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STATE OF WASHINGTON
COURT OF APPEALS

NO. 297829

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

JERRIE VANDER HOUWEN, ANNE VANDER HOUWEN, and FORD
ELSAESSER, Chapter 11 Trustee for Jerrie Vander Houwen,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

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

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I. INTRODUCTION

In 1994, the Department of Ecology (Ecology) received two applications from Jerrie Vander Houwen (Vander Houwen) seeking permits to appropriate ground water from existing wells on separate parcels of land adjacent to the Naches River. As required by the state Water Code, Chapter 90.03 RCW, Ecology investigated the applications to determine if they satisfied the four part test of RCW 90.03.290 for granting a water right. Finding that the proposed appropriation of ground water from the wells did not satisfy the no impairment of existing rights and public welfare prongs of the statutory test, Ecology denied the applications. The present appeal challenges the Pollution Control Hearings Board's (Board) and Yakima County Superior Court's affirmance of Ecology's denials.

An application for a water right permit runs with the person submitting the application, not the land. Absent an assignment of an application under RCW 90.03.310, which has not occurred, Vander Houwen remains the party with an interest in the applications and he is no longer involved in the litigation.¹ Consequently, Mike Monson and Monson Fruit (Monson) lack standing to pursue this appeal.

¹ Vander Houwen subsequently filed for bankruptcy and both parcels were sold in 2004. At oral argument on the appeal to the Yakima County Superior Court on May 6, 2010, it was revealed that the party pursuing the present appeal is Mike Monson of

supports the Board's factual findings, which are now verities. Monson's appeal lacks substance. The Court should therefore affirm the Board's decision upholding Ecology's denials of Vander Houwen's water right applications.

II. COUNTERSTATEMENT OF ISSUES

1. Whether Monson has standing to pursue this appeal?
2. Whether Monson failed to preserve the issues raised in this appeal?
3. Whether the Board's legal conclusions regarding the impairment and public welfare prongs of RCW 90.03.290 comport with applicable law?
4. Whether the Board's decision affirming Ecology's water right permit denials is supported by substantial evidence in the record?

III. COUNTER STATEMENT OF THE CASE

A. Procedural Facts Through Remand Hearing

Vander Houwen owned two parcels near Naches, Washington, one located within Section 34, Township 15 North, Range 17 East, and the other in Section 5, Township 14 North, Range 17 East, Willamette Meridian. CP 10, 11 (Finding of Fact (FF) I, IV).² In 1992, Vander

² Citations to exhibits admitted at the Board hearing will appear as AR Ex., followed by the exhibit number. The testimony cited in this brief is from the hearing transcripts for the Board hearings on March 7, 1997, and March 17, 2003. References to those transcripts will appear as TR (year) page number:line number (witness name). Citations

Houwen filed two applications with Ecology seeking water right permits for existing ground water wells, one in Section 5 and the second in Section 34. CP 11-12 (FF V). On May 25, 1994, Ecology denied Vander Houwen's applications. *Vander Houwen v. Dep't of Ecology*, Pollution Control Hearings Bd. Nos. 94-108, 94-146 & 94-231, at 9 (Mar. 25, 1997) (*Vander Houwen I*).³ Vander Houwen timely appealed the denials, as well as two cease and desist orders and two penalties Ecology issued to Vander Houwen for unauthorized water use, to the Board. App. Ex. 1 at 1. The appeals were consolidated and an evidentiary hearing was held by the Board on March 7, 1997. *Id.* at 1-2.

At the Board hearing, Vander Houwen appeared *pro se* because his then attorney was unable to attend the hearing. TR (1997) 5:5-9:7. Vander Houwen did not offer any evidence and, other than his own testimony, he presented no witnesses. In contrast, Ecology presented several witnesses and introduced numerous exhibits in support of its case. On March 25, 1997, the Board issued its Findings of Fact, Conclusions of Law and Order affirming Ecology's denial of the water right permit

to the Clerk's Papers will appear as CP page number. Citations to the Appendix to this brief will appear as App. Ex., followed by the exhibit number.

³ A copy of the decision is in the Board's record transmitted to the Court, however, the record does not contain an index and the documents are not numbered. For the Court's convenience, copies of pertinent documents from the Board's record are included in the Appendix accompanying Ecology's Response Brief. A copy of the Board's decision in *Vander Houwen I* is included in the Appendix as Exhibit 1.

applications and its issuance of the cease and desist orders and penalties.
App. Ex. 1 at 1-16.

Pursuant to RCW 34.05.542(2), Vander Houwen petitioned for review of the Board's decision by the Yakima County Superior Court. Oral argument was held before Judge Heather Van Nuys on October 14, 1999. More than two years later, on April 29, 2002, Judge Van Nuys issued a Memorandum Opinion affirming the cease and desist orders and penalties, and remanding the matter to the Board for further proceedings regarding Ecology's denials of Vander Houwen's water right permit applications. *Vander Houwen v. Dep't of Ecology*, Yakima County Superior Court No. 97-2-00957-9 (2002), Memorandum Opinion at 1-5.⁴ Specifically, the Board was directed on remand to take additional evidence regarding Ecology's determination that the applications failed the non-impairment requirement of RCW 90.03.290. *Vander Houwen v. Dep't of Ecology*, Yakima County Superior Court No. 97-2-00957-9 (2002), Order at 2.⁵

⁴ Contrary to Monson's claim, Judge Van Nuys did not reverse Ecology's denials. See Appellant's Brief at 1. Rather, finding that Ecology needed to present evidence in addition to hydraulic continuity to support its determination that Vander Houwen's proposed ground water withdrawals would impair existing rights, Judge Van Nuys remanded the matter to the Board for the taking of additional evidence. A copy of Judge Van Nuys' Memorandum Opinion is included in the Appendix as Exhibit 2.

⁵ A copy of the superior court's Order remanding the case to the Board is included in the Appendix as Exhibit 3.

Before the remand hearing, Vander Houwen filed for bankruptcy. CP 8. The remand hearing was held before the Board on March 17, 2003. *Id.* Prior to the hearing, Ecology filed a Motion in Limine requesting that the Board strike Vander Houwen's proposed exhibits. CP 9. The Board granted Ecology's motion. *Id.*

At the remand hearing, Ecology presented evidence supporting its denial of Vander Houwen's water right permit applications. Consistent with the first hearing before the Board, Vander Houwen presented no witnesses and offered no evidence. TR (2003) 175:9-10. On June 26, 2003, the Board issued its Findings of Fact, Conclusions of Law and Order, again affirming Ecology's denial of Appellants' applications. *Vander Houwen v. Dep't of Ecology*, Pollution Control Hearings Bd. Nos. 94-108, 94-146 & 94-231 (June 26, 2003) (*Vander Houwen II*). CP 7-26. Vander Houwen timely petitioned for judicial review of the Board's decision to the Yakima County Superior Court.

The bankruptcy proceedings concluded by the time the petition for review of the Board's decision on remand in *Vander Houwen II* was heard by the superior court. In May 2004, Monson took ownership of Vander Houwen's property in Section 34 and Nache LLC took ownership of the property in Section 5. On January 25, 2006, a Notice of Withdrawal and Substitution of Attorneys was filed with the Yakima County Superior

Court, which stated that new counsel was “substituting in as counsel for said appellants.” CP 67–68. Ecology first learned of Monson’s ownership of a portion of Vander Houwen’s property at the May 6, 2010, oral argument in superior court on the petition for review, when counsel stated

May it please the court, Jay Carroll on behalf of Mike Munson [sic]. As the court has observed, this case has been around for a while. Munson [sic] Fruit actually is a successor purchaser of the Vander Houwen properties. Mr. Vander Houwen ultimately went through bankruptcy, and my client now purchased portions of the Vander Houwen properties, and that’s why we’re here today.

VRP 2:19–3:1. Ecology has not received a request under RCW 90.03.310 to assign Vander Houwen’s water right permit applications to Monson or Nache Farms LLC. Nache Farms LLC has not appeared in the litigation.

B. Facts Established Before The Board

In his briefing to the superior court, Monson did not challenge any of the Board’s Findings of Fact. Under the APA, unchallenged findings of fact are verities on appeal. *See, e.g., Hilltop Terrace Homeowner’s Ass’n v. Island Cy.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). The facts summarized in this section are taken from the Board’s Findings of Fact, Conclusions of Law and Order in *Vander Houwen II*, with citations to the record supporting each finding.

In 1989, Vander Houwen purchased two parcels of land lying northeast of the Town of Naches and the Naches River, which he planned to use to expand his orchard operations. The land is in two locations. One parcel is within Section 5, Township 14 North, Range 17 East, and the other is in Section 34, Township 15 North, Range 17 East, Willamette Meridian. CP 10 (FF I); TR (2003) 24:19–26:1, 36:21–39:5 (Monroe); AR Ex. R-6, R-12.

The parcel in Section 34 contained an existing ground water well drilled to 340 feet below ground surface. Vander Houwen contacted Ecology in 1992 to discuss obtaining water for his orchard expansion. Ecology informed Vander Houwen that there was no record of a water right for the existing well and further advised him to apply for a ground water permit. CP 10 (FF II); TR (2003) 26:2–6 (Monroe). Rather than apply for a permit, in March 1992 Vander Houwen hired a well driller to deepen the well. The well driller deepened the well to a depth of 802 feet below ground surface and installed casing to 600 feet. The static water level in the well was 530 feet and the Naches River, at that point, was approximately 530 feet below the top of the casing. CP 10–11 (FF III); TR (2003) 26:7–23 (Monroe); AR Ex. R-7, R-10.

