MVID.

## II. COUNTER STATEMENT OF ISSUES

1. Whether MVID's due process claims were properly raised below and thereby preserved for appeal? If so, are these claims barred by collateral estoppel as a result of the decisions in *MVID I*? If not, did the procedures applied in this case violate due process?

2. Whether MVID's claims under RCW 90.03.605 were properly raised below and thereby preserved for appeal? If so, whether Ecology violated RCW 90.03.605 when issuing the 2003 Order to MVID?

3. Whether the superior court's denial of MVID's motion for reconsideration was an abuse of discretion?

4. Whether the PCHB's decision affirming the 2003 Order is supported by substantial evidence in the record?

## III. COUNTER STATEMENT OF THE CASE

### A. History Between MVID and Ecology.

Because the 2003 Order was the product of a remand by the PCHB of an earlier Ecology order to MVID, a discussion of the prior order and resulting litigation is necessary.

Litigation regarding MVID's wasteful water practices began in 2002 with Ecology's issuance of an administrative order (2002 Order). The 2002 Order required MVID to cease its wasteful practices and limited the District's diversion of water from the Twisp River into its West Canal

to 29 cubic feet per second (cfs) and from the Methow River into its East Canal to 24 cfs. MVID appealed the 2002 Order to the PCHB challenging the limits placed on its water diversions.<sup>1</sup> CP 260 (Finding of Fact (FF) XLVI). Okanogan Wilderness League (OWL) also appealed the 2002 Order asserting that Ecology did not go far enough to stop MVID's waste of water. CP 260 (FF XLVII).

Following a three day hearing in May 2003, the PCHB issued its Findings of Fact, Conclusions of Law and Order. *Methow Valley Irrigation Dist. v. Dep't of Ecology*, PCHB No. 02-071 (Aug. 20, 2003) (*MVID I*). CP 237-74. MVID appealed the PCHB's decision to the Okanogan County Superior Court. On May 20, 2005, Judge Burchard issued his Memorandum Decision on Appeal affirming the PCHB's decision in full. CP 743-785. MVID appealed the matter to this Court but subsequently dismissed its appeal. *Methow Valley Irrigation Dist. v. Dep't of Ecology*, No. 242285 (Wash. Ct. App., Div. III) (Sept. 12, 2005).

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<sup>1</sup> Citations to the Administrative Record will appear as AR, followed by the Volume Number (Vol.), Document Number (Doc.), and page number. Citations to exhibits will appear as AR Ex., followed by the exhibit number. Citations to the PCHB hearing transcript will appear as TR page number:line number (witness name). Citations to the verbatim report of proceedings from the superior court will appear as VRP page number:line number.

**B. Findings and Conclusions from *MVID I*.**

The following facts and conclusions from *MVID I*, under the doctrine of collateral estoppel, are conclusive in this appeal.<sup>2</sup>

**1. *MVID I* Factual Findings.**

MVID serves lands in the Methow River valley between the towns of Twisp and Carleton in northeastern Washington. CP 238 (FF I). The District's irrigation works, constructed in the early 1900s, consist of two largely unlined earthen canals: the West Canal, which diverts water from the Twisp River, and the East Canal, which diverts water from the Methow River. CP 239 (FF II). MVID holds a surface water right claim filed with Ecology in 1971, for the diversion of 120 cfs from the Twisp River for irrigation of 705 acres of land. CP 239 (FF IV). MVID also holds a surface water claim from 1936, authorizing the diversion of 150 cfs of water from the Methow River for irrigation of 1,366.6 acres of land. CP 239-40 (FF V).

In 1921, MVID entered into an agreement with the Barkley Irrigation Company (Barkley) under which MVID was permitted to use

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<sup>2</sup> Collateral estoppel prevents the re-litigation of issues between identical parties, even though the cause of action in the subsequent suit is a different one. *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). The purpose of the doctrine is "to promote judicial economy, and to prevent harassment of and inconvenience to litigants." *Malland v. Dep't of Ret. Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985). Collateral estoppel applies to judgments rendered in quasi-judicial proceedings. *Stevens v. Centralia*, 86 Wn. App. 145, 157, 936 P.2d 1141 (1997). As the PCHB ruled in a decision not challenged by MVID, collateral estoppel applies and precludes MVID from relitigating claims it raised in *MVID I*. See AR Vol. 3, Doc. 25.

Barkley's existing irrigation canal in exchange for delivering water through the canal to Barkley water users. CP 241 (FF VIII). Water to irrigate the Barkley lands is diverted from the Methow River into the East Canal. CP 257-58 (FF XLI). The Barkley lands are served by an independent water right held by Barkley and those lands are not included in the water rights held by MVID. CP 241 (FF VIII).

Over the years, MVID failed to adequately maintain its canal system and many portions of the distribution system fell into disrepair, resulting in numerous District members at the ends of the canals not receiving water delivery. CP 241-42 (FF IX). An evaluation of the system by the United States Department of Agriculture Soil Conservation Service in 1975 characterized the West Canal as "near failure" and observed that the East Canal was constructed in "sandy areas where seepage is high and banks are unstable." Although the report suggested that the open canal system be replaced with a more efficient pressurized pump system, MVID took no action to modify its existing canal system. *Id.*

As problems persisted, MVID began exploring possible courses of action and entered into discussions with Ecology regarding ways to address the inefficiencies in the District's system. CP 242 (FF X). When informal actions failed to produce a change in MVID's operations,

Ecology issued MVID an administrative order in 1988. *Id.* Under the 1988 order, MVID was required to either reduce its diversion of water by 25 percent or perform an engineering assessment of its irrigation system. *Id.* MVID elected to perform the engineering assessment and hired Klohn Leonoff Consulting Engineers (Klohn Leonoff) to conduct the assessment. CP 242-43 (FF XI).

The Klohn Leonoff assessment, completed in 1990, contained a comprehensive review of MVID and its facilities. *Id.* The assessment found that the physical condition of MVID's irrigation system was poor, the canals had high seepage losses, and many of the turnout structures leaked when turned off. *Id.* Ecology responded by notifying MVID that the conveyance efficiencies found in the assessment were an indication of wasteful water management practices. CP 243 (FF XII). Ecology further stated that "waste is not a beneficial use of water and therefore no water right exists for the amount inefficiently managed." *Id.* MVID was encouraged to implement system improvements identified in the Klohn Leonoff assessment, which could be accomplished without undue hardship on MVID or its members. *Id.*

Although MVID initially seemed receptive to improving its system, the District failed to implement any of the water saving measures outlined in the Klohn Leonoff assessment. CP 244 (FF XIV). In 1991,

the Yakama Nation filed suit in Thurston County Superior Court against Ecology and MVID seeking to compel Ecology to enforce the state Water Code and to enjoin MVID's wasteful use of water. *Id.* Following the filing of the lawsuit, MVID began making efforts to change its system and began eliminating members at the end of the canals from the District. *Id.* The Yakama Nation dismissed its lawsuit in 1994. *Id.*

MVID and Ecology then contracted with Montgomery Water Group to conduct a further study of the District and develop long-term alternatives for improving the water delivery system. CP 245 (FF XV). The resulting report (Montgomery Report), analyzed MVID's irrigation water demand, the acres included on MVID's assessment roles, the acres within the MVID actually irrigated, the efficiency of MVID's water delivery system, and the efficiency of the field delivery systems. CP 245-47 (FF XVII, XIX). The Montgomery Report found that MVID's overall conveyance efficiency was 20 percent, with 80 percent of the water being lost to conveyance and field application inefficiencies. CP 248 (FF XXI).

The Montgomery Report concluded that substantial modifications needed to be made to MVID's system to improve its efficiency and proposed four alternatives to MVID. CP 249 (FF XXIV). The preferred alternative, which MVID's Board of Directors (MVID Board) agreed to implement, eliminated users from the lower ends of the canals and

converted the surface water diversions to a pressurized pipe system fed by groundwater wells. *Id.* By reducing the total acres in the District and eliminating conveyance losses, the preferred alternative would have reduced peak demand from the Twisp and Methow Rivers to 17.6 cfs. *Id.*

The Bonneville Power Administration, Ecology, and Washington Department of Fish and Wildlife offered funding for implementation of the preferred alternative, with the public agencies committing to funding the entire project at cost of more than \$5 million. CP 249-50 (FF XXV), 251-52 (FF XXIX). A majority of MVID members voted for implementation of the preferred alternative. CP 251 (FF XXVII). A dissenting group of MVID members filed an action in Okanogan County Superior Court seeking to block the project. *Id.* Through a 1998 resolution, the MVID Board approved the plan to convert the District to groundwater wells and a piped system. CP 251-52 (FF XXIX).

As part of the restructuring of MVID, Ecology began processing 115 water right change applications filed by members seeking to leave the District. CP 252 (FF XXX). Pursuant to RCW 90.03.380, when reviewing the change applications, Ecology performed a tentative determination of the extent and validity of MVID's entire claim and certificate to determine the quantity of water eligible for change. *Id.* Based on its analysis of the historic records, Ecology concluded that

historically a maximum of approximately 1,250 acres in the MVID had been irrigated in any given year. *Id.* Additionally, because the same parcels were not irrigated each year, Ecology determined that nearly 1,600 acres of land in the District had been irrigated at one time or another. *Id.*

Ecology next applied an annual water duty of 4.0 acre-feet per acre to the 1,250 acres, resulting in an annual historic water usage of 5,000 acre feet of water per year. *Id.* When determining how to assign the historic water use of 5,000 acre-feet per year to the acreage within the District, Ecology consulted with a representative of MVID. CP 253 (FF XXXII). Based on that discussion, it was agreed that Ecology would assign a proportionate share of the 5,000 acre-feet to each of the 1,600 acres that received water over the years, resulting in an allocation of 3.08 acre-feet per acre. *Id.*

Contemporaneous with Ecology's processing the 115 change applications, MVID filed its own change application seeking Ecology's approval of its transfer of 400 acre-feet of water to the Town of Twisp pursuant to a lease. CP 253-54 (FF XXXIII). Because the leased water would not be available to MVID members, it needed to be excluded from Ecology's calculation of the on-farm water allocation resulting in a final allocation of 2.83 acre-feet per acre. *Id.* MVID members excluded from

the District were thus assigned 2.83 acre-feet per acre from MVID's water rights. *Id.*

The exclusion of these members and their lands was formally approved by the MVID Board in April 2000. CP 254 (FF XXXIV). The exclusion of lands left approximately 881 acres of irrigable land to be served by MVID's canals. *Id.* Due to the exclusion of certain MVID members, there was a change in the membership of MVID's Board. The newly constituted MVID Board rejected the previously approved pressurized pipe plan in favor of the historic open canal gravity flow system. CP 254-55 (FF XXXIV, XXXV). In May 2000, the MVID Board formally withdrew MVID's commitment to the pressurized pipe plan. CP 254 (FF XXXIV).

Over the following 18 months, MVID, the Yakama Nation and Ecology negotiated to determine if a revised rehabilitation plan could be developed. CP 254-55 (FF XXXV). Separate from the negotiations, Ecology agreed to fund replacement of broken and dilapidated lateral lines used to deliver water from MVID's canals to the District members' farms. CP 255 (FF XXXVI). Upgrading of the lateral piping did not address the open canal system conveyance losses. *Id.* The Northwest Power Planning Council and Bonneville Power Administration hired IRZ Consulting to work with MVID to develop a revised rehabilitation plan.

CP 255 (FF XXXVII). Ecology and MVID also negotiated a water right agreement. However, the MVID Board never formally acted upon the agreement. CP 256 (FF XXXVIII).

