POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ORONDO FRUIT COMPANY; MARCUS GRIGGS; DOUGLAS COUNTY PUBLIC UTILITY DISTRICT; and MICHAEL AND DINA BECK, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB Nos. 10-164 & 165 (Consolidated) **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Appellants Orondo Fruit Company and Marcus Griggs (OFC or Griggs) challenge the decisions by the Respondent Washington State Department of Ecology (Ecology) related to three water right change applications approved by the Douglas County Water Conservancy Board (Conservancy Board).

The Pollution Control Hearings Board (PCHB or Board) conducted a hearing in this matter on June 22-23, 2011, in Wenatchee, Washington. Attorney Mark Peterson represented Appellants OFC and Griggs. Assistant Attorney General Sharonne O'Shea represented Ecology. Douglas County Public Utility District (PUD) did not participate in the hearing other than to provide the testimony of witness Gordon Brett, PUD Property Supervisor. Michael and Dina Beck were present at the hearing, *pro se*, and participated in a minimal fashion.[1]

[1] Dina Beck testified as a witness for Appellants Griggs and OFC, and verbally agreed to a stipulation signed by Griggs, OFC, and Ecology, regarding the extent of the Becks' interest in the subject water rights.

The Board hearing the case was comprised of Andrea McNamara Doyle, Presiding; and William H. Lynch and Kathleen D. Mix, Members. Court reporting services were provided by Kim Otis of Olympia Court Reporters.

Witnesses were sworn and heard, exhibits were introduced, and the parties presented arguments to the Board. Based upon the evidence presented, the Board makes the following:

FINDINGS OF FACT

1.

Marcus Griggs and his family come from a long line of orchardists, dating back to 1886 when his wife's family homesteaded and planted some of the first orchards in the Orondo area. Several members of his family continue to be involved in various aspects of the orcharding business, including two sons, John and Marcus Jr., a daughter, and his brother-in-law and nephew, Barton and Cameron Clennon. Over the years they have formed a number of business entities in connection with their orcharding enterprises, including the Orondo Fruit Company, Inc.; G&C Farms, LLC; and Griggs Orchards, Inc. *M. Griggs, J. Griggs, B. Clennon, and C. Clennon Testimony.*

2.

Orondo Fruit Company was incorporated in 1973, and its growing-packing-shipping business is currently owned in equal shares by the Griggs and Clennon families. *Id., Ex. 31*. Griggs Orchards, Inc. was incorporated in 2006 and is governed by the Griggs family. *Id., Ex. 32*. G&C Farms was formed in 2008 to bring the Griggs and Clennon children into the financial

and operational aspects of the family business, particularly as it relates to the Orondo Ruby® cherry. *Id., Ex. 33*.

3.

Marcus Griggs also personally owns sizable tracts of land in the Orondo area, including a large, mostly vacant and arid parcel adjacent to his other orchards and land owned by the Orondo Fruit Company for its warehouse operations. *Id., Ex. 104*. It has always been his goal to plant an additional orchard, and he has identified suitable, irrigable areas within his current vacant parcel to do so. *Id.* In furtherance of that goal, Mr. Griggs previously applied for a new water right several years ago, but that application stalled when shortly thereafter the Columbia River was closed to new appropriations. *M. Griggs Testimony*.

4.

The Griggs and Clennon family members, and all three business entities, have been collaborating and cooperating with one another for several years to expand their orchard holdings and, most recently, to develop the Orondo Ruby® cherry. *M. Griggs, J. Griggs, B. Clennon, and C. Clennon Testimony*.

5.

During the 2001 growing season, Marcus Griggs noticed a single cherry tree within one of his orchards that displayed new and different attributes than the rest of the neighboring trees, which had been planted in 1998.[2] It was maturing a week to ten days earlier than the

[2] Although there was some uncertainty on the part of the witnesses regarding the year the mutation was originally discovered, we find the patent's reference to a 2001 discovery date, corroborating Bart Clennon's testimony, to be the most reliable evidence on this point. *Ex. 93*.

surrounding Rainier cherry trees, and the fruit was redder, sweeter, and more acidic than the Rainiers. Mr. Griggs and his family then monitored the tree over the next couple of growing seasons to see whether the apparent mutation returned, and whether it could be artificially reproduced by grafting it into some trees growing in an adjacent block. The mutation returned in 2002 and 2003, and bore the new fruit on the grafted trees. In 2003, having concluded they had a viable new type of cherry, Mr. Griggs and his family sought the assistance of Willow Drive Nursery to conduct genetic tests, propagate additional stock from the mother tree, and begin the process of obtaining a patent. *M. Griggs, J. Griggs, and B. Clennon Testimony*.