In June 1992, Vander Houwen hired the same well driller to drill a new well on his land in Section 5. The well driller bored a hole to a total

depth of 625 feet and installed casing. The static water level in the well was recorded as 340 feet below ground surface. The Naches River, at that point, is approximately 320 feet below the top of the casing. CP 11 (FF IV); TR (2003) 39:8–40:11 (Monroe); AR Ex. R-13, R-15.

The Naches River, a tributary to the Yakima River, is highly appropriated by water users. As a result, there are periods of time when all of the water rights on the Naches River are not satisfied. CP 14–15 (FF XI); TR (2003) 35:8–36:11, 77:25–78:23 (Monroe). Water rights on the Naches River have been curtailed in many dry years. Over the years, there has been a growing recognition of the relationship between ground and surface waters. Prior to the time Vander Houwen submitted his applications for water rights, Ecology and others had become concerned about the availability of water in the Yakima Basin System, which includes the Naches River. In particular, Ecology has been concerned with the interaction of ground and surface water in the Yakima Basin System. CP 15–17 (FF XII, XVII); TR (2003) 156:21–159:19 (Barwin).

Both of Vander Houwen's wells draw from a thick sequence of saturated silts, clays, and gravels comprising the Ellensburg Formation. The water drawn from the well in Section 5 is at an elevation slightly

below that of the Naches River. CP 17 (FF XVIII).⁶ The primary source of the water for this well is the Naches River Alluvium. In spring, the high waters of the river flow through the surrounding alluvium, comprised of sands and gravels, down through the aquifer to the well. During the summer, when the level of water in the river is lower, the water flows in the opposite direction. Pumping this well results, therefore, either in intercepting water destined for the river, or inducing losses from the river, to fill the void created by the groundwater pumping. This phenomenon is described in the science of hydrogeology as hydraulic continuity. The Naches River would show an effect in less than one week after pumping of this well. CP 17 (FF XVIII); TR (2003) 92:19–115:22 (Kirk); AR Ex. R-18, R-19, R-19A, R-37, R-38, R-39, R-40.

The well in Section 34 draws from the same aquifer, but the well intake is farther below the Naches River than the intake for the Section 5 well. The Ellensburg Formation, from which the well draws water, in the vicinity of the Section 34 well, does not connect to the Naches River Alluvium, but rather lies below it. Although the well is drilled through Tieton andesite (a lava rock similar to basalt) at the surface, there is no

⁶ In Finding of Fact XVIII, the Board erroneously refers to the well in Section 34 but goes on to describe the characteristics of the well in Section 5. In Finding of Fact XIX, which describes the characteristics of the well in Section 5, the Board mistakenly refers to the well in Section 34. If that error is corrected, which this brief does, substantial evidence in the record supports these findings as they accurately describe the geology and hydrology related to each well.

basaltic formation between the wellhead and the river. This Ellensburg aquifer is in hydraulic continuity, at the location of this well, with the Naches River. Water withdrawal from the well would lower the pressure within the Ellensburg Formation, causing water from the river, during high flows, to flow faster toward the well. Due to the fact the Ellensburg Formation lies below the river at this location, the well water would be drawn down towards the well through the overlying aquitards. These aquitards are permeable. Pumping this well would eventually induce losses from the river, to heal the void in the aquifer created by the withdrawal. Due to the presence of intervening aquitards, the effect of pumping this well on the river would not be as immediate as the effect of withdrawing water from the well in Section 5. It would likely take less than eight months after pumping this well for the river to be affected through reduction in flow. Over time, however, the total impact on the river would equal the amount of water withdrawn from the well, minus whatever irrigation amount would not be drawn by the crops, but which would be recharged to the system. CP 17-18 (FF XIX); TR (2003) 112:12-115:22, 127:14-132:9 (Kirk); AR Ex. R-18, R-19, R-19A, R-37, R-38, R-39, R-40.

There is no known window of time that the proposed water withdrawals, in the quantities and duration requested by Vander Houwen,

could be distributed through the Naches River so as to not impact existing water rights and fisheries interests. Although surplus water may be available in some years, this water would only be available for a few weeks. There is a strong public interest in the fishery in this river. CP 18-19 (FF XX); TR (2003) 32:1-34:14, 44:2-18 (Monroe); AR Ex. R-10, R-15.

C. Proceedings Before Yakima County Superior Court In *Vander Houwen II*

On June 26, 2003, the Board issued its Findings of Fact, Conclusions of Law and Order in *Vander Houwen II* again affirming Ecology's denials. CP 7-26. Vander Houwen timely filed a petition for review of the Board's decision to the Yakima County Superior Court. CP 1-26. By the time the petition for review was heard by the superior court, Vander Houwen had gone through bankruptcy and his property had been sold. As stated above, counsel representing Monson, the new owner of the property in Section 34, filed a notice of substitution and assumed responsibility for litigating the case. CP 67-68. In his briefs filed with the superior court, Monson did not assign error to any finding of fact entered by the Board. CP 27-34. The only legal argument advanced by Monson appeared in his reply brief. CP 46-49. Monson also did not assign error to the Board's decision granting Ecology's Motion in Limine

nor did he offer any legal argument in either of his superior court briefs on this point. CP 27–34, 44–51.

On May 14, 2010, Judge Michael G. McCarthy issued a letter opinion affirming the Board’s decision. CP 63–64. Monson now appeals to this Court and assigns error to a number of the Board’s Findings of Fact, as well as its decision on the Motion in Limine.

IV. STANDARD AND SCOPE OF REVIEW

Judicial review of a decision by the Board is governed by the APA. *Pub. Util. Dist. No. 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 superior court sits in an appellate capacity when hearing a petition for judicial review under the APA. *US West Commc’ns, Inc. v. Wash. Util. & Transp. Comm’n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). With limited exceptions not applicable here, RAP 2.5(a) 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. W. Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 681, 997 P.2d 405 (2000).

In his appeal to superior court, Monson was required to raise all

alleged errors committed by the Board. As detailed below, having not done so, Monson waived those alleged errors and the present appeal lacks merit.

If the Court does not conclude that Monson waived the errors he now asserts, the APA prescribes the standard of review of an agency order in an adjudicative proceeding. RCW 34.05.570(1), (3). An appellate court reviews administrative decisions on the record of the administrative tribunal, in this case the Board, rather than the record of the superior court. *Sherman v. Moloney*, 106 Wn.2d 873, 881, 725 P.2d 966 (1986). This Court sits in the same position as the superior court and applies the standards of the APA directly to the record before the Board. *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 Board. RCW 34.05.558. The burden of demonstrating the invalidity of the Board's decision is on Monson, the party asserting invalidity. RCW 34.05.570(1)(a).

The Board'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. *Pend Oreille Cy. PUD*, 146 Wn.2d at 790. However, Ecology's interpretation of the laws it administers is entitled to "great weight." *Kittitas Cy. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011) (Washington Supreme Court gives great weight to Ecology's interpretation of water resources statutes); *Port of Seattle*, 151 Wn.2d at 594.

The Court may grant relief if the Board'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 premises.'" *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

Board 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 Board’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)).

V. SUMMARY OF ARGUMENT

A water right permit application runs with the applicant, not the land. Vander Houwen submitted the applications at issue and he has not assigned those applications to anyone else. Absent such an assignment under RCW 90.03.310, Monson has no interest in the applications and, therefore, no standing to pursue this appeal.

Even if Monson is deemed a party in interest, he failed to preserve for review any alleged errors by the Board. In his briefing to the superior court, Monson did not cite to a single finding of fact or conclusion of law, relying instead on an unsubstantiated assertion that the record lacked substantial evidence supporting the Board’s decision. Monson did not even mention the Board’s granting of Ecology’s Motion in Limine let alone challenge that ruling. Because he failed to preserve any errors for appeal, Monson’s appeal lacks merit and should be dismissed.

Regardless of his lack of standing and failure to preserve errors for appeal, Monson's challenges to the Board's decision can be readily rejected. Apparently trying to compensate for Vander Houwen's failure to present any witnesses or offer any evidence at either Board hearing, Monson attacks the credibility of Ecology's witnesses and ignores the uncontroverted evidence in the record. Monson's attack on the credibility is not only unsupported, it is untimely. Because Vander Houwen failed to present any witnesses or offer any evidence at the Board hearings, the only evidence in the record supports the Board's findings. Each and every Board finding is supported by substantial evidence and its application of the law to those facts is not erroneous. The Court should affirm the Board's decision in its entirety.

VI. ARGUMENT

A. Monson Lacks Standing To Pursue This Appeal

"Absent standing, [the court] has no justiciable controversy before [it]." *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349 (2004). In order to have standing, the party seeking relief "must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right." *Osborn v. Grant Cy.*, 78 Wn. App. 246, 248, 896 P.2d 111 (1995). As this Court recently concluded, the owner of a parcel of land is not the owner of a water right permit application merely because he owns the real

property. *Hanson Indus., Inc. v. Kutschkau*, 158 Wn. App. 278, 294–95, 239 P.3d 367 (2010). Monson has no clear legal or equitable right in the water right applications at issue in this appeal.