Without any formal water right agreement, Ecology chose to enforce the Water Code against MVID. CP 256 (FF XXXIX). In December 2001, Ecology issued a Notice of Violation to MVID. *Id.* The Notice of Violation required MVID to respond within 30 days identifying steps it was taking to control its waste of water. *Id.* MVID submitted a late response that Ecology determined did not resolve the violations. *Id.*

To address MVID's waste of water, Ecology quantified the conveyance losses associated with delivery of the quantity of water identified in the tentative determination of extent and validity conducted by Ecology in processing the 115 water right change applications. CP 257-58 (FF XLI). Ecology reviewed the available information regarding MVID's existing water system and considered the lands MVID proposed to serve within the District's realigned boundary. *Id.* The primary analysis focused on the annual amount of water that the existing canal would need to divert (the maximum instantaneous diversion rate) to obtain 2.83 acre-feet per acre per year for the lands remaining within the MVID's service area. *Id.* It also considered MVID's obligation under the 1921 agreement to deliver water to the Barkley lands. *Id.*

On April 29, 2002, Ecology issued the 2002 Order to MVID. CP 257 (FF XL). Under the 2002 Order, MVID was required 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 from the Methow River to a maximum instantaneous rate of 24 cfs and an annual quantity of 5,829 acre-feet. *Id.*

The 2002 Order did not require MVID to improve its existing canal efficiencies or institute improved canal management practices. CP 259 (FF XLV). Rather, the 2002 Order focused on the quantity of water required to provide for crop irrigation through MVID's admittedly inefficient, dilapidated, and poorly managed canal system. *Id.* The 2002 Order allowed the loss of 9,053 acre-feet of water for every 13,195 acre-feet diverted from the Twisp and Methow Rivers, a 68.6 percent loss rate. *Id.*

## **2. Legal Conclusions from *MVID I*.**

Based on the facts presented and the applicable law, the PCHB concluded that RCW 90.03.005 requires Ecology to reduce wasteful practices in the exercise of water rights to the "maximum extent practicable." CP 263-64 (Conclusion of Law (CL) V). Further, RCW 90.03.005 directs Ecology to consider specified factors in its evaluation of waste: (1) sound principles of water management, (2) the benefits and cost of

improved water use efficiency and (3) the most effective use of public and private funds. CP 268-69 (CL XVI).

The evidence established that MVID's water distribution system was extremely inefficient. CP 267 (CL XII). MVID's unlined canals, operational spills, and lack of meaningful management of the daily diversions and on-farm use combined to produce an overall system efficiency of no more than 20 percent. *Id.* By contrast, standard rates of efficiency for unlined canal distribution systems in the United States generally and eastern Washington particularly ranged from 55 to over 75 percent. *Id.*

MVID's assertion that it should be compared only to other canals in the Methow Valley as opposed to a wider geographic area was unpersuasive. CP 267 (CL XIII). As the state Supreme Court held in *Department of Ecology v. Grimes*, 121 Wn.2d 459, 474-75, 852 P.2d 1044 (1993), customary practice does not sanction the waste of water and the reasonable efficiency inquiry is not limited to solely local practices.

While customary irrigation practices common to the locality are a factor for consideration, they do not justify waste of water. . . . Local custom and the relative efficiency of irrigation systems in common use are important elements, but must be considered in connection with other statutorily mandated factors, such as the costs and benefits of improvements to irrigation systems,

including the use of public and private funds to facilitate improvements.

CP 267-68 (CL XIII, XIV) (quoting *Grimes*, 121 Wn.2d at 474-75). In determining reasonable efficiency, it is appropriate to consider both local custom and the larger agricultural community. CP 268 (CL XV). The evidence offered by MVID regarding local custom did not establish a standard efficiency rate for the Methow area nor did it provide a justification for the District's inefficient operations. *Id.*

The evidence established that MVID diverted much more water than necessary to meet applicable crop irrigation requirements and reasonable conveyance losses. CP 270 (CL XVIII). MVID's excessive diversions were inconsistent with the requirement for reasonable efficiency set forth in *Grimes*, especially in light of the available public funding for capital costs and the reasonable level of ongoing maintenance and operation cost. *Id.*

The PCHB concluded that, while MVID's wasteful actions provided a legitimate basis for Ecology's enforcement efforts, the evidence also substantiated OWL's claim that the 2002 Order did not go far enough to address the significant inefficiencies of MVID's conveyance system. CP 270 (CL XVIII), 272-73 (CL XXII). The PCHB held that the water duties allowed under the 2002 Order and the anticipated conveyance

losses were much greater than justified under *Grimes*, standards in the industry, or the PCHB's prior decisions. CP 272-73 (CL XXII). Therefore, the PCHB directed Ecology to "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." *Id.*

**C. Ecology's 2003 Order.**

In response to the PCHB's remand directive in *MVID I*, Ecology asked its engineer, Dan Haller, to revisit his initial engineering analysis of MVID's system and determine whether additional efficiencies could be achieved. AR Ex. R-24 at 2. Mr. Haller prepared an engineering report that analyzed (1) local custom by looking at the 14 irrigation ditches in the Methow basin, over a dozen other irrigation districts in Central Washington, and seven Okanogan County Superior Court adjudications; (2) whether MVID's delivery of water reflected sound principles of water management; and (3) the availability of a multitude of funding sources for canal efficiency projects. AR Ex. R-1.

On December 19, 2003, based upon Mr. Haller's professional engineering analysis, Ecology issued the 2003 Order. The 2003 Order established interim limits governing diversions from April 1, 2004, through September 15, 2006 (21 cfs West Canal, 20 cfs East Canal) and

final limits governing diversions after September 15, 2006 (11 cfs West Canal, 20 cfs East Canal). AR Ex. R-24 at 3. In further compliance with the PCHB's remand directive, the 2003 Order also required MVID to install and maintain one or more measuring devices for the purpose of measuring the quantity of water entering MVID's East Canal from the Barkley ditch.<sup>3</sup> AR Ex. R-24 at 2.

**D. Litigation Of 2003 Order Before The PCHB.**

MVID timely appealed the 2003 Order to the PCHB. OWL intervened in the appeal. On April 7, 2004, MVID moved to stay the effectiveness of the 2003 Order. AR Vol. 1, Doc. 52. Responding to MVID's stay motion, Ecology submitted a declaration from Mr. Haller, which included his engineering report analyzing the MVID's system and establishing five alternatives for system improvements.<sup>4</sup> AR Vol. 1, Doc. 50 (Haller Declaration; Ex. 1); TR 50:6-51:2 (Haller). Finding that MVID failed to demonstrate either a likelihood of success on the merits

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<sup>3</sup> The PCHB recently affirmed an Ecology penalty issued to MVID for its failure to comply with this requirement of the 2003 Order. *Methow Valley Irrigation Dist. v. Dep't of Ecology*, PCHB No. 04-165 (July 14, 2010), can be accessed at <http://www.eho.wa.gov/searchdocuments/2010%20archive/pchb%2004-165%20findings%20of%20fact,%20conclusions%20of%20law,%20and%20order.pdf>.

<sup>4</sup> MVID erroneously asserts that it was not provided a copy of Mr. Haller's engineering analysis until shortly before the hearing. MVID Br. at 17, 27-28. As the record demonstrates, MVID's statement is false. See AR Vol. 1, Doc. 50 (Haller Declaration Ex. 1). MVID not only had a copy of Mr. Haller's engineering analysis some six months prior to the hearing, it also had Mr. Haller's declaration detailing the preparation of that analysis. *Id.*

of its appeal or irreparable harm, the PCHB denied MVID's motion.  
AR Vol. 1, Doc. 48, p. 10.

Prior to trial, OWL moved for summary judgment asserting that MVID was barred by collateral estoppel from relitigating several of the legal issues raised in its appeal as they had been decided in *MVID I*. Granting OWL's motion, the PCHB precluded MVID from relitigating eight issues previously resolved in litigation between the parties. AR Vol. 3, Doc. 25, pp. 6-11. The PCHB identified the remaining issues for litigation in the case as:

1. Whether Ecology's order reducing diversions from the Twisp River from 29 cfs (7,367 acre feet per year) to 11 cfs (2,716 acre feet per year) and reducing diversions from the Methow River from 24 cfs (5,829 acre feet per year) to 20 cfs (4,909 acre feet per year) properly implements the requirement to minimize waste to the maximum extent practicable. Evidence regarding the practicability of the further reductions ordered by Ecology in DE 03WR-5904 will be considered. Evidence on the issues of waste and recharge will be limited to material addressing Ecology's reduction of allowed diversions below the 29 cfs (Twisp) and 24 cfs (Methow) affirmed in *MVID I*.

2. Whether the Ecology order correctly implements the Board's decision requiring proper accounting for MVID's diversion of water for the Barkley Irrigation Co. lands.

AR Vol. 3, Doc. 25, pp. 10-11.

The PCHB held a hearing on MVID's appeal on December 6-8, 2004.

**E. PCHB And Superior Court Affirm 2003 Order.**

Based on the evidence presented, on May 9, 2005, the PCHB issued its Final Findings of Fact, Conclusions of Law, and Order affirming Ecology's 2003 Order (*MVID II*) in all respects. The PCHB found that MVID's irrigation system continued to waste water in violation of RCW 90.03.005 and concluded that the diversion limits in the 2003 Order sufficiently addressed MVID's water waste. CP 576-77 (CL 28, 29). The PCHB also concluded that MVID had not timely raised a claim under RCW 90.03.605 and that the District was barred by collateral estoppel from challenging the 2003 Order on due process grounds. CP 560-62 (CL 2, 3).

MVID appealed the PCHB decision to the Okanogan County Superior Court. CP 520-78. Prior to briefing the superior court appeal, the parties agreed to supplement the administrative record.<sup>5</sup> CP 437-48. The parties referenced the additional evidence in their briefs and arguments to the superior court. On July 16, 2007, the superior court issued a memorandum decision affirming the PCHB's decision.

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<sup>5</sup> Contrary to MVID's statements in its brief, MVID Br. at 18, the stipulation and additional evidence was provided to the superior court in 2006, not 2009. *See* CP 437-48. The superior court considered that additional evidence when issuing its decision affirming the PCHB. CP 26.

CP 23-36. In addition, the superior court rejected MVID's claim based on RCW 90.03.605,<sup>6</sup> finding that it was not timely raised below and there was no support in the record that the District did not receive Ecology's engineering report in a timely fashion. CP 31-32.

The superior court entered its Findings of Fact, Conclusions of Law and Final Order on December 4, 2009.<sup>7</sup> CP 68-71. MVID sought reconsideration of the superior court's decision on the basis of alleged "new evidence" that it attached to the motion. CP 72-146. In its response, Ecology demonstrated that MVID's motion was predicated on inaccurate facts. CP 627-32. In addition, Ecology asked the superior court to strike the declarations attached to MVID's motion as the District failed to establish that it met the requirements of RCW 34.05.562(1) to supplement the administrative record. CP 632-35. Because MVID advanced wholly new arguments in its reply brief, Ecology and OWL filed a joint motion to strike that brief and its attachments. CP 592-94. The superior court granted the motion to strike and denied MVID's

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<sup>6</sup> RCW 90.03.605 sets forth a sequence of measures Ecology can take to ensure compliance with the Water Code. The measures begin with education and technical assistance. RCW 90.03.605(1)(a), (b). If compliance is not obtained through those measures, Ecology can issue a notice of violation, administrative order or penalty. RCW 90.03.605(1)(c). The statute further provides that Ecology is not precluded from taking immediate action when the agency determines that the nature of the violation is causing harm to other water rights or to public resources. RCW 90.03.605(2).

<sup>7</sup> Entry of the superior court's final order was delayed due to settlement negotiations between Ecology and MVID, which ultimately broke down in late 2009.

motion for reconsideration. CP 621-22, 431-33. MVID then appealed to this Court.

In its appeal, MVID challenges several of the PCHB's findings of fact as not being supported by substantial evidence. In addition, MVID asserts that the PCHB's findings of fact and conclusions of law are arbitrary and capricious, are in violation of constitutional provisions, and alleges that the PCHB erroneously interpreted and applied the law. MVID does not challenge the PCHB's Order on Collateral Estoppel or any specific evidentiary ruling made by the PCHB during the hearing, with the exception of exclusion of testimony regarding Ecology's compliance with RCW 90.03.605. Nor does MVID challenge the superior court's decisions denying the addition of evidence into the administrative record and granting the motion to strike. As detailed below, MVID fails to establish that the PCHB's or superior court's decisions are defective in any respect.