6.

During the next several years, from 2003 through 2008, the Griggs and Clennon families worked in concert with one another to advance their plans of developing the new cherry variety into a commercially viable business venture. Together, the project's many components necessarily required several years of effort before the new orchard could be planted, including obtaining sufficient water rights, preparing the land, and developing the nursery stock. They also desired to obtain a patent for the new variety of cherry. The Griggs and Clennon families never deviated from their intended goal, and consistently took steps necessary to move each of the many different aspects of the project forward in tandem.

7.

In November 2002, the Orondo Fruit Company acquired several acres of land located adjacent to its existing warehouse property and one of Mr. Griggs' parcels, for the primary purpose of installing a new wastewater pond to serve the warehouse. *Ex. 103*. The newly

acquired property included appurtenant water rights. Within a few months of this purchase, the company determined there was more water than needed for the fruit company's warehouse and wastewater pond operations. At that time, in the first part of 2003, they decided to transfer a portion of the water right to suitable parts of Marcus Griggs' adjacent vacant land to plant a new orchard. In doing so, the company understood and expected that they would need to acquire and transfer enough additional water to cultivate a viable-sized block of trees. Mr. Griggs began looking for additional water rights to acquire at that time. *M. Griggs and B. Clennon Testimony; Ex. 104*.

8.

By 2007, with the help of Willow Drive Nursery, the Griggs had developed enough stock over the previous two years or so to plant a commercial test plot of 5,000 trees on property owned by John Griggs (the buds are grafted onto the trees at the nursery two years after cultivating the root tissue). Once planted in the commercial test plot, the trees require an additional two to three years to begin producing marketable fruit. *J. Griggs Testimony*.

9.

Mr. Griggs filed a patent application on November 13, 2006, for the new and distinct variety of cherry tree (the MG 200), and the patent for the Orondo Ruby® was issued May 20, 2008. *Ex. 93*.

10.

By the fall of 2008, G&C Farms placed an order for 50,000 additional Orondo Ruby® trees, which were to be propagated in California and delivered in the spring of 2011. *Ex. 20*.

After the trees were delivered to the nursery this spring, G&C Farms had to lease thirty acres from the state Department of Natural Resources (DNR) immediately north of Mr. Griggs' large vacant tract in Orondo to plant some of the trees while this appeal is pending. The rest of the trees are being stored at the nursery until next spring. *M. Griggs Testimony, Ex. 104*.

11.

Waddell Trust Claims

In November 2008, Marcus Griggs and Molly Waddell signed a purchase and sale agreement to convey three parcels of property in Okanogan County from a Waddell family trust to Mr. Griggs. *M. Griggs and M. Waddell Testimony*; *Exs. 15 & 21*. The agreement provides that it includes all water rights appurtenant to the subject property that are transferable to an Orondo well and similar use in Orondo. *Ex. 21*. It includes a purchase price and method of payment. It further provides that the agreement is contingent on the successful change/transfer of the water rights from Okanogan County to Orondo, that Marcus Griggs is responsible for initiating and paying for the change/transfer process, and that Ms. Waddell will provide necessary cooperation in support of the transfer application and processing. The purchase and sale agreement also contains language that allows the purchaser or seller to terminate the transfer at any time at the purchaser's or seller's sole discretion. *Id.*

12.

The Waddell Trust properties include two appurtenant water rights, Water Right Claim No. 022990 associated with the Waddell's original land, and Water Right Claim No. 073526, acquired in the 1980s when the Waddell's purchased the Thorson property. *Ex. 15*.

13.