Vander Houwen submitted the two permit applications to Ecology in 1992. Prior to the remand hearing before the Board in *Vander Houwen II*, Vander Houwen filed for bankruptcy. At the close of the bankruptcy proceedings, Monson purchased Vander Houwen's property in Section 34. Ecology has never received any request under RCW 90.03.310 for assignment of either of Vander Houwen's permit applications. Under RCW 90.03.310

[a]ny application for permits to appropriate water prior to permit issuing, may be assigned by the applicant, but no such assignment shall be valid or binding unless the written consent of the department is first obtained thereto, and unless such assignment is filed for record with the department.

Therefore, any legal or equitable right in those applications resides with Vander Houwen, not Monson. As Monson lacks standing, this case must be dismissed.

If this Court determines that Monson has standing, which Ecology does not concede that it should, the appeal should be limited to challenging Ecology's denial of the permit application for the ground water well in Section 34. While the Court has determined that mere

ownership of real property does not create an interest in a water right permit application, there is no evidence in the record that the successor owner of Vander Houwen's property in Section 5, Nache LLC, has asserted any interest in this litigation, or any legal or equitable interest in the permit application associated with that parcel. Therefore, at most, the current appeal should be limited to review of Ecology's denial of Vander Houwen's application for a water right permit for the ground water well in Section 34.

B. This Case Should Be Dismissed Because No Issues Were Preserved For Appeal

In his superior court challenge to the Board's decision, Monson did not assign error to a single finding of fact or even cite to a particular factual finding that he considered erroneous. CP 27-34, 44-51. In contrast to the opening brief filed with this Court where Monson challenges 13 of the Board's 31 Findings of Fact, in his briefing to the superior court Monson merely asserted that the Board's decision was not supported by substantial evidence. As discussed in Section IV *supra*, the superior court sits in an appellate capacity when hearing a petition for judicial review under the APA. *US West Commc'ns*, 134 Wn.2d at 72. Therefore, the party requesting review must raise any alleged errors by the administrative tribunal in order for the superior court to properly review

the decision below.

Contrary to settled case law, Monson did not raise any legal argument until his superior court reply brief. *See R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 147 n.10, 969 P.2d 458 (1999) (a party must raise all arguments in support of its appeal in its initial brief and cannot reserve arguments to be raised for the first time in a reply brief). Similarly, Monson neither assigned error to the Board's ruling granting Ecology's Motion in Limine nor referred to that decision in any part of his legal briefing before the superior court.⁷

Having failed to challenge a single finding of fact and the Board's ruling on the Motion in Limine, or timely raise legal arguments on either of these issues in his appeal to the superior court, Monson should be precluded from raising these new challenges with this Court. 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),

⁷ In advance of the hearing on remand, the parties exchanged exhibits that they intended to offer. Vander Houwen's exhibits consisted of other water right permits granted by Ecology. App. Ex. 4 at 2. Ecology objected to Vander Houwen's proposed exhibits as not relevant to the narrow issue on remand—whether Vander Houwen's applications failed the no impairment prong of the statutory four part test for granting a water right. *Id.* The Board granted Ecology's Motion in Limine and excluded the exhibits from evidence. TR (2003) 5:21–6:7. The Board did not abuse its discretion in granting the motion. On appeal to the superior court, Monson did not assign error to the Board's ruling on the Motion in Limine. Therefore, Monson is bound by that ruling and cannot challenge it at this stage of the litigation.

prohibit the raising of new issues on appeal. As Monson waived the errors he now alleges were committed by the Board, his present appeal is meritless.

This Court should not excuse Monson's failure to assign error to the Board's findings or its ruling on the Motion in Limine. *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (court may excuse failure to assign error where briefing makes clear the nature of the challenge and challenged finding is argued in the text of the brief). Monson's briefing to the superior court did not contain a single assignment of error, did not reference a single finding of fact, and the text did not contain any argument regarding any finding now being challenged. CP 27-34, 44-51. Moreover, Monson's briefing in superior court made no mention whatsoever of the Motion in Limine or the Board's ruling on that motion. Because Monson failed to raise these issues in assignments of error to the superior court *and* failed to provide any legal citation, this Court should not consider the merits of these issues. *Olson*, 126 Wn.2d at 321.

Finally, the overwhelming majority of Monson's assignments of error relate solely to the factual findings of the Board. However, Monson neglects to tell the Court that Vander Houwen had the burden to prove that

Ecology erred in denying the permit applications.⁸ WAC 371-08-485(3). At the two hearings before the Board Vander Houwen offered *no* evidence, let alone evidence that supported his theory of the case. With the exception of his own testimony at the first hearing, Vander Houwen did not present a single witness or offer a single exhibit at either hearing. The only evidence in the record supports the Board's Findings of Fact, which are verities on appeal. *See, e.g., Hilltop Terrace*, 126 Wn.2d at 30 (findings of fact that are unchallenged are verities on appeal). Because the issues now raised before this Court were not preserved for further review, the Court should dismiss the appeal as without merit and affirm the Board's decision.

C. Monson's Assignments Of Error Lack Substance

If the Court concludes that Monson has standing and he properly preserved his challenges to the Board's findings, which Ecology does not concede the Court should do, the appeal still fails as the record contains substantial evidence supporting the challenged findings.

The burden of proof in an appeal of a denial of a water right application is on the party challenging the decision. WAC 371-08-485(3). Therefore, at the Board hearings Vander Houwen had the burden to

⁸ Because Vander Houwen was the party appearing before the Board at the evidentiary hearing below, the discussion of those hearings and the adequacy of the record below will refer to Vander Houwen as he was the party responsible for presenting evidence supporting the underlying appeal.

present admissible evidence establishing that Ecology's denials of his water right applications were improper. As can be seen from the record, Vander Houwen offered no such evidence. In fact, Vander Houwen offered no evidence at all. The alleged errors in the Board's decision now raised by Monson lack substance and should be rejected.

1. Vander Houwen's applications failed two prongs of the four-part test for granting a water right

As a general matter, all water in this state is publicly owned. With limited exceptions, private individuals or entities must apply to Ecology for a permit to appropriate water. RCW 90.03.250; RCW 90.03.260; RCW 90.44.060. In reviewing an application for a water right permit, Ecology must determine (1) whether any water is available to be appropriated; (2) whether the proposed use will be beneficial; (3) whether the appropriation will impair existing water rights; and (4) whether the appropriation will detrimentally affect the public welfare. RCW 90.03.290(3); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000). RCW 90.44.060 makes these criteria applicable to applications for ground water. Each of the four parts is a separate determination that must be met before a new water right can issue. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 384, 932 P.2d 139 (1997).

Ecology has the discretion to approve a permit in whole or in part, or for less water than is requested in an application. RCW 90.03.290. Ecology is authorized to determine whether the granting of a withdrawal permit will injure or damage any vested or existing rights. RCW 90.44.070. In this instance, Ecology properly exercised its statutory authority in denying Vander Houwen's applications.

An applicant for a water right must satisfy all four parts of the test set forth in RCW 90.03.290. As described above, Ecology determined that Vander Houwen's applications failed the non-impairment and no detriment to the public welfare prongs of RCW 90.03.290. The record contains substantial evidence supporting Ecology's determination and the Board properly applied the law to those facts in affirming Ecology.

The only evidence in the record establishes the following:

Impairment: The Yakima River Basin, which includes the Naches River, is highly managed through various irrigation projects operated by the United States Bureau of Reclamation. TR (2003) 30:15–31:19 (Monroe); TR (2003) 150:9–160:16 (Barwin). Water is not readily available in the Yakima Basin throughout the irrigation season. TR (2003) 30:15–31:19 (Monroe); TR (2003) 160:7–161:6 (Barwin). All unappropriated surface water in the Yakima Basin has been withdrawn from appropriation under RCW 90.40.030 since January 16, 1982, to meet

the needs of the Yakima River Basin Water Enhancement Program project. TR (2003) 150:12–153:23 (Barwin). Flow reductions to the Naches and Yakima Rivers reduce water supply available to the existing water users in the basin whose water supplies from the Bureau of Reclamation are reduced through prorationing during times of shortage. TR (2003) 153:24–156:20 (Barwin).

Ground water withdrawn by Vander Houwen is hydraulically connected to the Naches River. TR (2003) 94:21–115:22 (Kirk). Ground water taken from each well would intercept water that would discharge from the ground water system into the Naches River. TR (2003) 96:22–115:22, 127:14–132:9 (Kirk); AR Ex. R-18, R-19. Granting a water right that removes water from the Naches River and results in a senior right receiving less water than it is entitled to receive constitutes impairment of existing water rights. TR (2003) 55:4–57:19 (Monroe).

Public Welfare: The United States Bureau of Reclamation and Ecology have invested significant sums of money seeking to improve the fisheries in the Yakima River Basin, as has the Yakama Indian Nation. TR (2003) 32:1–34:14 (Monroe); TR (2003) 156:25–159:9 (Barwin). These efforts include the purchase of existing water rights to increase water in the system. TR (2003) 32:1–34:14 (Monroe). Because granting the Vander Houwen's water right applications would result in a reduction

of water in the Naches River, thereby undermining the public investment in the basin to improve the fisheries, Ecology concluded that approving the applications was contrary to the public welfare. TR (2003) 32:1–34:14, 44:2–18 (Monroe); AR Ex. R-10, R-15.