#### **IV. STANDARD AND SCOPE OF REVIEW**

An appellate court reviews administrative decisions on the record of the administrative tribunal, in this case the PCHB, rather than the record of the superior court. *Sherman v. Moloney*, 106 Wn.2d 873, 881, 725 P.2d 966 (1986). The Court reviews the PCHB's decision under the Administrative Procedure Act (APA), RCW 34.05. *Pub. Util. Dist. 1 of*

*Pend Oreille Cy. v. Dep't of Ecology*, 146 Wn.2d 778, 789–90, 51 P.3d 744 (2002); *see also* RCW 34.05.518(1), (3)(a). The Court sits in the same position as the superior court and applies the standards of the APA directly to the record before the PCHB. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The Court's review of the facts is confined to the record before the PCHB. RCW 34.05.558. The burden of demonstrating the invalidity of the PCHB's decision is on MVID, the party asserting invalidity. RCW 34.05.570(1)(a).

The PCHB's application of law to a particular set of facts is reviewed de novo, but the Court should not “undertake to exercise the discretion that the legislature has placed in the agency.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004) (quoting RCW 34.05.574(1)). Where statutory construction is necessary, a court will interpret statutes de novo. *PUD No. 1*, 146 Wn.2d at 790. However, Ecology's interpretation of the laws it administers is entitled to “great weight.” *Port of Seattle*, 151 Wn.2d at 594.

The Court may grant relief if the PCHB's order is “not supported by evidence that is substantial when viewed in light of the whole record before the court . . . .” RCW 34.05.570(3)(e). “Substantial evidence is ‘evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.’” *Heinmiller v. Dep't of Health*, 127 Wn.2d

595, 607 n.9, 903 P.2d 433 (1995) (quoting *Nghiem v. State*, 73 Wn. App. 405, 412, 869 P.2d 1086 (1994)). The substantial evidence test is “highly deferential” to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The Court will view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The test is not whether the evidence is sufficient to persuade the reviewing court of the truth or correctness of the order; rather, the test is whether any fair-minded person could have ruled as the PCHB did after considering all of the evidence. *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). Evidence may be “substantial” even if it is in conflict with other evidence in the record. *Id.* at 676. A reviewing court does not weigh the credibility of witnesses or substitute its judgment for the PCHB’s with regard to findings of fact. *Port of Seattle*, 151 Wn.2d at 588 (citing *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000)).

Finally, this Court may grant relief if the PCHB’s decision is “arbitrary or capricious.” RCW 34.05.570(3)(i). Arbitrary or capricious agency action has been defined as action that “is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Port of*

*Seattle*, 151 Wn.2d at 589 (quoting *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003), and *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)). Where there is room for two opinions, and the agency acted honestly upon due consideration, the Court should not find that an action was arbitrary and capricious, even though the Court may reach an opposite conclusion. *Port of Seattle*, 151 Wn.2d at 589 (citing *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)).

## V. SUMMARY OF ARGUMENT

Ecology must reduce wasteful water use practices to the maximum extent practicable. RCW 90.03.005. Carrying out that directive, through the issuance of sequential regulatory orders, Ecology required MVID to reduce its excessive diversions from the Twisp and Methow Rivers. Both orders have been affirmed by the PCHB and the Okanogan County Superior Court. MVID cannot demonstrate that either tribunal erred in affirming Ecology's most recent order, the 2003 Order, or that the process employed in issuing the order was faulty.

Despite its experience with the PCHB's hearing procedures, MVID failed to timely raise a claim under RCW 90.03.605 or due process. The APA prohibits the raising of new issues that have not been raised before the administrative tribunal. RCW 34.05.554. Similarly, the Rules of

Appellate Procedure preclude new issues on appeal. RAP 2.5(a). MVID cannot demonstrate that it properly preserved those issues for appeal or that it meets any of the exceptions provided in the statute or rule.

Even if MVID had preserved claims under RCW 90.03.605 and due process for appeal, it fails to establish that it is entitled to relief under either issue. Ecology was not required to begin its enforcement process anew after the PCHB directed Ecology on remand to reexamine MVID's irrigation system to address excessive conveyance losses. Moreover, both the 2003 Order and proceeding before the PCHB afforded MVID all of the process it was due.

MVID's remaining claims, that the superior court erred in denying its request for reconsideration and that the PCHB's findings of fact are not supported by substantial evidence, are rebutted by the record. The superior court did not abuse its discretion by rejecting the factually inaccurate arguments raised on reconsideration. Additionally, the administrative record contains overwhelming evidence supporting the PCHB's findings. The Court should reject MVID's attacks on the PCHB's and superior court's decisions and affirm both in full.

## VI. ARGUMENT

### A. MVID Improperly Relies On Evidence Not In The Record.

MVID's brief is replete with factual statements that have no support in the record. Moreover, MVID attempts to bolster its arguments with citations to evidence that was specifically excluded from the record by the superior court. The Court should reject MVID's unsupported factual allegations and its attempt to backdoor stricken evidence into the record on appeal.

Judicial review under the APA is confined to the record. RCW 34.05.558. There are very limited circumstances under the APA where new evidence can be added to the administrative record. RCW 34.05.562(1). This Court articulated the policy underlying this practice: "If the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate, jurisdiction and the purpose behind the administrative hearing would be squandered." *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App 62, 76 ¶ 34, 110 P.3d 812 (2005).

In violation of RAP 10.3(a)(5), MVID's Statement of the Case contains numerous factual statements with no citation to the administrative

record. *See* MVID Br. at 5, 8-9, 10, 19. As such, MVID's unsupported factual statements should be disregarded.

In its reconsideration motion, MVID did not cite RCW 34.05.562 or make any effort to demonstrate that declarations attached to the motion met the requirements for admission of new evidence. Then, rather than responding to Ecology's arguments demonstrating that its motion lacked merit, in its reply MVID advanced an entirely new argument and attached three declarations supporting that argument. CP 504-09, 43-67. Ecology and OWL jointly moved to strike MVID's reply submittals. CP 592-94.

The superior court rejected MVID's argument that the reply submittals were "not anything new." VRP 17:1-19:3. Finding that MVID's reply briefing completely abandoned the arguments advanced in its initial motion, the superior court granted the motion to strike. *Id.*; CP 621-22. In denying reconsideration, the superior court also rejected MVID's attempt to add additional evidence into the administrative record. CP 432. Despite the superior court's decisions and its failure to assign error, MVID's designation of clerk's papers included the stricken declarations.<sup>8</sup> As MVID does not challenge the superior court's rulings excluding those documents, the Court should disregard any references to

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<sup>8</sup> The following declarations were stricken by the superior court: Johnson Decl. (CP 37-42), Wattenburger Decl. (CP 43-44), Nordang Decl. (CP 45-50), Jolley Decl. (CP 51-67). The superior court also struck MVID's reconsideration reply brief (CP 504-09).

them or their content in MVID's brief. *See* MVID Br. at 4-5, 19-20, 23-24, 35-36.

**B. Ecology's Issuance Of 2003 Order Did Not Contravene Applicable Statutory Or Constitutional Requirements.**

MVID argues that Ecology issued the 2003 Order in violation of both RCW 90.03.605 and due process. However, MVID bases its arguments on inaccurate statements regarding MVID's receipt of Mr. Haller's engineering report and of the record and procedure below. Once MVID's errors are corrected, it is clear that the District's RCW 90.03.605 and due process claims are without merit and should be rejected by this Court.

**1. MVID received Haller report seven months prior to the PCHB hearing.**

As discussed previously, in its decision in *MVID I* the PCHB remanded the 2002 Order to Ecology with the direction that it re-examine MVID's "system with the goal of issuing a supplemental order adequate to address excessive conveyance losses in light of any funding options available." CP 273 (Order). Mr. Haller was assigned that responsibility and he subsequently prepared an engineering report that was used in establishing the diversion limits contained in the 2003 Order. AR Exs. R-1, R-24.

Shortly after MVID filed its appeal with the PCHB, Ecology submitted a preliminary list of exhibits and witnesses. AR Vol. 1, Doc. 60, p. 2. Mr. Haller's report was one of the two exhibits identified. On April 7, 2004, MVID filed a motion to stay the effectiveness of the 2003 Order. In its response brief, filed on May 3, 2004, Ecology described Mr. Haller's engineering analysis. Ecology also submitted a declaration from Mr. Haller detailing that analysis and attaching a copy of the engineering report. AR Vol. 1, Doc. 50 (Haller Declaration; Ex. 1).

MVID makes several claims regarding the timing of its receipt of Mr. Haller's report, which are both internally inconsistent and inaccurate.<sup>9</sup> Rejecting similar arguments, the superior court concluded that "[t]here is no support in the record for MVID's claim that it did not receive Dan Haller's report in a timely manner." CP 30, 32. MVID took no depositions of Ecology's witnesses, submitted untimely written discovery<sup>10</sup> and did not even seek records via public disclosure. AR Vol.

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<sup>9</sup> See MVID Br. at 17 (Ecology "sat on Mr. Haller's report . . . for almost a year before listing it on its Exhibit list preceding the PCHB (*MVID* 2) hearing held in December of 2004"); at 27 (report not shared with MVID); at 27 (alleging that, by not having the report, MVID's experts prepared their testimony on pre-existing documents and were unable to focus their hearing presentation on the report); at 27 (Ecology withheld the report "until the hearing"); at 28 (Ecology did not deal scrupulously with MVID by withholding critical information and "springing it on MVID during the PCHB hearing").

<sup>10</sup> Interestingly, the untimely discovery requests did not seek information regarding the development of the diversion limits in the 2003 Order.

3, Doc. 28 (Ecology's Response to MVID's Motion to Extend Discovery Cutoff Date). MVID's failure to review Mr. Haller's report when it was received in May 2004, seven months prior to hearing, does not constitute a violation of RCW 90.03.605 or due process.<sup>11</sup>

**2. As MVID did not raise RCW 90.03.605 and due process claims below, it is precluded from doing so on appeal.**

MVID has not properly raised RCW 90.03.605 or due process as issues in this appeal. With narrow exceptions, none of which apply here, the APA prohibits new issues from being raised on appeal. RCW 34.05.554. An issue must properly be raised before the agency; a simple hint or reference in the record is not sufficient. *King Cy. v. Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993). Similarly, with limited exceptions not applicable here, RAP 2.5(b) precludes new issues on appeal. "Arguments not raised in the trial court generally will not be considered on appeal." *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002) (quoting *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). The preclusion on new issues set forth in RAP 2.5 applies in APA appeals. *Wells v. Western*

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<sup>11</sup> Addressing Ecology's statements at trial that MVID neglected to engage in discovery, MVID now claims that Ecology was asserting that the District "had a duty to go on a fishing expedition to find out how Ecology came up with the new draconian diversion limitations." MVID Br. at 26. While MVID may now regret its trial preparation strategy, it can cite to no statutory or constitutional requirement obligating Ecology to provide Mr. Haller's report or any other documents supporting the 2003 Order at the time it was sent to MVID.

*Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 681, 997 P.2d 405 (2000).

As detailed below, MVID did not timely raise its RCW 90.03.605 claim in the PCHB hearing. Nor did MVID sufficiently advance its due process claim in the superior court to permit its inclusion in this appeal. Ecology requests that the Court bar MVID from pursuing its RCW 90.03.605 and due process claims as neither were properly preserved for appeal.

**a. MVID failed to timely raise RCW 90.03.605 before the PCHB.**

MVID did not timely raise its RCW 90.03.605 claim at the hearing before the PCHB. Under the PCHB's procedural rules, the issues that the pre-hearing order identifies for the hearing shall control the subsequent course of the appeal, and shall be the only issues to be tried at the hearing, unless modified for good cause by subsequent order of the board or the presiding officer. WAC 371-08-435(2). MVID did not raise compliance with RCW 90.03.605 as an issue in its statement of issues filed with the PCHB nor did MVID subsequently request the PCHB to include that issue for hearing. Rather than complying with the PCHB's procedural rules, MVID chose instead to assert the argument on the last

day of a three day hearing. TR 619:17-623:16. The PCHB rejected MVID's attempt to inject a new issue at the hearing.