Water Right Claim No. 022990, originally filed by Arthur T. and Arthur F. Waddell, (Waddell claim) asserts an April 21, 1910, priority date for surface water from the Okanogan River to irrigate 68 acres from April 1 through October 1 with an annual quantity (Qa) of 292.4 acre feet per year (afy) and an instantaneous quantity (Qi) of 10 cubic feet per second (cfs). The Waddell claim identifies the legal description of the lands in Okanogan County on which the water is used as the SE ¼ Section 30, T 32 N, R 25 EWM. *Ex. 24*.

14.

Water Right Claim No. 073526, originally filed by Robert Thorson, (Thorson claim) asserts an April 1910 priority date for surface water from the Okanogan River to irrigate 31 acres of orchard from April 15 through October 15 with a Qa of 100 afy and a Qi of 310 gallons per minute (gpm). The Thorson claim identifies the location of the point of diversion/withdrawal as the SE ¼ of Section 30, T 32, N, R 25 EWM, but identifies the legal description of the lands on which the water is used only as Okanogan County. *O'Shea Decl., Ex. A*.

15.

The Waddells have grown irrigated orchards on their properties in Okanogan County since the 1960s, until 2003. When the Waddells originally acquired their property, the eastern boundary of their parcel extended to the Okanogan River. *M. Waddell Testimony*.

16.

This property boundary changed when Wells Dam was constructed and the Douglas County PUD acquired riverfront parcels on both sides of the river for flood control. At that time,

the PUD entered into verbal lease agreements allowing the Waddells (and other property owners in the area) to continue farming and irrigating the lands the PUD had acquired. In the early 1990's, the PUD began requiring signed agreements for new users, clarifying the relationship between land and water ownership and usage rights, but never required the Waddells to sign one. The PUD has denied verbal requests to release the water rights associated with PUD lands, and generally does not approve requests to use non-PUD water rights on PUD parcels. The PUD commissioners must take formal action to dispose of any property interests including water rights, which they have not done in the case of the property or water rights adjacent to the Waddell Trust properties. *Brett Testimony*.

17.

The Waddells continued irrigating the parcels acquired by the PUD as orchard, pursuant to the verbal lease agreement with the PUD, believing they were using water from the Waddell portion of the Waddell and Thorson claims to do so. Sometime after 1996, the Waddells began leasing the property to other orchardists for a few years until they made the decision to remove the orchards. In 2002 and early 2003, they removed a large part of the orchards, and the remaining acres were taken out after the 2003 growing season. The parties have stipulated that approximately 14 acres of orchard was irrigated on the Waddell property in 2003. In 2004, the Waddells leased the property to a cattle farmer, who irrigated the land as pasture throughout the season, including down to the river on the PUD property, using permanent sprinklers on the northern portion and big gun sprinklers on the southern portion of the property. Approximately

one hundred head of cattle, and five bulls, were grazed on the pastures that year. *Ex. R-75 (D. Waddell Decl., with map), M. Waddell, D. Waddell, and Beck Testimony*.

18.

In 2007, Molly Waddell's daughter and son-in-law, Dina and Michael Beck, purchased a parcel from the Waddell Trust within the original place of use designated by both the Waddell and Thorson claims. *Beck Testimony, Exs. 23 & 25*. The parties have stipulated the extent of the Becks' interest in the water rights subject to this appeal as follows: a total of 10 acres of irrigation (totaling 35.75 afy at 0.2 cfs) with nine acres covered by the Waddell claim and one acre covered by the Thorson claim.

19.

Neither the Waddells, nor their lessees or successors in interest (the Becks), have ever extended their irrigation outside the boundaries of the property they owned, or leased from the PUD. They have never irrigated across the Okanogan River to the east, across the road to the west, nor on the Fitzgerald or McGaha properties also located in the SE ¼ of Section 30. *M. Waddell Testimony*.

20.