Regardless of Vander Houwen's failure to offer any evidence to substantiate his claim that Ecology improperly denied his water right applications, the record contains substantial evidence supporting Ecology's denials. Moreover, the Board did not commit error in applying the law to the facts. As established by the facts presented and the Board's application of the law to those facts, Vander Houwen's applications fail the statutory test for granting a water right. Monson's Assignment of Error No. 14 asserting that the superior court erred in upholding the Board's decision is meritless. This Court should affirm the decisions below.

2. Impairment evidence in the record is consistent with requirements of *Postema*

Contrary to Monson's assertions, the evidence of impairment presented by Ecology is consistent with that required by the Supreme Court in *Postema*. In fact, the uncontroverted evidence presented by Ecology in this case is the type of evidence that the Supreme Court stated was acceptable to demonstrate impairment. *Postema*, 142 Wn.2d at 91–93

(in determining whether proposed ground water withdrawal will impair existing surface water rights Ecology may rely on any appropriate new information, scientific techniques, or modeling techniques). Moreover, in *Postema*, the Supreme Court affirmed Ecology's denials of ground water right applications that were based on similar evidence. *Id.* at 101–107 (ground water application denials upheld where evidence established that proposed withdrawals would reduce surface flows and impair existing rights). As detailed above, the uncontroverted evidence presented by Ecology, which included conceptual models, established that water withdrawn from the proposed wells would impair existing rights in the Naches River. *See, e.g.*, TR (2003) 96:22–115:22, 127:14–132:9 (Kirk); AR Ex. R-18, R-19.

As contemplated by the Supreme Court, Vander Houwen was “provided the opportunity to challenge Ecology’s factual determinations.” *Postema*, 142 Wn.2d at 93. However, his failure to take advantage of that opportunity by presenting evidence at the administrative hearings does not undermine Ecology’s denials or the Board’s decision. Monson’s belated, and unsupported, claims that Ecology’s evidence was deficient cannot rectify Vander Houwen’s failure to carry his burden or offer any admissible evidence at the hearings below. The time to demonstrate that

Ecology's denials were erroneous was at the administrative hearings. No such showing was attempted, let alone made.

The record contains substantial evidence supporting Ecology's determination that Vander Houwen's applications failed the no impairment and public welfare prongs of RCW 90.03.290. The Board correctly affirmed Ecology's denials and the Court, in turn, should affirm the Board's decision below.

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

Monson's challenges to several of the Board's findings, as well as the Board's affirmance of Ecology's denials, are in fact attacks on the credibility of the expert witnesses who testified before the Board.⁹ However, Monson neglects to inform the Court that at the Board hearings Vander Houwen did not challenge the expertise of Ecology's witnesses to testify on the technical subjects at issue and, in fact, asked Ecology's witnesses to offer opinion testimony. *See, e.g.*, TR (2003) 117:16-119:2 (Kirk). Regardless, the evidence and testimony presented was credible and supports denial of the water right applications.

⁹ For example, Monson asserts that "the record is devoid of any legitimate testimony or evidence[.]" Appellant's Brief at 1. As detailed in this response, the *only* evidence and testimony in the record, all of which is indeed legitimate, supports Ecology's denials and the Board's decision affirming Ecology.

Arguments pertaining to witness credibility are not appropriate at this appellate level of review. The Board has already weighed the evidence and determined the weight to be given to any competing inferences. These functions reside with the Board 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 Board’s findings are supported by substantial evidence in the record. The Court should reject Monson’s baseless attacks on evidence in the record and the credibility of Ecology’s witnesses. As established below, the findings are supported and the Court’s inquiry need go no further.

As provided in RCW 90.03.290, a water right cannot be granted if other existing water rights will be impaired. Nor can a water right issue if the proposed water use would be detrimental to the public welfare. After reviewing the history of the basin, existing rights in the area and the hydraulic continuity between the proposed ground water withdrawal and the Naches River, Ecology correctly determined that approving the applications would result in impairment of existing rights. Ecology also correctly concluded that granting the applications would be detrimental to the public welfare as allowing further withdrawals in continuity with the

Naches River would undermine the public investment in improving the fisheries in the Yakima River Basin.

Before the Board, the burden was on Vander Houwen to establish that his proposed withdrawals met the requirements of RCW 90.03.290, specifically the no impairment of other existing rights and no detriment to the public welfare prongs. No such showing was made. In light of the overwhelming evidence that granting of Vander Houwen's applications would be detrimental to existing rights and the public welfare, Ecology properly denied those applications and the Board correctly affirmed Ecology's decision.

4. Challenged findings are supported by substantial evidence

Monson challenges 13 of the Board's 31 Findings of Fact alleging that they are not supported by substantial evidence.¹⁰ It is unclear what record Monson reviewed as every Board finding he challenged is, in fact, supported by evidence that is substantial and uncontradicted. In actuality, Monson seeks to reargue the evidence and asks the Court to override the

¹⁰ Although not doing so in its appeal to the superior court, Monson now asserts that Findings of Fact II-IV, XI, XIV, XV, XVI, XVII, XVIII, XIX, and XX-XXII are not supported by substantial evidence. As detailed in Section VI.B *supra*, Monson should be precluded from raising these new challenges. See RCW 34.05.554, RAP 2.5. Notwithstanding Monson's failure to comply with applicable statutes and court rules, as demonstrated in this section all of the challenged findings are supported by substantial evidence. Additionally, Monson did not assign error to Findings of Fact I, V-X, XII, XIII, XXIII-XXXI. Findings of fact that are unchallenged are verities on appeal. See, e.g., *Hilltop Terrace*, 126 Wn.2d at 30.

Board's judgment on the credibility of the witnesses and the weight to be given the evidence, neither of which is permitted under the APA. As demonstrated above in the Counter Statement of the Case and supplemented below, the record contains substantial evidence supporting the Board's affirmance of Ecology's denials. The Court should readily reject Monson's assignments of error as the record contains substantial, uncontroverted evidence supporting each and every factual finding.

Finding of Fact II: This finding tracks the testimony of Darrell Monroe of Ecology and Mr. Vander Houwen. Mr. Monroe was assigned to investigate the two water right applications and testified regarding the characteristics of the well drilled in Section 34. TR (1997) 24:4-14 (Monroe). Mr. Vander Houwen testified that he contacted Ecology to see if there was an existing water right and was told that there was not one and that he should file an application. TR (1997) 17:24-18:12 (Vander Houwen).

Findings of Fact III and IV: Contrary to Monson's assertion, the distance between the top of the casing of each well to the Naches River is contained in the Reports of Examination for each well. Ex. R-10 at 3 (Section 34), R-15 at 3 (Section 5).

Findings of Fact XI, XIV, XV: In challenging these findings, Monson is alleging facts that are not part of the record. Rather than

establishing the lack of substantial evidence in the record, Monson is asking the Court to substitute his unsupported statements in place of record evidence. If there were any such competent evidence available, which Ecology does not concede there is, it was incumbent upon Vander Houwen to offer it at the hearing. He did not. The following citations demonstrate that the record contains substantial evidence supporting each of these findings: Finding of Fact XI — TR (2003) 35:8–36:11, 77:25–78:23 (Monroe); Finding of Fact XIV — TR (2003) 163:11–164:20, 173:13–16 (Barwin); Finding of Fact XV — TR (2003) 153:24–156:8 (Barwin).

Finding of Fact XVI: Monson simply claims that this finding is not supported by substantial evidence. To the contrary, this finding is based on the testimony of Robert Barwin of Ecology. TR (2003) 156:2–159:9 (Barwin).

Finding of Fact XVII: Again, contrary to Monson's flat assertion regarding lack of substantial evidence, the record fully supports this finding. TR (2003) 156:2–159:19 (Barwin).

Findings of Fact XVIII and XIX: As noted above, the Board mistakenly referred to the well in Section 34 when it was describing the characteristics of the well in Section 5, and vice versa. As is evident from the record, when the error is corrected, there is more than

substantial evidence supporting these findings. Finding of Fact XVIII — TR (2003) 92:19–115:22 (Kirk); AR Ex. R-18, R-19, R-19A, R-37, R-38, R-39, R-40; Finding of Fact XIX — TR (2003) 112:12–115:22, 127:14–132:9 (Kirk); AR Ex. R-18, R-19, R-19A, R-37, R-38, R-39, R-40.

Lacking citation to any evidence, Monson alleges that there is not substantial evidence in the record supporting the “opinion” in Finding of Fact XIX and that it is not “sound science”. As the record amply demonstrates, Ecology’s hydrogeologist, John Kirk, is an expert in his field and is competent to testify on the scientific matters at issue. TR (2003) 87:5-88:14 (Kirk); AR Ex. R-17. There was no challenge to Mr. Kirk’s qualifications as an expert and the Board permitted his testimony. As noted above, Vander Houwen asked Mr. Kirk a number of questions seeking his expert opinion. *See, e.g.*, TR (2003) 117:16–119:2 (Kirk). The Court should reject Monson’s belated and unsubstantiated attack on the credibility and expertise of Mr. Kirk.

Finding of Fact XX, XXI and XXII: Monson’s challenges to these findings can readily be distilled to his overall mantra—the record lacks substantial evidence. Despite repeatedly making this statement, Monson’s claims do not withstand even minimal scrutiny. The record contains substantial evidence supporting these findings: Finding of Fact XX — TR (2003) 32:1–34:14, 44:2–18 (Monroe), AR Ex. R-10, R-15;

Finding of Fact XXI — TR (2003) 30:15-31:19, 35:8-36:11 (Monroe),
AR Ex. R-10, R-15; Finding of Fact XXII — TR (2003) 80:16-81:6
(Monroe), AR Ex. R-10, R-15.