MVID raised a legal issue for the first time at the hearing, relating to whether Ecology's actions complied with RCW 90.03.605. Although MVID was represented by counsel throughout the pre-hearing process for this case, the legal issue addressing RCW 90.03.605 was not raised at the pre-hearing conference, during the collateral estoppel motion, or at any time prior to the hearing. Allowing a new legal issue and theory to be interjected for the first time at the hearing, without any notice to the other parties to prepare evidence and argument on that issue, would have prejudiced the parties. Accordingly, the issue was not included in the hearing and is not addressed in this decision.

CP 561-62 (CL 3). The PCHB did not commit error of law or act arbitrarily and capriciously when it barred MVID from raising its RCW 90.03.605 on the last day of the hearing.<sup>12</sup>

**b. MVID did not sufficiently assert a due process claim in the superior court.**

MVID did not properly raise due process as a basis for relief in the superior court. The superior court sits in an appellate capacity when hearing an appeal under the APA. *US West Communications, Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). As stated above, issues will not be addressed by the appellate courts if raised for the first time on appeal. RAP 2.5(a). In its opening brief to the

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<sup>12</sup> The superior court concurred with the PCHB's determination that MVID failed to timely raise its RCW 90.03.605 claim. CP 32.

superior court, MVID identified four issues. Not one of those issues referenced due process or even hinted at a due process claim. CP 179. While that brief contained two fleeting references to “due process,” CP 188, 189, MVID made no effort to articulate any alleged violation or even provide a discussion of the requirements of due process and citations in support. Rather, MVID focused its argument solely on RCW 90.03.605. CP 184-191. In its response brief, Ecology noted MVID’s failure to advance a due process claim. CP 681-82. Although it would have been inappropriate to do so for the first time on reply, MVID did not even reference due process or attempt to discuss the issue in its reply brief.<sup>13</sup> CP 16-20.

Only now, after having lost before the PCHB and superior court, does MVID attempt to assert a due process claim in its appeal to this Court. MVID thus seeks relief contrary to RAP 2.5(a)’s preclusion of new issues on appeal. Allowing the mere reference to a legal doctrine to serve as a basis for fully articulating a claim in a later appeal would subvert the purpose behind RAP 2.5(a). Because MVID did not raise an alleged violation of due process as a basis for relief in the superior court, this Court should decline to consider MVID’s due process claim.

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<sup>13</sup> The superior court did not mention due process as an issue in its 14 page memorandum decision. CP 23-36. Moreover, MVID’s motion for reconsideration did not cite the superior court’s failure to address due process as a ground for reconsidering its decision. CP 72-78.

**3. Regardless, MVID's RCW 90.03.605 and due process claims are meritless.**

Even if the Court determines that MVID properly preserved its RCW 90.03.605 and/or due process claim for appeal, which Ecology does not concede that the Court should, both claims are without merit and should be rejected.

**a. RCW 90.03.605 does not apply to issuance of an order after remand.**

As set forth above, Ecology's 2003 Order was the result of the PCHB's remand of the 2002 Order. MVID was aware that Ecology was directed to supplement its prior order and did not challenge that part of the PCHB's decision in its appeal of *MVID I* to the superior court. Consequently, MVID is barred by res judicata from attempting to relitigate the PCHB's remand authority. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (res judicata "prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action.") Ecology's reexamination of MVID's system pursuant to the PCHB's order of remand did not trigger the requirements of RCW 90.03.605.

Consistent with the PCHB's remand directive, Ecology began its analysis from the point where its prior analysis supporting the 2002 Order

ended. Mr. Haller, the author of both of Ecology's engineering analyses, testified that his second engineering report (AR Ex. R-1) built upon the foundation of his first (AR Ex. R-2). TR 48:1-49:22 (Haller). From the issuance of the 2002 Order through the issuance of the 2003 Order, Ecology's regulation of MVID's waste of water was continuous. Contrary to MVID's assertion, Ecology was not required to begin its enforcement efforts from scratch. On remand, the provisions of RCW 90.03.605 did not apply to the development and issuance of the 2003 Order.

Even if RCW 90.03.605 applied, which Ecology does not concede, subsection (2) provides that Ecology can take "immediate action to cause a violation to be ceased immediately if in the opinion of the department the nature of the violation is causing harm to other water rights or to public resources." The unrebutted facts from *MVID I*, which by virtue of collateral estoppel are conclusive in this appeal, fully support Ecology's issuance of the 2003 Order under RCW 90.03.605(2). CP 240-41 (FF VI, VII), 246 (FF XVIII), 271-72 (CL XX, XXI). MVID's RCW 90.03.605 claim is both untimely and not supported by the statute.

**b. MVID afforded all process it was due.**

MVID makes a variety of disjointed assertions that its right to due process has been violated. The root of many, if not all, of those

assertions relate to MVID's alleged non-receipt of Mr. Haller's report. As detailed above, those assertions are readily dismissed. MVID's remaining due process claims are equally unavailing.

First, MVID argues that Ecology should have incorporated Mr. Haller's report, as well as two other trial exhibits, into the 2003 Order. MVID Br. at 27. While MVID properly states that the essence of due process is notice and opportunity to be heard, MVID Br. at 22, its expansive view of due process is not supported by the law. As required by due process, the 2003 Order provided MVID with "notice of the charges or claims against which [it] must defend" and an opportunity to be heard. *Mansour v. King Cy.*, 131 Wn. App. 255, 270, 128 P.2d 1241 (2006). The 2003 Order, issued pursuant to RCW 43.27A.190, cited (1) the authority for issuing the order, (2) the statute that was violated, (3) the actions constituting the violation, (4) the corrective actions that must be taken, and (5) notified MVID that it was appealable to the PCHB. AR Ex. R-24 at 4. The 2003 Order satisfied applicable due process requirements.<sup>14</sup>

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<sup>14</sup> MVID mistakenly claims that, at the hearing on *MVID II*, Ecology "departed from the issue of excessive seepage in *MVID I* and developed a new 'performance standard' based on conveyance efficiency." MVID Br. at 24. The PCHB's decision in *MVID II* demonstrates why MVID's assertion is incorrect.

The Board's analysis in *MVID I* acknowledged the validity of conveyance efficiency as a recognized engineering tool for evaluating the performance of a conveyance system. By contrast, seepage loss per

Next, MVID also asserts that “[a]n order is void as being violative of due process where it is based on a hearing for which there was no adequate notice.” MVID Br. at 28. Again arguing that Ecology should have incorporated Mr. Haller’s report and trial exhibits into the 2003 Order, MVID flatly states that the order is void. *Id.* Presuming that the hearing referred to by MVID is the hearing before the PCHB, there are absolutely no facts in the record that MVID did not receive adequate notice of its occurrence. It was MVID itself, through its appeal, that set the appeal proceeding into motion. Moreover, MVID appeared at the hearing and participated fully in the proceedings. If MVID is asserting that Ecology held an adjudicative hearing, that is simply not true as the agency is not authorized to do so.<sup>15</sup> RCW 43.21B.240. Under either scenario, MVID does not establish a violation of due process.

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mile measures only a limited facet of overall conveyance loss in a system. Focusing solely on seepage loss per mile fails to consider the magnitude of water lost during delivery for its intended beneficial use. Using seepage loss per mile as the metric for waste would also mask one of the key problems with the MVID system – its length. The Board reaffirms its conclusion in *MVID I* that conveyance efficiency, rather than seepage loss per mile is a more meaningful measure of whether an irrigation system is experiencing excessive conveyance losses.

CP 568-69 (CL 15) (footnote omitted). Ecology has consistently employed conveyance efficiency when evaluating MVID’s irrigation system.

<sup>15</sup> Once again raising an issue that was conclusively decided against it, the District cites *Sheep Mountain Cattle Co. v. Dep’t of Ecology*, 45 Wn. App. 427, 726 P.2d 55 (1986) and appears to allege that Ecology was required to hold a hearing before issuing the 2003 Order. MVID Br. at 22. The PCHB rejected this claim in *MVID I* holding that *Sheep Mountain* was distinguishable as it “involved the relinquishment of a water right, not an enforcement action against waste or pollution. . . . Here, the MVID, as

Finally, MVID asserts that Ecology violated a corollary of due process, the principal that the government must deal scrupulously with its citizens. MVID Br. at 28. As detailed previously, this claim is tied to MVID's false assertion that Ecology withheld Mr. Haller's report "springing it on MVID during the PCHB hearing[.]" *Id.* MVID received Mr. Haller's report seven months prior to the hearing before the PCHB. There is no evidence in the record supporting MVID's claim that Ecology did not act scrupulously in its dealings with the District.

The Court should reject MVID's untimely and unsubstantiated due process claim. The 2003 Order and the subsequent hearing before the PCHB satisfied all applicable requirements of due process.

**C. Superior Court Did Not Abuse Its Discretion When Denying MVID's Motion For Reconsideration.**

MVID assigns error to the superior court's denial of its request for reconsideration. In support of its argument, rather than presenting the appropriate legal standard and demonstrating the superior court abused its discretion, MVID cites to documents that were excluded from the record and makes conclusory statements regarding its view of the "facts." MVID Br. at 35-36. Denial of a motion for reconsideration is reviewed for abuse

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we discuss below, unlike the relinquishment situation, has no vested right to waste water." *MVID I*, 2003 WL 724314, at \*8 (Feb. 27, 2003) (PCHB order on motion for partial summary judgment) (attached hereto as Appendix A). Both the 2002 Order and 2003 Order were based on MVID's waste of water, not its non-use. MVID is barred by *res judicata* from relitigating this issue.

of discretion. *Hornback v. Wentworth*, 132 Wn. App. 504, 510, 132 P.3d 778 (2006). Under the abuse of discretion standard, a court abuses its discretion “when it bases its decision on untenable grounds or reasons.” *Id.* (citing *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 777, 37 P.3d 354 (2002)). The record before this Court amply demonstrates that the superior court correctly denied MVID’s motion and the decision should not be set aside.

At the same time Ecology noted for presentation a final order concluding superior court review, MVID filed its Motion for Reconsideration and Alternatively Relief from Judgment. Ignoring that the case was governed by the APA, MVID cited to CR 59(a)(4) and 60(b)(3) as the basis for its motion. Although styled as a request for reconsideration, citing “new” evidence MVID’s motion actually requested the superior court to throw out its and the PCHB’s decisions affirming Ecology’s 2003 Order. MVID made no effort to establish that it met the requirements of RCW 34.05.562(1) for the admission of new evidence. Nor did MVID argue or establish that the superior court should remand the case to the PCHB under RCW 34.05.562(2) for the taking of new evidence.

After Ecology and OWL pointed out the myriad deficiencies in MVID’s motion, not the least of which was its factually inaccurate

recitation of the alleged “new” evidence, MVID abandoned the arguments advanced in its motion and attempted to assert new arguments in its reply brief. Ecology and OWL jointly moved to strike the reply materials for improperly raising new arguments in a reply. CP 592-94. The superior court concurred with Ecology and OWL, granting the motion to strike. CP 621-22; VRP 17:1-19:3. The court then evaluated and denied MVID’s reconsideration request. CP 431-33.

As is evident from the pleadings submitted and the transcript of the oral argument, the superior court’s denial of MVID’s motion for reconsideration was not based on untenable grounds or reasons. Rather, the superior court applied the appropriate legal standards to MVID’s request and found it wanting. The superior court did not abuse its discretion in denying MVID’s motion.