VII. CONCLUSION

For the reasons stated above, the Court should affirm the Board's
decision upholding Ecology's denials of Vander Houwen's water right
permit applications.

RESPECTFULLY SUBMITTED this 3rd day of November
2011.

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1 that they had planted and irrigated, at least partially, from the wells in question. The Board
2 concluded that any harm resulted from the Vanderhouwens' illegal actions.

3 The case was set for hearing on March 7, 1997. On March 5, the Vanderhouwens'
4 attorney requested a continuance from the Board. The motion was based on the inability of the
5 attorney to obtain an expert witness for the hearing. The Presiding Officer denied this motion by
6 written order issued that day. The attorney renewed the motion the following day, arguing that
7 he would be unable to attend the Board hearing because of an on-going trial. He apparently had
8 hoped that the trial, which had been set since January, would be finished by the date of the
9 Board's hearing. The Presiding Officer denied that motion on March 6. Mr. Vanderhouwen
10 appeared at the hearing on the morning of March 7, without his attorney. He requested a
11 continuance, on the grounds that he did not have an attorney or an expert witness. His attorney
12 also transmitted a facsimile letter to the Presiding Officer, the morning of the hearing, renewing,
13 once again, his motion for a continuance. The Board had notified the parties, in a letter sent on
14 December 5, 1996, that the hearing was set for 9:00 a.m., in the Board's hearing room in Lacey,
15 Washington, on March 7. The Presiding Officer denied these motions, citing to the December 5
16 letter, and to the Pre-Hearing Order in the case which established January 27, 1995 as the
17 deadline for the submittal of final witness and exhibit lists. The Vanderhouwens had filed their
18 final lists on February 27, 1995. That list contained the names of two former Ecology employees
19 who now act as water right consultants, and are recognized experts in the field.

1 Present for the Board were: Robert V. Jensen, Presiding Officer and Richard C. Kelley,
2 Chair. Mr. Vanderhouwen represented himself at the hearing. Ecology was represented by Joan
3 Marchioro, Assistant Attorney General. The proceedings were recorded by court reporter, Randi
4 R. Hamilton, of Gene Barker and Associates of Olympia.

5 The parties produced witnesses who testified and whom were subject to cross-
6 examination by the parties, and to questions from the Board. The parties also introduced exhibits
7 which the Board examined. The Board considered the final arguments of the parties. The Board,
8 based on its review of the evidence and the relevant law, renders the following decision.

9 FINDINGS OF FACT

1 I

11 Jerrie Vanderhouwen has been farming in the area around Naches for about 40 years.
12 Approximately 8 years ago, he purchased lands lying northeast of the Town of Naches and the
13 Naches River, for the purpose of expanding his orchard operations. The lands were within
14 section 3, township 14 north, range 17 east; and section 34 township 15 north, range 17 east,
15 Willamette Meridian.

16 II

17 There was an existing 8 inch diameter well on section 34, which extended to a depth of
18 340 feet below the ground surface. Mr. Vanderhouwen contacted Ecology in 1992 for advice as
19 to how to get water for his orchard expansion. Ecology told him that it had no record of any
20 water right for the well on section 34. Ecology advised him to apply for a ground water permit.

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III

In March 1992, Mr. Vanderhouwen hired a well-driller to deepen the existing well on section 34. The well-driller bore the 8 inch well to a depth of 802 feet below ground surface, and installed casing to 600 feet. He encountered water at 580 feet. The well-driller recorded the static water level of the deepened well at 530 feet. The Naches River, at this point, lies about 530 feet below the top of the casing.

IV

Mr. Vanderhouwen, in late June 1992, had the same well-driller bore a new well in the southeast portion of section 5, township 14 north, range 17 east, Willamette Meridian. The well-driller bored a hole 8" in diameter to a depth of 505 feet below ground surface. Below that level, he narrowed the hole to a 6" diameter, to a total depth of 625 feet. He installed 8" casing to the upper depth, and continued with 6" casing to the lower depth. He recorded the static water level of the well as 340 feet below ground surface. The Naches River, at this point, lies about 320 feet below the top of the casing.

V

Mr. Vanderhouwen, in care of his attorney, filed applications for both wells with Ecology, on September 17, 1992. He wrote on the applications that he intended to use the water for "continuous single domestic supply, irrigation during irrigation season, frost protection, miscellaneous agricultural purposes." For the well on section 34, he requested an instantaneous withdrawal of 500 gallons per minute ("gpm"), and a total annual withdrawal of 750 acre feet, to

1 irrigate 379 acres. He described the proposed irrigation system as comprising a 60 horsepower
2 pump, and a 6" pipe connected to "100 acres of in-ground under tree sprinklers." There was no
3 home on the site, but he apparently intended to build one. This well is located about 9,000 feet
4 northeast of the Naches River.

5 VI

6 Mr. Vanderhouwen's application for the well on section 5, asked for an instantaneous
7 withdrawal of 350 gpm, and a total annual withdrawal of 350 acre feet. He wrote that the
8 Yakima-Tieton Irrigation District would supply the water for 60 of the 200 acres. Mr.
9 Vanderhouwen described the system as being comprised of a 60 horsepower pump, and a 5"
10 diameter pipe, "connected to 150 acres of in-ground under tree sprinklers." He fixed the well
11 location about 1000 feet southwest of the Naches River.

12 VII

13 Ecology received reports in 1993 that Mr. Vanderhouwen, in 1992, had planted orchard
14 trees and irrigated them illegally from the Naches-Selah Canal. At that time, Mr.
15 Vanderhouwen's land, within section 34, was outside the boundaries of the Naches-Selah
16 Irrigation District. Therefore, he was not entitled to use that entity's water to irrigate such land.
17 Ecology wrote to Mr. Vanderhouwen's attorney, on April 12, 1993 to urge Mr. Vanderhouwen to
18 stop making any unauthorized use of water, and await "proper water right permitting by this
19 office." Ecology further advised Mr. Vanderhouwen to stop the construction of two reservoirs
20 on section 34, and one near the top of the Naches-Tieton grade, pending a determination from

1 that agency as to whether the reservoirs would need Ecology's approval. Ecology suggested in
2 its letter that the parties meet to discuss Mr. Vanderhouwen's water permit situation.

3 VIII

4 Mr. Vanderhouwen's attorney and Darrell Monroe, of Ecology had a telephone
5 conversation the next day. On April 15, the attorney wrote to Mr. Monroe, requesting a
6 temporary permit, pending the processing of his client's water permit application. The attorney
7 explained that the application for the well in section 34, was filed in anticipation of Ecology's
8 processing the application in 1993. However, the attorney understood that Ecology then was not
9 processing water permit application in the area of his client's lands, and that such processing
10 might take from two to three years. The attorney wrote that such delays already had seriously
11 jeopardized Mr. Vanderhouwen.

12 IX

13 Ecology wrote to Mr. Vanderhouwen's attorney on April 29, 1993, in response to the
14 latter's April 15 letter. Doug Clausing, the Section Manager of the Water Resources Program,
15 for Ecology's Central Region, wrote that Ecology was reviewing the older applications in the
16 region, and anticipated making decisions on approximately 600 applications during 1993. He
17 pointed out that the Legislature could seriously curtail Ecology's water resources' program
18 budget, which would result in a major staff reduction, and thereby vitiate this projection.¹ Mr.

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20

¹ This fear was borne out as the Legislature, in 1994 failed to pass a new water-right fee bill. This resulted in the triggering of a proviso in the previous year's legislation, which reduced Ecology's water rights permit program budget by 63 percent. Laws of 1993, 1st Spec. Sess., ch. 24, § 303, p. 2937.

1 Clausing wrote that Mr. Vanderhouwen should not expect a permit decision on either application
2 until late 1993, or early 1994. Mr. Clausing explained that the temporary permit mechanism was
3 not designed to enable applicants an opportunity to avoid waiting their turn for a final decision.
4 He pointed out that Mr. Vanderhouwen should not fault Ecology for his planting orchard trees, in
5 the absence of a legal source of water. Ecology warned Mr. Vanderhouwen's attorney, that
6 further construction or planting of trees by his client would "certainly cause the Department to
7 consider formal enforcement alternatives."

8 X

9 Mr. Monroe and Stan Isley of Ecology, on April 12, 1994, inspected Mr.
10 Vanderhouwen's orchard project. They found that both the wells on sections 34 and 5 had been
11 constructed. Mr. Vanderhouwen stated that on section 34 he had planted 100 acres of apple and
12 cherry trees, in a 1:1 ratio. He explained that he was working on obtaining a connection to the
13 Selah-Naches Irrigation District, and showed the Ecology representatives where he proposed to
14 withdraw water from the Naches-Selah flume. The trees were one to two years old. They would
15 have had to receive irrigation water to survive. The well on section 5 was outside the boundaries
16 of the Yakima-Tieton Irrigation District. The orchard had been recently flooded with irrigation.
17 The source of that irrigation was the well on section 5.

18 XI

19 The waters of the Naches River, which is a tributary to the Yakima River, are highly
20 appropriated. These waters are used as a conduit to deliver stored water to downstream irrigation

1 right holders and to protect downstream fisheries. The project storage reservoirs in the Yakima
2 Basin are intensely managed to satisfy fishery management needs and water contract obligations.