**D. PCHB’s Findings Are Supported By Substantial Evidence**

MVID challenges a number of the PCHB’s Findings of Fact, alleging that they are not supported by substantial evidence.<sup>16</sup> In actuality, MVID seeks to reargue the evidence and asks the Court to override the

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<sup>16</sup> Although not doing so in its appeal to the superior court, MVID now asserts that Findings of Fact 18-21, 34, 35, 50, and 51 are not supported by substantial evidence. MVID should be precluded from raising these new challenges. An appeal of an agency decision to the superior court is not simply an opportunity to test which issues a reviewing court finds acceptable. Both the APA (RCW 34.05.554) and the Rules of Appellate Procedure (RAP 2.5), prohibit the raising of new issues on appeal. Notwithstanding MVID’s failure to comply with applicable statutes and court rules, as demonstrated in this section all of the challenged Findings of Fact are supported by substantial evidence.

PCHB's judgment on the credibility of the witnesses and the weight to be given conflicting evidence, neither of which is permitted under the APA. The record contains substantial evidence supporting the PCHB's affirmance of the 2003 Order. As demonstrated above in the Counter Statement of the Case and supplemented below, the record contains substantial evidence supporting the PCHB's findings. Therefore, the Court should affirm all of the PCHB's Findings of Fact.

**1. On appeal, the Court does not reweigh the evidence or make credibility determinations.**

MVID dedicates a significant portion of its brief arguing over the credibility of various expert witnesses who testified before the PCHB.<sup>17</sup> Arguments pertaining to witness credibility are not appropriate at this appellate level of review. The PCHB has already weighed the evidence

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<sup>17</sup> Contrary to MVID's assertions, the PCHB's discounting of the testimony of MVID's expert witnesses, Dr. Wattenburger and Mr. Kauffman, was not arbitrary and capricious. Rejecting the same arguments on appeal below, the superior court found

[The] PCHB's reasoning is explained in Findings of Fact 42-45, all of which are unchallenged on appeal. Both relied on seepage rates rather than conveyance efficiency. Both Mr. Kauffman and Dr. Wattenburger based their calculations on the untenable assumption that MVID must be allowed to continue use of the same dilapidated, leaky and unlined ditches. Mr. Kauffman used more acres and a higher on-farm duty than permitted in MVID 1. Under Mr. Kauffman's calculations, MVID would operate at 14 percent efficiency. Dr. Wattenburger and Mr. Kauffman both maximized their calculations by assuming peak level diversions at all times. However, typical distribution patterns resemble a bell curve. Peak level diversions are not used or necessary over the entire irrigation season. The Board had the opportunity to personally observe the manner and appearance of the witnesses at the hearing. The record contains substantial evidence supporting the Board's decision to accept the testimony of Mr. Haller over the testimony of Dr. Wattenburger and Kris Kauffman.

and determined the weight to be given to competing inferences. These functions reside with the PCHB as fact-finder and this Court cannot reweigh the evidence at this juncture. *City of Univ. Place*, 144 Wn.2d at 652–53. Rather, the only question before the Court is whether the PCHB’s findings are supported by substantial evidence in the record. As established below, the findings are supported and the Court’s inquiry need go no further.

**2. Substantial evidence in the record supports challenged findings of fact.**

MVID challenges 29 of the PCHB’s 53 Findings of Fact.<sup>18</sup> MVID has not, and cannot, meet its burden to set aside the PCHB’s Findings of Fact. Contrary to MVID’s assertions, each of the challenged Findings of Fact is supported by substantial evidence.

MVID objects to Findings of Fact 15-22 on the basis that it believes that they are unnecessary facts. The PCHB indicated that the background information included in its Findings of Fact 2-21 was drawn largely from its decision in *MVID I*. CP 536 (n.1). Those facts, which are conclusive in this appeal, provide appropriate context for Ecology’s issuance of the 2003 Order. As for Finding of Fact 22, it merely

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<sup>18</sup> MVID did not assign error to Findings of Fact 1-14, 23, 24, 28, 29, 40, 42-45. Findings of fact that are unchallenged are verities on appeal. *See, for example, Hilltop Terrace Homeowners’ Ass’n v. Island Cy.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

summarizes the contents of the 2002 Order that MVID appealed in *MVID I*.

The remainder of MVID's challenge to the PCHB's findings consists of arguments regarding the weighing of the evidence and witness credibility. In order to demonstrate that each challenged finding is supported by substantial evidence, those findings are set forth verbatim. Ecology has added citations to the record supporting each Finding of Fact, which replace any citations appearing in the PCHB's decision.

Finding of Fact 25. The interim limits authorize MVID to divert from the Twisp River into the MVID West Canal at a maximum rate of 21 cfs up to a total of 5,161 acre-feet annually. The MVID diversion from the Methow River into the MVID East Canal is allowed at a maximum rate of 20 cfs up to a total of 4,909 acre-feet per year. The combined diversion is 41 cfs and 10,070 acre-feet per year. AR Ex. R-24. The interim diversion limits were developed by incorporating additional data into the calculations prepared for the existing system in connection with *MVID I*. The interim diversion limits are designed to be achievable through sound management practices without capital improvements. AR Ex. R-1 at. 2, 3-9; TR 94:4-99:17, 787:18-789:25 (Haller).

Finding of Fact 26. The final limits contained in Order DE 03WRCR-5904 reduce diversions from the Twisp River into the West

Canal to a maximum rate of 11 cfs and a total of 2,716 acre-feet annually. The diversion from the Methow River into the East Canal remains at 20 cfs and 4,909 acre-feet annually. The final combined diversion totals 31 cfs and 7,625 acre feet per year. AR Ex. R-24. The MVID would have to make capital improvements to targeted aspects of its irrigation system to achieve the final diversion limits. AR Ex. R-1 at 16-21; Ex. R-15; TR 136:8-137:22 (Haller).

Finding of Fact 27. Ecology's Order in response to the Board's remand was based on an Ecology engineering analysis prepared by Daniel Haller. AR Ex. R-1 at 1; TR 48:1-22 (Haller). Mr. Haller used a number of data sources in compiling his report including the Klohn Leonoff study, (AR Ex. R-4), the Montgomery Report (AR Ex. R-5), seepage studies performed by the United States Geologic Survey (USGS) (AR Ex. R-3) and data collected by the United State Bureau of Reclamation. (AR Ex. R-1, Appendices 1-3). Mr. Haller used professional judgment in evaluating the data sources and giving appropriate weight to their findings. AR Ex. R-1, at 20-21; TR 154:8-156:4; 794:24-795:3 (Haller).

Finding of Fact 30. In collecting the data for its study, USGS measured a 3.13-mile stretch at the upper end of the MVID West Canal. AR Ex. R-1 at 3. This reach is characterized in the USGS study as "unlined canal" but was reported in the Klohn Leonoff study as consisting

of 1.4 miles of lined canal, 1.7 miles of unlined canal, and approximately 575 feet of pipe. This reach was not similar in efficiency to the unlined portions of the lower West Canal targeted for improvement and is not representative of the overall performance of the unlined portions of the MVID system. AR Ex. R-1 at 4; TR 77:5-84:24 (Haller).

The USGS data on seepage from unlined irrigation canals, using the partially lined and piped stretch of the MVID West Canal, found MVID's seepage rate in cfs per mile among the lowest for "unlined" ditches. AR Ex. R-3, Table 21. The USGS inquiry measured seepage loss per mile and did not attempt to measure total conveyance loss or conveyance efficiency. TR 77:5-78:23 (Haller). The testimony established several of the canals evaluated in the USGS study have either been improved since the seepage data was obtained or are pursuing improvement projects. The McKinney Mountain ditch, Skyline ditch and Fulton ditch have all undertaken improvements that will reduce conveyance losses in their systems. TR 567:4-24; 570:20-572:3 (Barwin).

Finding of Fact 31. The Bureau of Reclamation study collected data for each reach of the MVID East and West Canals in September 2003. Mr. Haller considered the Bureau's data and the USGS data in making the calculations leading to issuance of Order DE 03WRCR-5904.<sup>[4]</sup> AR Ex. R-1 p.7. Based upon all the data available,

Mr. Haller modified the efficiency calculations from his 2002 Engineering Report. The new figures showed better efficiency for the Roach Spill to Hotchkiss Spill segment of the West Canal and Mr. Haller adjusted his conveyance efficiency for the reach from the 2002 figure of 44 percent to a 2003 figure of 62 percent. The two most downstream reaches of the MVID West Canal continue to be among the least efficient of the MVID system.<sup>[5]</sup> AR Ex. R-1, Table 6, p. 8.

<sup>[4]</sup> Mr. Haller did not use the USGS data for the Twisp Valley Power and Irrigation Co. because he lacked the data regarding flow into and out of the system. He also did not use the USGS data regarding the Foghorn canal because he was unable to reproduce the USGS numbers. AR Ex. R-1 at 4, n.8; TR 186:4-187:14 (Haller).

<sup>[5]</sup> The Beaver Creek to Benson Creek reach of the East Canal was also low, showing a revised efficiency of 55 percent per Table 6, AR Ex. R-1.

Finding of Fact 32. Using the revised efficiency figures generated through use of the additional data, Mr. Haller calculated the water needed to service MVID's customers under the existing canal configuration. This calculation led to the interim diversion limits of 41 cfs and 10,070 acre-feet per year. In establishing this figure, Ecology assumed the use of good management practices and no capital improvements. TR 97:19-99:3, 327:11-328:11, 787:18-789:25 (Haller).

Finding of Fact 33. Mr. Haller went on to evaluate whether simply operating the existing system without any modification would serve to minimize wasteful practices to the maximum extent practicable. AR Ex. R-1 at 9. He examined the diversions allowed by adjudication for a number of other irrigation systems. AR Ex. R-1 at 11-14. Several decisions, such as those involving Black Canyon Creek, McFarland Creek and Bear Creek/Davis Lake, allowed 0.02 cfs per acre total diversion, including all conveyance losses. AR Ex. R-1 at 13. The MVID interim limits allow .032 cfs/acre and the final limits equate to .024 cfs/acre, both of which are higher than this recognized .02 standard. The Libby Creek adjudication,<sup>[6]</sup> which is south of the MVID but still located in the Methow Valley, was specifically reviewed for amount of conveyance loss. AR Ex. R-1 at 12; TR 106:25-108:14 (Haller). A comparison of water duties in north central Washington contained in Ex. R-33 demonstrates the duty allowed MVID is one of the highest reported. While each District has unique characteristics, the information does provide general evidence of lower diversion rates in other regional irrigation systems with similar soil types, weather, and crops grown. Each of these districts had access to some type of public funding. AR Exs. R-1, R-11, R-33; TR 99:4-125:5 (Haller).

<sup>[6]</sup> AR Ex. R-11.

Finding of Fact 34. The Wolf Creek Reclamation District is a public irrigation district located in the Methow Basin. Wolf Creek's water right adjudication fixes the water duty at 3.8 acre-feet per acre including all conveyance losses. AR Ex. R-8. The Wolf Creek water duty is .016 cfs/acre. AR Ex. R-33. While the Wolf Creek District has improved its distribution system in recent years, it was primarily a canal system at the time the adjudication decree was entered in 1984 establishing a total diversionary right of 3.8 acre-feet per acre. By contrast, the MVID interim limits allow approximately 7.8 acre-feet per acre annually. AR Ex. R-1, Appendix 4; TR 101:11-104:20 (Haller). The MVID objects to Ecology's use of adjudications in establishing local custom of water usage. The Board disagrees. Adjudications are a useful tool in analyzing local custom because the referee provides an independent evaluation of the water usage in the area, including water duty. In addition, the adjudication itself establishes the extent to which a water right may be exercised in the future. TR 99:4-125:5 (Haller).

Finding of Fact 35. Mr. Haller also evaluated diversion limits contained in the Draft Methow River Basin Plan (1994) referenced in the Montgomery Report. The Methow Plan established a maximum diversion of 4.0 acre-feet per acre for alfalfa and 5.0 acre feet per acre for orchards:

The standard for alfalfa irrigation in the Methow Valley should be established at 0.02 cfs instantaneous diversion, not to exceed 2.7 ac-ft; plus ditch transportation loss at 15% per mile, not to exceed 4.0 acre feet per acre total diversion annually (page 2.7).