3 XII

4 Both wells draw from a thick sequence of saturated silts, clays and gravels comprising the
5 Ellensburg Formation. The water drawn from the well in section 34 is at an elevation slightly
6 below that of the Naches River. In spring, the high waters of the river flow through the
7 surrounding alluvium, comprised of sands and gravels, down through the aquifer to the well.
8 During the summer, when the river water is lower, the water flows in the opposite direction.
9 Pumping this well results, therefore, either in intercepting water destined for the river, or
10 inducing losses from the river, to fill the void created by the ground water pumping. This
11 phenomenon is described in the science of hydrogeology as hydraulic continuity.

12 XIII

13 The well in section 5 draws from the same aquifer, but the well-intake is farther below
14 the Naches River than the intake for the section 34 well. The Ellensburg Formation, from which
15 the well draws water, in the vicinity of the section 5 well, does not connect to the Naches River
16 alluvium, but rather lies below it. Nevertheless, this aquifer is in hydraulic continuity, at the
17 location of this well, with the Naches River. Water withdrawal from the well would lower the
18 pressure within the Ellensburg formation, causing water from the river, during high flows, to
19 flow faster toward the well. Due to the fact that the Ellensburg Formation lies below the river at
20 this location, the well water would be drawn down towards the well through the overlying

1 aquitards. These aquitards are permeable. Pumping this well would probably induce losses
2 from the river, to heal the void in the aquifer created by the withdrawal. Due to the presence of
3 intervening aquitards, the effect of pumping this well on the river would not be as immediate as
4 the effect of withdrawing water from the well in section 34. Over time, however, the total impact
5 on the river would equal the amount of water withdrawn from the well, minus whatever irrigation
6 amount would not be drawn by the crops, but which would be recharged to the system.

7 XIV

8 Ecology gives priority to the senior rights, within this watershed, namely the surface
9 rights existing prior to 1917, and the ground water rights existing prior to 1944, which are the
10 respective dates of the surface and ground water codes. The remaining rights are pro-rated, in
11 times of water shortage.

12 XV

13 The water shortage and deteriorated water quality of the Yakima River Basin and the
14 lower reach to which the Naches River contributes, has created a substantial public interest in
15 improving river flow and fish passage conditions for endangered species and to protect existing
16 water rights.

17 XVI

18 On May 25, 1994, Ecology finalized its Report of Examination, denying Mr.
19 Vanderhouwen's two water right applications. Ecology determined that the two applications, if
20 approved, would impair existing rights and would be detrimental to the public interest. Ecology

1 finalized these decisions by written order on May 26, and mailed them to Mr. Vanderhouwen's
2 attorney, by certified mail, on the same day.

3 **XVII**

4 Ecology, on June 15, wrote to Mr. Vanderhouwen and his attorney, expressing its
5 concerns that the former, in developing sections 34 and 35, township 15 north, range 17 east and
6 sections 4 and 5, township 14 north, range 17 east, Willamette Meridian, had planted several
7 acres of small fruit trees, without a water permit. He was advised that he should contact Ecology
8 before proceeding further with the project.

9 **XVIII**

10 On June 21 and 22, Mr. Monroe made field investigations of Mr. Vanderhouwen's
11 orchard expansion. They observed recently irrigated trees on sections 34, 35 and 5. by then, Mr.
12 Vanderhouwen had achieved annexation of section 34 into the Selah-Naches Irrigation District.
13 He was pumping some water to the approximately 100 acres of trees from that source; however,
14 the amount was insufficient to adequately irrigate the trees on section 34. The irrigation system
15 on section 34 included a 60 horsepower submersible pump, located in the well, and a distribution
16 system containing a 40 horsepower centrifugal booster pump and two reservoirs. The trees on
17 section 35, were outside the boundaries of the Selah-Naches Irrigation District. Mr.
18 Vanderhouwen's trees on section 5, were located on 4 to 5 acres of land outside the boundaries
19 of the Yakima-Tieton Irrigation District. The irrigation system on section 5, consisted of a 60
20 horsepower submersible pump, installed in the well, which was connected to a sprinkler system.

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XIX

Mr. Monroe recommended enforcement action to his supervisor, Doug Clausing. On June 29, Mr. Clausing signed two enforcement orders against Mr. Vanderhouwen, for the illegal use of the public ground waters of the state, on sections 34 and 5. The order required Mr. Vanderhouwen to cease immediately the irrigation of his orchards, on sections 34 and 5, from the wells on those sections. Further, Ecology required Mr. Vanderhouwen to install measuring devices on the wells, within 30 days of the order. Finally, Ecology prescribed that Mr. Vanderhouwen take weekly readings from the measuring devices, and submit monthly reports to Ecology, documenting his use of the water from those wells. These orders were delivered to Mr. Vanderhouwen's attorney, by certified mail, on June 29. They were received on July 1.

XX

Messrs. Monroe and Isley returned to the property of Mr. Vanderhouwen on August 15 for another site inspection. They observed that the ground cover, as well as the trees on section 5 were green, attesting to recent irrigation. The pressure gage, on the line on that property, revealed that the water was under high pressure. The power meter readings, on this system, indicated that the well had been pumped a substantial number of days.

XXI

On section 34, the Ecology representatives observed green, healthy trees, surrounded by brown fields. In addition they noticed that the well head was leaking. This indicated that the lines from the well were under pressure, and had been recently used.

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XXII

Mr. Isley took color photographs. There were no flow meters on either well. Based on these observations, Mr. Monroe recommended that Ecology issue civil penalties against Mr. Vanderhouwen for: Mr. Vanderhouwen's illegal pumping, and his failure to install flow meters and provide Ecology with monthly readings.

XXIII

Ecology, on August 25, issued a total of \$12,000 in civil penalties against Mr. Vanderhouwen, \$6,000 for each well. The Vanderhouwens received the orders establishing these penalties on August 26.

XXIV

Any conclusion of law deemed to be a finding of fact is adopted as such. Based on these findings, the Board makes the following:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and subject matter of these appeals under RCW 43.21B, 90.03, and 90.44.

II

The Board has found hydraulic continuity between Mr. Vanderhouwen's wells on sections 34 and 5, and the Naches River.

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III

The Naches River and the Yakima River, to which the Naches is a tributary, are highly appropriated waters.

IV

Mr. Vanderhouwen's has applied for a sizable amount of water to irrigate newly planted orchards in the Naches River Valley. These volumes would reduce the water available to prior appropriators downstream from his property, on the Naches-Yakima River system. His withdrawals would impair existing rights. Therefore, Ecology was under a duty to reject the applications under RCW 90.03.290.

V

The water quality of the Yakima River Basin is presently in a deteriorated condition. Further withdrawals, such as those sought by Mr. Vanderhouwen would further reduce that quality, by reducing the amount of diluting water contributed by the Naches River. There is a substantial public interest in improving river flow and fish passage conditions for endangered species in the Naches-Yakima River system. We conclude therefore, that Mr. Vanderhouwen's proposed withdrawals would also be detrimental to the public interest. The Board thus sustains Ecology's denials for this additional reason, under RCW 90.03.290.

VI

RCW 43.27A.190(2) authorizes Ecology to issue a regulatory order against any person violating RCW 90.44. RCW 43.27A.190(7) empowers Ecology to issue cease and desist orders,

1 and. in the appropriate circumstances corrective action to be taken within a specific and
2 reasonable time. WAC 508-64-010 authorizes Ecology to require that those withdrawing the
3 state's waters, place measuring devices on their facilities to "provide accurate measurement of
4 waters so utilized." Ecology, on June 29, 1994, ordered Mr. Vanderhouwen to cease and desist
5 from withdrawing ground water with out a permit. Ecology further ordered Mr. Vanderhouwen
6 to install flow meters on both wells, to take weekly readings, and to provide monthly reports to
7 Ecology, documenting the use of water from these wells. Mr. Vanderhouwen violated RCW
8 90.03 and 90.44 by withdrawing ground water for the irrigation of crops on more than 100 acres
9 of property, without a water right. Mr. Vanderhouwen has, since at least 1993, withdrawn water
10 illegally from the wells on sections 34 and 5 to irrigate newly planted orchard.

11 VII

12 RCW authorizes Ecology to impose a civil penalty of up to \$100 per day, per violation of
13 the Water Code, Ecology's implementing regulations and regulatory orders.

14 VIII

15 Ecology has established that Mr. Vanderhouwen violated the Water Code by unlawfully
16 withdrawing water from the wells located on sections 34 and 5. Moreover, he violated Ecology's
17 regulatory order, by failing to: cease and desist from such illegal withdrawal; install flow meters;
18 and provide monthly reports to Ecology, documenting his water use from these wells.

1 IX

2 The Board, in determining the reasonableness of a penalty, may consider the nature of the
3 violation, the previous history of the appellant, and the actions of the appellant to correct the
4 problem, since the violation. Fletcher v. Ecology, PCHB 94-178 at 11 (1995).

5 X

6 Mr. Vanderhouwen committed a serious violation. With full knowledge that he had no
7 right to it, he illegally withdrew state ground water to irrigate newly planted fruit trees. He took
8 the risk that he would be penalized by taking this action, and continuing it, even after having
9 been clearly forewarned by Ecology.