\* \* \*

The standard for orchard irrigation in the Methow Valley should be established at 0.02 cfs instantaneous diversion, not to exceed 4.2 ac-ft; plus ditch transportation loss at 15% per mile, not to exceed 5.0 acre feet per acre total diversion annually (page 4.2)

AR Ex. R-1, p. 14; TR 118:12-122:5 (Haller).

Finding of Fact 36. Testimony was presented demonstrating a trend in the Methow Valley toward improving canal delivery systems. Public and private funds have been used to improve canals in the Skyline and Fulton systems. Several systems, including Big Valley Ranch, Little Bridge Creek, Brown-Gillihan Ditch, McKinney Mountain Ditch, 8 Mile Ditch and Rockview Ditch, have also converted from canals to groundwater withdrawals. This information not only indicates the potential availability of public funds, but also that the local custom regarding irrigation practices in the Methow Valley is changing. TR 523:8-19, 552:12-572:13 (Barwin); TR 696:19-705:7 (Bernheisel).

Finding of Fact 37. After reviewing the diversion rights of other Districts and referencing literature in the field, Mr. Haller concluded that

further action was required to meet the standard of minimizing waste to the maximum extent practicable:

Although the revised numbers in the 2003 Engineering Analysis identified on Page 9 of this report support a lower diversion (41cfs and 10,070 ac-ft) based on a revised understanding of the efficiency of the current canal system, these diversions would still allow nearly 60% of all water diverted to be lost during conveyance (40% efficiency). This degree of conveyance loss remains significantly higher than those reported in the literature and still does not meet Ecology's obligation to reduce waste to the maximum extent practicable.

AR Ex. R-1 at 16; TR 98:9-99:3 (Haller).

Finding of Fact 38. Having concluded some improvement to the current condition of the distribution system would be needed to minimize waste to the maximum extent practicable, Mr. Haller analyzed several possible alternatives, including the status quo (Alternative 0) and five different modifications of the MVID system. AR Ex. R-1 at 16-18. These alternatives ranged from the piped system contemplated by the Montgomery Report (AR Ex. R-5) to a variety of different combinations of piping and/or canal lining. Estimated efficiencies for the options analyzed by Ecology ranged from a low of 54 percent to a high of 81 percent. *Id.* Mr. Haller based the final diversion limits calculation on the efficiencies expected from implementation of a plan similar to identified

Alternative 5, which would result in 54 percent conveyance efficiency. The option selected by Ecology was the least stringent of the five improvement options considered. Mr. Haller retained the 10 percent additional flow to account for operational spills, but eliminated the additional 10 percent flow for canal charging included in his 2002 engineering analysis. This revision was based on further analysis of the flow diameters of the MVID canals, allowances for other reported ditches, and lack of a foundation for it in relevant literature. AR Ex. R-1 at 8-9, 19-21; TR 136:8-156:21 (Haller).

Finding of Fact 39. Mr. Haller exercised professional judgment in recommending diversion limits consistent with the efficiencies that could be achieved through implementation of Alternative 5.

Given the availability of public and private funding, Ecology's mandate to reduce waste to the maximum extent practicable and after evaluating local custom, I have concluded that conveyance losses of 60% of the diversionary quantity constitutes waste of water. Determining a level of improvement necessary to remove the waste requires my best professional judgment.

AR Ex. R-1 at 20; TR 154:8-156:4 (Haller).

Finding of Fact 41. The 2003 Order does not direct MVID to install the improvements identified in Alternative 5. The Order was purposely phrased as a performance standard rather than a requirement to

install specific improvements. MVID can choose to meet the performance standard however it chooses. TR 154:8-156:4 (Haller). The Alternative 5 improvements standard was selected because the targeted West Canal improvements in Alternative 5 were directed to the most inefficient part of the MVID canal system. Targeting this area for improvement would generate the most water savings for the amount expended. TR 140:16-147:20 (Haller). The Alternative 5 improved performance level of 54 percent efficiency would bring MVID up to at least the low end of irrigation district efficiencies in the Methow area specifically and within eastern Washington generally. In addition, because the water savings generated by Alternative 5 would benefit the Twisp River, whose fish and other instream values are more impacted by low instream flows than the Methow River, opportunities for funding were expected to be better than if the improvements were directed to larger flows in the Methow River. AR Ex. R-1 at 20-21; TR 154:8-156:4 (Haller); TR 665:1-17 (Barwin).

Finding of Fact 46. Funding for irrigation improvement projects that will improve instream flows on fish bearing streams is offered through a number of different sources. The Alternative 5 plan was used as a template for Ecology's performance standards for MVID, in part, because it benefits flows in the Twisp River, which would help the project

attract public funding. AR Ex. R-1 at 20-21; TR 154:8-156:4 (Haller); TR 524:4-529:13, 536:21-543:4 (Barwin).

Finding of Fact 47. The cost of the improvements contemplated by Alternative 5 was estimated at \$800,000. AR Ex. R-1, Table 7. Part of the overall scope of the project relating to screening has already been completed, funded primarily through grants. TR 757:14-759:1 (Jolley). The District has incurred significant expenses in recent years for litigation costs and professional services. No MVID construction fund is currently in place to fund needed system improvements. TR 764:11-16 (Jolley). The District has applied to certain entities for grant funding to implement portions of an improvement plant developed by IRZ Consulting. MVID Board Director, Vaughn Jolley, testified he expected to receive some grant funding for system improvements. TR 759:2-20, 762:9-22 (Jolley).

Finding of Fact 48. The District says it does not believe member assessments can be raised to offset increased expenses or to obtain additional capital funds. Ecology indicated that some Referendum 38 funds that had been allocated to MVID for another purpose could be re-allocated to canal improvements. TR 491:7-22 (Newkirk). The testimony further established that a large number of potential funding sources exist for projects enhancing stream flows and fish habitat such as the canal improvements and reduced diversions contemplated by Alternative 5.

TR 524:13-529:15, 536:21-543:7 (Barwin); TR 200:24-206:4 (Baldi);  
TR 689:9-693:4 (Adams).

Finding of Fact 49. The *MVID I* decision acknowledged MVID's agreement and obligation to convey water through the MVID East Canal to serve certain water users with rights in the Barkley Ditch Co. diversion. In *MVID I* the Board found that the diversion amounts allowed by the Ecology Order 02WRCCR-3950 included all the water required to serve Barkley users, and failed to account for water entering the MVID system from the Barkley system. To avoid duplicate diversions under the single Barkley Irrigation Co. right, the Board held in *MVID I* that the Order should be clarified by Ecology on remand to assure any water being diverted by MVID for use on the Barkley lands is not also being diverted from the Barkley Ditch Co. diversion. Ecology's Order DE 03WRCCR-5904 responded to the Board's ruling by requiring the District to install measuring devices to determine the amount of water entering the MVID East Canal from the Barkley Ditch. The Order also required MVID to develop a management plan in cooperation with the Barkley Irrigation Co. to measure and manage the total diversion amounts taken by MVID under Order DE 03WRCCR-5904. AR Ex. R-24. The Barkley Ditch contribution to the MVID canal is not insignificant and was measured at 13.3 cfs in the Bureau of Reclamation study. AR Ex. R-1, Appendix 1.

Finding of Fact 50. MVID has not been able to reach a cooperative agreement with the Barkley Ditch Co. regarding measurement and/or management of diversions to serve the Barkley users. TR 231:12-232:3 (Haller). As of the hearing in the present case, MVID had not installed any measuring devices designed to quantify water entering the MVID system from the Barkley Ditch.

Finding of Fact 51. MVID contends it is not possible to measure water entering the MVID East Canal from the Barkley Ditch without cooperation from Barkley Ditch Co. Ecology's testimony, however, demonstrated that measurements upstream and downstream of the Barkley Ditch would provide the required information. While cooperation with Barkley Ditch Co. would be preferable, easier, and possibly less expensive, a method for measuring the water without Barkley Ditch Co. cooperation was established by Ecology's witnesses with expertise in measurement. TR 152:9-154:7 (Haller); TR 543:8-545:12 (Barwin).

Finding of Fact 52. MVID watermaster, Josh Morgan, testified that even if the Barkley water were measured the District could not adjust the system to offset the spill entering the MVID canal from the Barkley Ditch. TR 769:9-770:23, 778:10-13 (Morgan). However, Ecology's witnesses indicated the Barkley water could be accounted for by adjusting the diversion at the headgate based upon the spill amount. Ecology

witnesses made a showing that collecting data reflecting the pattern of spills from the Barkley ditch could be used to develop a meaningful diversion adjustment strategy. TR 152:9-154:7, 787:10-790:10 (Haller).

Because MVID not only fails to argue that the PCHB's findings are not supported by substantial evidence and the record belies any such claim, Ecology requests that the Court affirm the PCHB's decision in full.

## VII. CONCLUSION

For the reasons stated above, the Court should affirm the PCHB's decision affirming Ecology's 2003 Order issued to MVID.

RESPECTFULLY SUBMITTED this 27th day of September 2010.

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2003 WL 724314 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board  
State of Washington

\*1 METHOW VALLEY IRRIGATION DISTRICT, APPELLANT

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

PCHB No. 02-071

**OKANOGAN  
WILDERNESS  
LEAGUE**  
, APPELLANT

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND METHOW VALLEY IRRIGATION DISTRICT, RESPONDENTS

PCHB No. 02-074

February 27, 2003

ORDER ON PARTIAL SUMMARY JUDGMENT

The Department of Ecology ("Ecology"), on October 18, 2002, filed with the Pollution Control Hearings Board ("Board") a motion for partial summary judgment. The Methow Valley Irrigation District ("MVID") filed a response and a cross-motion for summary judgment on January 8, 2003. The Washington State Farm Bureau ("WSFB"), Okanogan County, Twisp Valley Power & Irrigation Company, and the Washington Water Power Alliance filed an amici curiae brief in support of MVID on the same day. The **Okanogan Wilderness League** ("OWL") filed a brief in response to MVID's cross-motion, in response to the WSFB's amicus curiae brief, and in support of Ecology's motion, on February 4. Ecology filed a reply brief in support of its motion and in response to the amici curiae brief, on February 5.

The pleadings address the issue of whether Ecology had the authority to issue an order to the MVID, which restricted the use of MVID's water rights, on the basis of waste and pollution. None of the motions request a ruling as to the factual basis for Ecology's order.

Joan M. Marchioro and Maia D. Bellon, Assistant Attorneys General, represented Ecology. Benjamin C. Waggoner and Russell C. Brooks, of the Pacific Legal Foundation, represented MVID. John B. Arum and Rachael Pascal Osborn, of Ziontz, Chestnut, Varnell Burley and Slonim, represented OWL. Galen G. Shuler, of Perkins Coie, represented the amici curiae.

The Board, comprised of Robert V. Jensen, presiding; Kaleen Cottingham and William H. Lynch, considered the

motion on the record. The pleadings filed with this motion were:

1. Ecology's Motion for Partial Summary Judgment, including the Declaration of Robert F. Barwin and attached federal court decisions;
2. MVID's Memorandum in Opposition to Ecology's Motion for Partial Summary Judgment and in Support of an Order Granting Summary Judgment to MVID, including attachments 1-8;
3. Motion and Brief Amicus Curiae for WSFB, Okanogan County, the Twisp Valley Power & Irrigation Co., and the Washington Water Policy Alliance, including Appendix A;
4. OWL's Reply Memorandum in Support of Motion for Partial Summary Judgment, in Opposition to MVID's Cross-Motion for Summary Judgment, and in Response to Amicus Brief, including Exhibits A-1, A-3, A-5, A-6, A-7, A-8, A-10, A-12, A-14, A-15, A-17, A-18, A-19, A-20, A-21, A-26, A-27, A-30, A-31, A-33, A-35, A-36, A-38, A-41, A-52, A-54, A-63, A-70, R-14, MVID-10, and MVID-15; and
5. Ecology's Reply Memorandum in Support of its Motion for Partial Summary Judgment and in Response to Amici Curiae, including Attachment 1, federal court decision, and Second Declaration of Robert F. Barwin with Exhibit 1.

## BACKGROUND

### I

\*2 The MVID was formed in 1919 to provide water to farmlands for agricultural production. It is located between the towns of Twisp and Carlton. The District's irrigation system consists of two main canals, one of which is located on the west and the other of which is located on the east side of the Methow Valley. These canals were constructed in the early 1900s and are largely unlined and open.

### II

MVID filed Surface Water Right Claim No. 003935 with Ecology on April 1, 1971. This claim has a priority date preceding the enactment of the water code in 1917. The claim was for the right to divert 120 cubic feet per second ("cfs") from the Twisp River, for the irrigation of 705 acres of land within the MVID, lying west of the Methow River. Water from this diversion flows into the West Canal. This canal originates about 3.5 miles north of Twisp. It originally ran about 12.5 miles along the southwest banks of the Twisp and Methow Rivers.

### III

In 1936, the MVID received Surface Water Certificate No. 945. Certificate 945 authorizes the diversion of 150 cfs from the Methow River for the irrigation of up to 1,366.66 acres of land lying east of the Methow River. Water from this diversion flows into the East Canal. This canal originates at the confluence of the Twisp and Methow Rivers. It originally ran about 15.5 miles along the east bank of the Methow River. The lower portions of these canals have been abandoned since members were excluded from the District, during the mid to late 1990's, and their rights converted to groundwater wells.

### IV

Ecology water right specialist, Robert Barwin, investigated approximately 40 water right applications related to the MVID, between 1980 and 1989. During this period he observed MVID's diversion works for the canals. He measured the flow of the water in the canals and performed hydraulic calculations to ascertain the peak diversion rates in each canal.

## V

Mr. Barwin observed the irrigation system lacked an adequate infrastructure. The system was poorly maintained and managed. He recommended his supervisor issue an administrative order to require the MVID to examine the system to determine its capacity and efficiency, and explore improvements to the system. Ecology subsequently issued to the MVID, Administrative Order No. DE-88-C386, dated August 8, 1988. The Order required the MVID to either reduce its diversions by 25%, or agree to an engineering assessment of the system. The MVID did not appeal the Order, but rather chose to commence the assessment. The assessment was undertaken by Bob Montgomery of the engineering firm, Klohn Leonoff. Ecology deferred any further enforcement pending the outcome of the study.

## VI

The Klohn Leonoff assessment, performed by Bob Montgomery, was completed in 1990. Mr. Montgomery found the physical condition of the MVID's irrigation system was poor and the MVID's conveyance and delivery of water to all water users was "insufficient." Ecology proposed interim improvements identified in the assessment, as a rehabilitation plan. The MVID took no action on Ecology's proposal.

## VII

\*3 In the early 1900's Ecology reviewed and authorized changes to allow several MVID members to switch from using MVID water to water from their individual wells. In reviewing these applications, Ecology applied the concept of a water duty to determine the amount of water reasonably required to irrigate the lands involved. This concept, as used in the Western United States, identifies the quantity of water sufficient to meet the irrigation needs of the farm involved, plus enough water to overcome the conveyance loss between the diversion works and the farm field.

Conveyance losses typically result from (1) seepage from the ditch to the canal, (2) transpiration by weeds, brush, and trees growing along the banks of the canal and ditch, and (3) operational spills. Operational spills are overflow points intended to prevent overspill and catastrophic failure of the canal due to changes in demand, by directing the unneeded water through a waste way back to a river or stream.

## VIII

Ecology historically has recognized up to 4.0 acre-feet per acre per year ("afay") in the vicinity of the MVID lands, as a reasonable water duty for conventional water systems employed by most users in the area. Applying this water duty to pasture turf, the most commonly grown crop within the MVID, would require an efficiency of 55% to achieve the maximum plant transpiration. Lesser amounts of water can also be used to fully irrigate the most demanding crops grown in the Methow Valley. However, the application efficiency would have to be higher than that required under a 4.0 afay water duty. Under a 2.83 afay water duty the necessary water application efficiency to achieve maximum crop transpiration would be 78%.

## IX

Ecology, in reviewing the water right change applications from the individual members of the MVID in the early 1990s made a tentative determination of the extent and validity regarding the historic use of water on those properties only, but not for the entire MVID water rights. This tentative determination analyzes the extent to

which the underlying water right has been put to beneficial use. Ecology applied a 4.0 afay water duty to these change applications.

#### X

The MVID elected a new Board of Directors, and in April 1991, Ecology made a nearly identical proposal to the one it offered the preceding year. The Board of Directors halted further planning to consider its options.

#### XI

The Yakama Nation filed suit in Thurston County Superior Court claiming the MVID was wasting water and Ecology had failed to require the MVID to implement measures to prevent waste.

#### XII

In 1994, the MVID's Board of Directors expressed its concurrence with Ecology's proposal. The Yakama Nation was notified of the MVID's decision. On February 17, 1994, the Nation indicated its willingness to dismiss its Thurston County lawsuit based upon the MVID's commitment.

#### XIII

The Montgomery Water Group was retained to develop a rehabilitation plan for the District. The Montgomery Water Group had drafted a plan by the end of 1995. The plan included several rehabilitation options. Ecology and the Yakama Nation assembled a funding plan, including support from the Bonneville Power Administration ("BPA"), which totaled nearly \$4 million for implementation of the rehabilitation plan. On June 13, 1996, the MVID Board of Directors passed Resolution 96-08, signaling its decision to proceed with the rehabilitation project. The MVID named Ecology as the project manager.

#### XIV

\*4 The Montgomery Water Group completed the MVID rehabilitation plan in June 1996. In this plan, the Montgomery Water Group estimated the MVID diverted half of the flow of the Twisp River during September low flow conditions. The East Canal diverts about a quarter of the natural flow of the Methow River under these same conditions.

#### XV

BPA completed a National Environmental Policy Act ("NEPA") Assessment and project feasibility report. The MVID Board of Directors adopted BPA's Alternative A (identified as alternative 4 in the Montgomery Water Group plan) in Resolution 98-15, which was adopted November 17, 1998.

#### XVI

The rehabilitation plan called for the exclusion of District members in the lower portion of the MVID. In 1999, Ecology began processing 115 change applications submitted by the members of the MVID requesting new points of withdrawal. These changes would allow the MVID members in the lower half of the District to use their own wells as their source of supply.

#### XVII

Subsequent to the Supreme Court's rulings in *Okanogan Wilderness v. Town of Twisp*, 133 Wn.2d 769, 948 P.2d 796 (1997) and *R.D. Merrill Co. v. Pollution Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999), Ecology performs a tentative determination of the extent and validity of the entire claim or certificate, even if only a portion of the water right is to be changed. Therefore, in processing subsequent changes submitted by members of the MVID, or the District itself, the agency performed a tentative determination of the extent and validity of the MVID's entire claim and certificate. This determines the amount of water put to beneficial use, which is eligible for change.

#### XVIII

The Town of Twisp and the MVID also submitted applications to change part of the MVID's water right, during the time Ecology was processing the 115 change applications. Twisp had made an agreement with the MVID to lease 400 acre-feet per year ("afy") of MVID's water rights. This water was to be withdrawn from Twisp's wells, rather than as historically from the Twisp and Methow rivers through the MVID canals. This water was for irrigation uses within Twisp.

#### XIX

Ecology performed a tentative determination of the extent and validity of the MVID's entire water right claim and certificate, to address all the change applications before it. It primarily used aerial photographs, MVID assessment records, county parcel lists, and an annual water duty of 4.0 afay to determine the amount of water the District had historically used for irrigation. From this evidence, Ecology determined the MVID had historically irrigated 1,250 acres in any given year, and a total quantity of water applied to beneficial use was 5,000 afy. However, because the irrigation did not historically occur on the same 1,250 acres, Ecology determined the total acres irrigated at one time or another, equaled nearly 1,600 acres.

#### XX

Ecology determined it needed to assign a quantity of water to each excluded member relating to the member's historic irrigation, because the excluded parcels would no longer use the MVID's water delivery system. Mr. Barwin contacted the counsel for the MVID, and asked how it would redistribute the approximately 5,000 afy among the nearly 1,600 acres of land Ecology identified in its analysis. One choice would have been to take water from one parcel and give it to another parcel. This choice would preserve the 4.0 afay water duty for each receiving parcel. A second option would have been to "spread" the 5,000 afy of water use across all the irrigated lands within the MVID. This method would provide each historically irrigated acre with an equal quantity of water.

#### XXI

\*5 MVID's counsel advised Mr. Barwin the MVID would follow the latter option. This option netted a water duty of 3.08 afay. Ecology additionally excluded the 400 afy, which was leased to Twisp from the MVID. This reduced the afay calculation by 0.25 feet, yielding a net final annual water duty of 2.83 afay.

#### XXII

MVID members submitted 10 additional applications for change, bringing the total number of change applications to 125. Ecology approved 115 and denied 10. Most of these were approved during the first half of the year 2000. The MVID appealed the 10 denials, but did not appeal the decisions where Ecology approved the change.

One issue raised in those appeals is Ecology's tentative determination of the extent and validity of its claim and certificate.

#### XXIII

On April 27, 2000, the MVID Board of Directors adopted Resolution 00-07. This measure addressed the lands excluded from the MVID. During May 2000, the MVID proceeded with the exclusions. These exclusions resulted in a "realigned" MVID, now encompassing approximately 873 irrigated acres.

#### XXIV

After July 2000, the MVID Board of Directors and Fred Ziari, an engineer provided by the Northwest Power Planning Council ("NPPC"), met with the Yakama Nation. These entities agreed upon 14 points, which identified the elements the Nation and the MVID agreed should be considered in developing the rehabilitation project. By December 2000, the Nation and the MVID requested Ecology's participation in a facilitated process to determine if a rehabilitation project, based upon 14 points of agreement could be developed and supported by the parties.

#### XXV

In the spring of 2001, Ecology agreed to fund a project to alleviate a significant source of wasted water; namely, the broken and dilapidated lateral systems used to carry water from the main MVID canals to the individual farms. The lateral replacement gave the MVID the capability to deliver water without the seepage loss, or the operational loss associated with the previously used open ditches and broken pipelines. This replacement was completed prior to the 2002 irrigation season.

#### XXVI

By November 2001, the facilitated process had produced a revised rehabilitation project scope and budget. The contents of this document were periodically shared with the NPPC through a series of meetings. The NPPC is also providing funding for the project.

#### XXVII

In mid-November 2001, Ecology and the MVID had prepared a document for an agreement regarding the MVID's water rights. The negotiators met and completed the document, initialed it, but the MVID Board has never voted on it.

#### XXVIII

Ecology, in December 2001, having received no response from the MVID on the water rights agreement, initiated an enforcement action against the MVID, to address the waste of water and the resulting water quality impacts. On December 27, 2001, Ecology issued Notice of Violation ("NOV") No. DE01WQCR-3425 to the MVID. In this notice, Ecology cited the earlier assessment of the MVID, which revealed the MVID had annually diverted up to 24,500 afy to beneficially irrigate no more than 1,578 acres. This notice specified various sections of RCW 90.03 (water code) and 90.48 (Water Pollution Control Act) and regulations, which Ecology contended the District was violating.

## XXIX

\*6 The NOV identifies the activities of the MVID and its members, which Ecology alleges constitute waste of water. The notice also identifies the alleged impacts to water quality and the water resources of the Twisp and Methow Rivers, resulting from the waste of water. The NOV required the MVID to provide a full report to Ecology, within 30 days of receipt. The report was to specify what steps the MVID had taken, or was taking to control waste and pollution, or to otherwise comply with Ecology's determination.