10 XI

11 Moreover, Mr. Vanderhouwen compounded his situation by continuing to withdraw
12 ground water without Ecology approval, and to ignore the metering and monitoring requirements
13 that Ecology placed on him in its regulatory orders. Just considering the time between the time
14 Mr. Vanderhouwen's attorney received the regulatory orders on: July 1 and August 26, 1995; and
15 when the Vanderhouwens received the civil penalties, was 56 days. Mr. Vanderhouwen
16 committed three violations on each well, for a total of six violations. Multiplying the maximum
17 penalty amount of \$100 by 56 days by 6 violations would amount to a potential penalty of
18 \$33,600.

19 XII

20 The Board concludes that the \$12,000 penalty is reasonable under the circumstances.

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XIII

Any finding of fact which is deemed a conclusion of law is hereby adopted as such.

From these conclusions of law, the Board enters the following:

ORDER

1. Ecology's denial of Mr. Vanderhouwen's applications for ground water permits, Nos. G4-31478 and G4-31479 is affirmed.

2. Ecology's cease and desist orders issued against Mr. Vanderhouwen, Nos. DE 94WR-C147 and DE 94WR-C159 are affirmed.

3. Ecology's civil penalties assessed against Mr. Vanderhouwen, Nos. DE 94WR-C370 and DE 94WR-C371, in the amount of \$6,000 each, are affirmed.

DONE this 25 day of March, 1997.

POLLUTION CONTROL HEARINGS BOARD

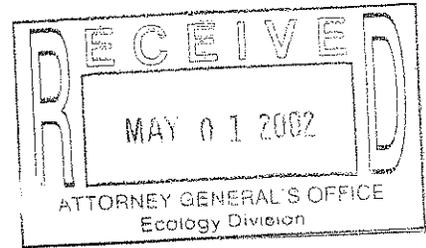


ROBERT V. JENSEN, Presiding



RICHARD C. KELLEY, Chair

P94-108F



SUPERIOR COURT STATE OF WASHINGTON
YAKIMA COUNTY

JERRIE VANDERHOUVEN and)
ANNE VANDERHOUVEN,)
)
Appellants,)
)
vs.)
)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
)
Respondent.)

NO. 97-2-00957-9
MEMORANDUM OPINION

This is a review of an administrative decision under the Administrative Procedures Act of a decision of the Pollution Control Hearings Board (Board). The petitioners had applied to the Department of Ecology (DOE) for two ground water permits to allow petitioners to use two wells. DOE denied the permits, issued a cease and desist order prohibiting use of the wells, and required the installation of flow meters and reporting use, and issued penalties for unauthorized appropriation of state waters and failure to install meters.

Petitioners appealed the denial of the permit applications, the cease and desist orders and the penalties to the Board. At the Board hearing the Board denied a continuance so that the Petitioners' attorney and expert witness could attend. The Board took evidence and concluded DOE's actions were appropriate. Petitioners appealed to this court. The court finds there is insufficient evidence to support the Board's findings and conclusions on the denial of the permits. The court finds the Board's decision regarding the cease and desist order and penalties was proper, contingent on the Board's proper finding that the denial of the permit was proper. The court remands the case to the Board for further proceedings.

FACTUAL BACKGROUND

Petitioners are farmers who planned to expand their orchard operations. They applied for permits to use wells they had on two separate properties described as sections 5 and 34. Concurrently with their attempts to gain approval for the wells they pursued water availability from two different irrigation districts. Relying on a belief they were pursuing the necessary course of action, they proceeded with the development of orchards on both properties and began using the wells without permits. DOE ultimately denied the applications, issued cease and desist orders, found continuing violations and issued civil penalties.

The key issue at the Board hearing is whether there is substantial evidence of hydraulic continuity between the wells and the Naches River, and whether that, alone, supports the denial of the permits.

Standard of Review

The standard of review by this court is whether there was substantial evidence before the Board supporting its findings, and whether there was a mistake or error in law.

The burden of proof at the Board hearing is on the petitioner. When an applicant is denied a permit the applicant must be given a meaningful opportunity for a hearing at which DOW must be prepared to prove pertinent facts that support its denial.

The applicant has the burden of proof on the four statutory elements under RCW 90.03.290. These are (1) that water is available, (2) that it is for a beneficial use, (3) that the withdrawal of water will not impair existing rights and (4) that the withdrawal will not be detrimental to public welfare. DOE concedes water is available and that the proposed use is a beneficial use.

Here the petitioners did not put on their own evidence contesting the existence of hydraulic continuity. They are, however, entitled to the benefit of the evidence presented by DOE. Specifically, the DOE evidence, through its expert Todd Kirk, conceded his opinion that hydraulic continuity existed was based on a conceptual model, and that it was "probable not factual".

There was no evidence that the conceptual model he created and relied upon for his opinion is of the kind relied upon by experts in the field.

Mr. Kirk testified at page 106, line 17, "I don't have models that can calculate how much time it would take to replace water that was in continuity with the river."

ANALYSIS

Hydraulic continuity exists whenever groundwater is discharging to a surface water body or whenever surface water is recharging to a groundwater body or aquifer. The underlying factual issue in this case is whether the Naches River is in hydraulic continuity with Petitioner's two wells, and if so, whether the proposed withdrawal adversely affects public interest or impairs existing water rights.

The Boards findings are all premised on an assumption of hydraulic continuity.

Hydraulic continuity of a well with a surface stream alone is an insufficient ground to deny a permit. *Postema v PHCB*, 142 Wn.2d 68, 102 (2000).

It is generally a question of fact whether an aquifer is in hydraulic continuity with a surface stream and whether it would affect the flow of a stream.

The court in *Postema* rejected the premise that a stream with unmet flows necessarily established impairment if there is an effect on the stream from groundwater withdrawals. The court said at page 93:

While the number of days minimum flows are unmet is a relevant consideration, it may be, for example, that due to seasonal fluctuations and time of withdrawal, groundwater withdrawal affecting the stream level will not impair the minimum flow rights. However, where minimum flows would be impaired, then an application must be denied.

Here, there was not showing that the Naches River, a "highly" appropriated river but not a "fully" appropriated river had minimum flows established by regulation. There was evidence that some rightful users, in some years, have had their water allocations diminished. There was no evidence supporting a finding that impairment would necessarily occur.

There was evidence under the theoretical model that withdrawal of water from the aquifer would create a pressure vacuum and that the Naches River had sufficient head to direct its flow in the direction of the low pressure created.

There was no evidence as to the length of time it would take to equalize the pressure, or at what rate this discharge would occur, or what impact seasonal recharges due to weather would have on the flow.

Mr. Vanderhouwen raised the issue in his testimony, and DOE did not respond with evidence, as to whether there is an opportunity for the aquifer to resaturate during a season when agricultural demands on the Naches are minimal or non-existent.

Continuity alone is not sufficient to demonstrate impairment or conflict, especially where the Naches River is not fully allocated.

Mr. Vanderhouwen raised the issue of recharging the aquifer, even if hydraulic continuity exists, because of seasonal use by himself and those with preceding rights, and because of varying availability for natural recharge because of weather.

Even if hydraulic continuity was established for both wells, the evidence concerning impact is lacking. The Board apparently presumed impact on the rights of others and on the public by inference from their finding of continuity. More is needed.

The court should not direct *qualitatively* what type of evidence is sufficient to establish the elements, or sufficient to determine the elements are not established. The court will not direct the use of particular tests or methods. It should defer to the fact finder, the Board, on these issues. The court's role is to determine *quantitatively* whether the Board's findings of fact are supported by substantial evidence. They are not and the case must be remanded for further proceedings, further evidence.

Cease and Desist; Penalties. In addition to denying the permit applications the petitioners seek review of the Board's decision regarding DOE's cease and desist orders and penalties it issued.

There is substantial evidence supporting the Board's findings that the petitioners continued to withdraw water from the two wells without permits and after being ordered not to do so. The evidence supports the finding that the petitioners failed to install flow meters as required under the order, and failed to monitor the meters.

DOE has authority to regulate use of wells by requiring meters and reporting usage under RCW 90.44.050 and WAC 508-64-010. This enforcement power is not limited to wells pending permit approval.

DOE imposed civil fines aggregating to a total of \$6,000.00 per well. They calculated and determined the fines reflected appropriate penalties at a rate of \$1,500.00 per well for failing to install meters, and \$6000.00 per well for continuing to appropriate water without a permit. While Mr. Vanderhouwen challenged DOE's assumption that the wells were used daily, thus justifying DOE's calculation of a fine on a daily rate (45 x 100), evidence was sufficient to support the inference.

Had the permit been approved the cease and desist order would have been inappropriate. The order to install meters was appropriate regardless of whether a permit was issued, denied, or wrongfully denied.

The penalty relating to the meters is upheld. The penalty relating to appropriating water is upheld contingent upon the Board's future finding that the denials of the permits were proper. If the permits should have been granted, those penalties should be set aside.

The court delayed the decision in this case. That delay was unintended and inadvertent, and was not caused by the parties. To the extent interest accrues on the

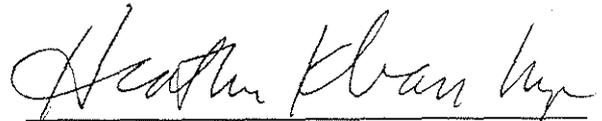
penalties, out of fairness it should be waived for the period of time the parties have been awaiting the final decision of this court.