## XXX

The MVID filed a detailed response with Ecology on February 28, 2002. This response addressed the various sections of the law Ecology alleged the District was violating. However, Ecology concluded the response did not provide information suggesting Ecology was erroneous in its assessment of the violations asserted in the NOV. Ecology therefore decided to issue an administrative order to the MVID, addressing both the waste and water quality issues. Ecology based its decision the MVID had wasted water on the efforts undertaken by: (1) Klohn Leonoff's assessment of the MVID system, (2) the Montgomery Water Group's development of a rehabilitation plan, (3) Fred Ziari's development of a revised rehabilitation plan, and (4) Ecology's investigation of the change applications.

## XXXI

Mr. Barwin assigned Dan Haller, an engineer with Ecology's Central Regional Office Water Resources Program, to develop a quantification of the MVID's conveyance losses in its water delivery system. The quantification was based upon Ecology's tentative determination of the extent and validity of the MVID's water rights made in the review of the 125 change applications. Mr. Barwin asked Mr. Haller to review the available information regarding the MVID's existing water system, and to consider the lands the MVID proposed to serve with the rehabilitated system. Mr. Barwin further asked him to recommend an amount of water (the maximum instantaneous diversion rate) for the MVID's two ditches, which would satisfy the requirement for the lands identified as the "realigned" MVID lands, plus the "Barkley ditch" lands. The Barkley ditch lands were not addressed in the tentative determinations because they are lands outside the MVID's boundaries. The MVID carries water to the Barkley ditch lands under a right-of-way agreement negotiated when the MVID canal was constructed. In exchange for access to the right-of-way granted by the Barkley ditch, the MVID agreed to carry water to the lowermost Barkley ditch lands from the new canal and headworks.

## XXXII

The analysis focused on the annual amount of water the existing canals would need to divert to obtain 2.83 afay for the lands within the MVID. It also considered the MVID'S obligation to convey water to the Barkley ditch lands.

## XXXIII

Mr. Haller also attempted to develop a computer model to estimate the instantaneous diversion rate using a similar technique. However, given the limitations of the proposed model and the results obtained from it, Mr. Haller and Mr. Barwin decided not to use the computer model. Instead, they exercised professional judgment to select the maximum instantaneous diversion rate for use in the administrative order to be issued to the MVID.

## XXXIV

\*7 Ecology, on April 29, 2002, issued Administrative Order No. 02WRCR-3950 to the MVID. The Order requires the MVID to limit its diversion of water from the Twisp River to a maximum rate of 29 cfs, and an annual amount of 7,367 afy; and from the Methow River to a maximum rate of 24 cfs, and an annual amount of 5,829 afy. A diversion of water at the peak rate allowed in the Order (53 cfs) would exhaust the annual total limit (13,196 afy) in only 125 days. The typical irrigation season in the Methow Valley is approximately 165 to 180 days.

## XXXV

Ecology, in June 2002, authorized the changes MVID sought to allow Twisp to withdraw up to 400 afy from Twisp's wells for irrigation within the town.

## XXXVI

The affected parts of the Twisp and Methow Rivers are listed on Ecology's 303(d) listing of water-quality impaired waters for instream flow. The Twisp River is listed for temperature impairment, as well.

## XXXVII

Three threatened or endangered species of salmonids use the Methow and Twisp rivers. The Upper Columbia River spring-run chinook salmon and the Upper Columbia River steelhead trout are listed under the Endangered Species Act ("ESA") as endangered. The Columbia River bull trout is listed as threatened. The Twisp River is very important for spring Chinook salmon. It has some of the highest densities of spawning redds (nests) remaining in the Methow Basin. The Department of Fish and Wildlife ("DF&W") has identified summer-run chinook salmon, which spawn and rear in the Methow river, as "depressed" stock, in the Salmon and Steelhead Stock Inventory report ("SASSI"). These salmon spawn largely in the main stem Methow River below the MVID diversions.

## ANALYSIS

## XXXVIII

Ecology bases its Order on the water code and the Water Pollution Control Act. Ecology brings its motion to decide whether Ecology has the authority under these laws to bring an enforcement action to eliminate waste and pollution. This motion is based upon legal issue one from the Pre-Hearing Order, which is: "Is Ecology's order limiting the MVID's diversions of water from the Twisp and Methow Rivers authorized under RCW 90.03 and 90.48?" Ecology does not request the Board resolve the factual issues behind the Order. The parties agree there are no genuine issues of material facts in regard to the motion. In fact, the MVID moves for summary judgment on the same issue.

## XXXIX

Amici curiae, however contend Ecology relies upon disputed facts, therefore Ecology's motion should be denied. Amici, however must take the facts as they find them. They are not in a position to offer evidence. Nor have they pointed out any specific genuine issues of material fact, which would bar the Board from ruling as a matter of law. Ecology is not seeking to fully resolve issue one; rather it seeks a determination from the Board regard-

ing its legal authority to issue the Order.

XL

Amici additionally argue Ecology's Order violates due process because the MVID did not have advance notice and the Order was issued before the MVID had a chance to oppose it in an adjudicative hearing by Ecology. This is an argument, which was not raised by the other parties. The Board will not consider arguments raised only by amici. *Sundquist Homes v. Snohomish PUD #1*, 140 Wn.2d 403, 413-14, 997 P.2d 915 (2000). We note the MVID has been on notice for years it has been diverting water, which Ecology believes substantially exceeds reasonable conveyance losses.

XLI

\*8 Amici also asks us to declare unconstitutional RCW 43.21B.400, which prohibits Ecology from holding adjudicative hearings. The Board does not have authority to address the facial constitutionality of a statute. *Yakima Clean Air v. Glascom Builders*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975). To the extent the Board has the authority to rule on the constitutionality of a statute as applied, we conclude the statute is not unconstitutional here. The parties have a right to a due process, de novo hearing from the Board. Amici cites to *Sheep Mountain v. Ecology*, 45 Wn. App. 427, 430, 426 P.2d 55 (1986) for the proposition Ecology should have held a show cause hearing, prior to issuing its enforcement order. However, *Sheep Mountain* is distinguishable. It involved the relinquishment of a water right, not an enforcement action against waste or pollution. After that case was decided, the Legislature amended RCW 90.14.130 to eliminate the show cause proceeding provided therein and directed all appeals of such orders to the Pollution Control Hearings Board. The amendment specifically stated a relinquishment order of Ecology, in and of itself, would not affect an appellant's right, if any, to use water. Here, the MVID, as we discuss below, unlike the relinquishment situation, has no vested right to waste water.

XLII

Ecology contends it has the legal authority to bring an enforcement action to prevent waste. The MVID argues Ecology cannot do that without commencing a general adjudication under the water code. We disagree. We conclude Ecology's order does not adjudicate the priority of the MVID's water rights, but rather legitimately enforces the extent to which they may be lawfully used, based upon the agency's tentative determination of the extent and validity of the MVID's water rights.

XLIII

The state's policy against waste preceded the water code. *Ecology v. Grimes*, 121 Wn.2d 459, 467-68, 852 P.2d 1044 (1933). RCW 90.03.005, in relevant part, sets forth the following state policy against waste.

based on the tenet of water law which precludes wasteful practices in the exercise of right to use of waters, the department of ecology shall reduce these practices to the maximum extent practicable, taking into account sound principles of water management, the benefits and costs of improved water use efficiency, and the most effective use of public and private funds, and, when appropriate, to work to that end in concert with the agencies of the United States and other public and private entities.

XLIV

Beneficial use is a basic requirement of Washington water law. No water right authorizes water beyond the

quantity necessary to accomplish the purpose of that right. *Grimes*, at 121 Wn.2d 468. The constitutional, legislative, and judicial emphasis on beneficial use of water is due to the relationship between available water resources and the ever-increasing demands made upon them. *Id.* (citing *Waters and Water Rights* § 19.2 (R. Clark ed. 1967)).

#### XLV

\*9 The MVID contends Ecology cannot issue an enforcement order against it, absent a general adjudication. This argument is based on *Rettkowski v. Ecology*, 125 Wn.2d 219, 858 P.2d 232 (1993). The Supreme Court there held neither Ecology, nor the Pollution Control Hearings Board has the authority to adjudicate the priorities of competing water rights. *Rettkowski*, at 125 Wn.2d 227, 229. However, that opinion clearly recognizes Ecology is authorized to make tentative decisions to determine the existence of claimed water rights during the permit process. *Id.* at 228. Later decisions hold Ecology has the authority to perform a tentative determination on validity of a water right, in the context of authorizing a change of the water right. *Pub. Util. Dist. v. Ecology*, 146 Wn.2d 778, 794 P.3d 744 (2002); *R.D. Merrill Co. v. Pollution Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999); *Okanogan Wilderness v. Town of Twisp*, 133 Wn.2d 769, 778-79, 947 P.2d 732 (1997).

#### XLVI

Neither *Rettkowski*, nor any other case cited by the MVID precludes Ecology from enforcing the water code against individual water right holders who use water in excess of their own rights. RCW 43.27A.190 authorizes Ecology to issue a regulatory order to any person violating, or about to violate various laws, regulations, and orders of Ecology, including the water code. The order shall specify the provision of the statute, regulation, or order the person is alleged to or about to be violating, and the facts upon which the alleged violation is based. We consider the sufficiency of the notice provided by the regulatory order in context with the lengthy history of the relationships between these parties in regard to these issues, Ecology's tentative determinations on 125 water right change applications involving the District, and to the MVID's very detailed response of February 28, 2002, to Ecology's December 27, 2001 NOV. The Board concludes the MVID had sufficient prior notice of the provisions of the water code and the Water Pollution Control Act the MVID was allegedly violating.

#### XLVII

Ecology can consider the waste of water of someone who holds a water right claim, as well as someone who holds a certificate. The Court's decision in *Grimes*, held a water right claimant committed waste of water. Although *Grimes* involved an adjudication, we have earlier pointed out why we do not believe an adjudication is necessary before Ecology can exercise its authority to enforce the water code's prohibition against waste, to an individual water right claimant, or water right holder. We conclude Ecology has authority, under the water code, to issue an order prescribing waste by the MVID. The Board grants partial summary judgment to Ecology on that issue. The Board will reserve for hearing, however, its determination of whether and to what degree the District has wasted water in the exercise of its water rights.

#### XLVIII

Amici assert Ecology relied on improper factors in its determination the MVID wasted water. Ecology, however, applied multiple factors to determine whether waste occurred, including the water duty necessary to deliver water in the system. Amici recognize in their own brief Ecology can consider water duty in its determination of whether waste has occurred. The Board will determine at the hearing whether Ecology properly calculated the

water duty for the MVID water right, and consider the other factors used to evaluate whether waste of water has occurred.

XLIX

\*10 The courts have recognized the close relationship between water quantity and water quality. They upheld the imposition of streamflow conditions by Ecology on the basis they were necessary to assure compliance with state water quality standards prohibiting degradation of state waters and fish habitat. *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 849 P.2d 646 (1993), *affirmed Jefferson County v. Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed.2d 716 (1994). This authority was extended to conditioning an applicant's existing water rights in *Pub. Util. Dist.*, at 812-821. Those cases involved Ecology's issuance of a Section 401 water quality certification to a federal license. Before the Board issues a decision on whether Ecology is authorized to place similar water quality limitations through its enforcement orders, the Board wishes to hear the facts underlying the order. Therefore, the Board reserves for hearing the question of whether Ecology, may through an enforcement order, impose flow conditions upon a water right, based upon violations of water quality standards.

L

Based on the foregoing, the Board issues the following:

ORDER

1. Ecology's motion for partial summary judgment on the question of whether it was authorized to issue the MVID an order prohibiting the District from wasting water, is granted. The question of whether and to what extent the District has wasted water is reserved for the hearing.
2. Ecology's motion for summary judgment on the issue of whether it is authorized to issue the MVID a regulatory order prohibiting the District from polluting the waters of the state is reserved for the hearing.

DONE this 27th day of February 2003.

Robert V. Jensen  
Presiding

Kaleen Cottingham  
Member

William H. Lynch  
Member

2003 WL 724314 (Wash.Pol.Control Bd.)  
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