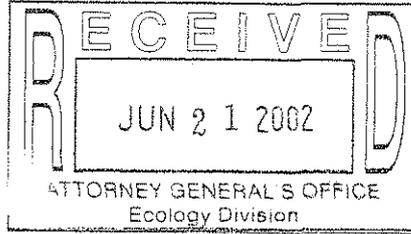
CONCLUSION

The evidence does not support a finding that the statutory prohibitions were met, that is that water appropriation from the two wells as proposed in the permit applications would impair existing water rights or the proposed groundwater withdrawal will detrimentally affect the public interest. Hydraulic continuity alone is insufficient to support such findings.

Parties are to submit final papers to remand this matter to the Pollution Control Hearings Board for further proceedings.

Dated this 29th day of April, 2002.


HEATHER K. VAN NUYS, Judge



FILED

JUN 18 2002

KIM M. EATON
YAKIMA COUNTY CLERK

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**SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY**

JERRIE VANDERHOUWEN and
ANNE VANDERHOUWEN,

NO. 97-2-00957-9

ORDER

Petitioners,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

THIS MATTER came before the court on Jerrie and Anne Vanderhouwens' (Vanderhouwen) Petition for Review of a decision by the Pollution Control Hearings Board (Board). The matter before the Board was an appeal by Vanderhouwen of Ecology's denial of Vanderhouwen's applications for water right permits for two ground water wells, issuance of cease and desist orders, and issuance of penalties for illegal water usage and failure to install flow meters on ground water wells and provide monthly reporting to Ecology.

The Board issued its decision on March 25, 1997. In its decision, the Board affirmed Ecology's denial of the applications for water right permits pursuant to RCW 90.03.290 as the evidence established that the ground water wells were in hydraulic continuity with the Naches River and would impair senior water right holders and would be detrimental to the public interest. The Board further ruled that Ecology properly ordered Vanderhouwen to cease and

Exhibit 3

ORDER

1 desist withdrawing water from the ground water wells and affirmed the penalties levied to
2 Vanderhouwen for illegal water usage and failure to install flow meters on the wells and submit
3 monthly reports to Ecology.

4 Vanderhouwen timely appealed the Board's decision to the Yakima County Superior
5 Court. The issue on appeal was whether the Board erroneously interpreted or applied the law in
6 affirming Ecology's denial of Vanderhouwen's application for water right permits for the ground
7 water wells and the agency's issuance of cease and desist orders and penalties.

8 In reaching its decision, the court considered the following:

- 9 1. The certified record compiled before the Board;
- 10 2. Petitioner Vanderhouwens' Brief in Support of Petition for Review;
- 11 3. Respondent Department of Ecology's Hearing Brief;
- 12 4. Petitioner Vanderhouwens' Reply Brief;
- 13 5. Oral argument of counsel for Vanderhouwen and Ecology.

14 The Court concludes that, given the Washington State Supreme Court ruling in *Postema*
15 *v. PCHB*, 142 Wn.2d 68 (2000), inadequate evidence was presented to the Board regarding
16 Vanderhouwen's failure to satisfy the statutory requirements of RCW 90.03.290 as hydraulic
17 continuity alone is not sufficient to support Ecology's denial of a water right application. The
18 Court remands this matter to the Board for further proceedings to present evidence in addition to
19 hydraulic continuity supporting Ecology's denial of Vanderhouwen's application for permits for
20 ground water wells. With respect to the penalties for illegal water usage, the Court affirms the
21 penalties contingent on the Board's future finding that the denials of the permits were proper.
22 The court affirms Ecology's issuance of penalties to Vanderhouwen for failure to install flow
23 meters on his wells and to provide monthly reporting to Ecology.

24 Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that the Petition for
25 Review is GRANTED IN PART, DENIED IN PART, and the matter is REMANDED to
26

1 Pollution Control Hearings Board for further proceedings consistent with this Order and the
2 Court's April 29, 2002, Memorandum Opinion.

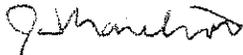
3 DONE IN OPEN COURT this 18th day of June, 2002.

4
5 HEATHER K. VAN NUYS
6 JUDGE

7
8 The Honorable HEATHER K. VAN NUYS, Judge

9 Presented by:

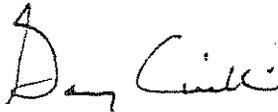
10 CHRISTINE O. GREGOIRE
11 Attorney General

12 

13 JOAN M. MARCHIORO, WSBA 19250
14 Assistant Attorney General

15 Attorneys for Respondent
16 State of Washington
17 Department of Ecology

18 Copy Received; Approved as to form;
19 Notice of Presentation Waived:

20 

21 GARY CUILLIER, WSBA 3633
22 Attorney for Petitioners
23 Jerrie and Anne Vanderhouwen
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**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

JERRI VANDERHOUWEN and
ANNE VANDERHOUWEN,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB Nos. 94-108, 94-146 and 94-231

MOTION IN LIMINE

I. INTRODUCTION

Respondent, Department of Ecology (Ecology) submits this Motion in Limine requesting the Board to disallow Appellants' (Vanderhouwen) proposed Exhibits 1 through 30. Those exhibits are not relevant to the issue on remand as defined in the Yakima County Superior Court's Order. As discussed below, the issue on remand is whether Ecology correctly determined that Vanderhouwen's applications for groundwater permits failed to meet the no impairment and public interest prongs of RCW 90.03.290. Vanderhouwen's proposed Exhibits 1 through 30 are not relevant to that issue and, therefore, should be disallowed.

II. STATEMENT OF FACTS

The Board originally heard this matter on March 7, 1997. The Board issued its Final Findings of Fact, Conclusions of Law and Order on March 25, 1997. In that decision, the

Exhibit 4

1 Board affirmed Ecology's denial of Vanderhouwen's water right permit applications, and
2 affirmed Ecology's issuance of cease and desist orders and penalties to Vanderhouwen.

3 Vanderhouwen appealed the Board's decision to the Yakima County Superior Court.
4 The appeal was argued before Judge Heather Van Nuys on October 14, 1999. Judge Van Nuys
5 issued a Memorandum Opinion on April 29, 2002. See Exhibit 1 to the Declaration of Joan M.
6 Marchioro (Marchioro Dec.) filed with this motion. In her ruling, Judge Van Nuys found that,
7 in light of the Supreme Court's ruling in *Postema v. Pollution Control Hearings Board*, 142
8 Wn.2d 68, 11 P.3d 726 (2000), Ecology did not provide sufficient evidence in addition to
9 establishing hydraulic continuity to support its denial of the water right applications. Judge
10 Van Nuys remanded the matter to the Board for further proceedings. The Order remanding the
11 case sets forth the issue that is to be considered by the Board on remand:

12 The Court remands this matter to the Board for further proceedings to present
13 evidence in addition to hydraulic continuity supporting Ecology's denial of
14 Vanderhouwen's application for permits for ground water wells. With respect to
15 the penalties for illegal water usage, the Court affirms the penalties contingent
16 on the Board's future finding that the denials of the permits were proper. The
17 court affirms Ecology's issuance of penalties to Vanderhouwen for failure to
18 install flow meters on his wells and to provide monthly reporting to Ecology.

19 See Exhibit 2 to Marchioro Dec. Therefore, the only issue before the Board is whether
20 Ecology correctly denied Vanderhouwen's applications for water rights as those applications
21 did not satisfy the requirements of RCW 90.03.290.

22 III. ARGUMENT

23 Vanderhouwen's proposed Exhibits 1 through 30 consist of documents from Ecology's
24 files regarding its decisions on other water right applications. See Exhibit 3 to Marchioro Dec.
25 Those documents do not relate in any way to the issue before the Board—whether Ecology's
26 denial of Vanderhouwen's water right applications was proper. Because the proposed exhibits
are not relevant to the issue before the Board, they should be disallowed.

It is anticipated that Vanderhouwen will assert that the exhibits are relevant to
demonstrate that Ecology subsequently granted applications with priority dates junior to that of

1 Vanderhouwen seeking water from the same source. Assuming *arguendo* that this assertion is
2 correct, it does not render those exhibits relevant to the issue before the Board. While Ecology
3 may have approved applications that are junior in priority to Vanderhouwen's, it does not
4 mean that Ecology's decision on Vanderhouwen's applications was incorrect or that Ecology
5 must now issue Vanderhouwen a water right permit. Addressing a similar issue, the Board
6 ruled:

7 [T]he fact that another party's later application in the same basin was approved
8 by Ecology, before Ecology acted on the application of this appellant, cannot be
9 a basis for Ecology or the Board to approve this appellant's application, if it
does not otherwise meet the statutory criteria for approval.

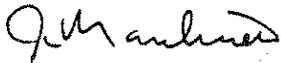
10 *Meacham v. Department of Ecology*, at 3, PCHB 96-249 & 91-19 (1997), quoting *Black River*
11 *Quarry, Inc. v. Department of Ecology*, at 14, PCHB 96-56 (1996). As Exhibits 1-30 offered
12 by Vanderhouwen are not relevant to this appeal Ecology requests that the Board grant its
13 Motion in Limine and exclude those exhibits.

14 IV. CONCLUSION

15 For the reasons set forth above, Ecology respectfully requests that Vanderhouwen's
16 proposed Exhibits 1 through 30 be disallowed.

17 DATED this 4th day of March, 2003.

18 CHRISTINE O. GREGOIRE
19 Attorney General

20 
21 JOAN M. MARCHIORO, WSBA #19250
Assistant Attorney General

22 Attorneys for Respondent
23 State of Washington
24 Department of Ecology
25 (360) 586-6770
26