Marcus Griggs applied to the Douglas County Conservancy Board for change/transfer of the Waddell Trust's portion of the Waddell and Thorson claims in February 2009, specifying both the intended use and place of use for the rights in furtherance of his plans for new irrigated

orchards.[3] *Exs. 18 & 19*. The Conservancy Board approved both applications. *Exs. 23 & 25*. Ecology subsequently reversed both Conservancy Board decisions in separate letters denying the requested change/transfer applications.[4] Mr. Griggs timely appealed Ecology's denial, and the appeal was consolidated with a separate Orondo Fruit Company appeal of Ecology's decision relinquishing a portion of the Ground Water Certificate No. G3-00570-C.

21.

Griggs Groundwater Certificate

Certificate of Ground Water Right G3-00570-C was originally issued to Marcus Griggs ("Certificate G3-00570-C") with a priority date of December 1, 1971, authorizing the withdrawal of 450 gpm, 235.4 afy for the irrigation of 46 acres from April 15 to October 15 and 10 gpm, 2.5 afy continuously for domestic supply. The certificate describes the lands in Douglas County to which the right is appurtenant. *Ex. 43*. The place of use described on the certificate includes multiple parcels now owned by several different property owners, including the Bickfords, Lancaster, Trapp, Orondo Fruit, and R and E. *Ex. 36*.

22.

The orchard previously irrigated with the Orondo Fruit Company portion of this right was taken out of production in 2002 and has not been irrigated since 2003. *Haller Testimony*.

[3] As the purchaser of the water right, Marcus Griggs signed the applications in February 2009. Molly Waddell also submitted her signature as the water right holder and land owner of the existing place of use in July 2009.

[4] No party made these letters exhibits at the hearing, but they are part of the Board's record having been filed with Griggs' notices of appeal.

As part of Ecology's review of the Douglas County Conservancy Board's approval of an application filed by one of the appurtenant property owners (Monroe Bickford) to change the Bickford portion of Certificate G3-00570-C (DOUG 09-06), Ecology modified the Conservancy Board's decision to relinquish the Orondo Fruit portion of the right. *Ex. 35*. Ecology's decision was based on its conclusions that insufficient documentation had been provided to establish a determined future development (DFD) exemption from relinquishment for the Orondo Fruit portion of the water right. *Id.*

23.

The Orondo Fruit Company timely appealed Ecology's relinquishment decision contained within DOUG 09-06 (approving Bickford's application to change the Bickford portion of the right). The appeal was consolidated with Marcus Griggs' appeal of Ecology's reversal of the Conservancy Board's approval of the Griggs' applications for change/transfer of the Waddell and Thorson claims (DOUG 09-03 and 09-04).

24.

Ecology's decisions

Ecology's decision denying change application DOUG 09-04 (Waddell claim) identifies six bases for the denial: (1) concerns about insufficient documentation of a determined future development for all portions of the right; (2) extent and validity concerns; (3) concerns regarding missing signature of Michael and Dina Beck on the application; (4) concerns re: Columbia River interruptibility provision for management of instream flows; (5) concerns about incompleteness and insufficiency of the Annual Consumptive Quantity analysis; (6) concerns about missing

hydrogeology analysis related to impairment. Ecology's decision denying change application DOUG 09-03 (Thorson claims) identifies each of these same concerns with the exception of (3) related to the Beck signatures. Neither decision letter identifies any procedural defects about how or to whom notice of the applications was given (or not given), or any insufficiency in the adequacy of the narrative descriptions of overlapping water rights, or compliance with consultation requirements related to out-of-WRIA (water resources inventory area) transfers.

25.

Ecology's decision modifying the Bickford change application (DOUG 09-06) identifies one main reason for the modification relinquishing the Orondo Fruit Company portion of the right: a lack of documentation to support a DFD exception from relinquishment. *Ex. 35*. The decision goes on to point out several particular deficiencies related to the DFD analysis. *Id.*

26.

Ecology has adopted a policy that addresses the DFD exception to relinquishment, which Ecology staff applied in reviewing these change applications. *Haller Testimony, Ex. 67*. The policy (POL-1280) outlines a four-part standard for evaluating DFDs, which includes the following considerations: (1) the ownership of the water right, whether the party asserting the DFD has a vested interest in the water right; (2) the nature of the water right holder's plan, whether it is firm and definite; (3) the scope of the plan, whether it was fixed prior to the end of the five-year period of nonuse; and (4) whether there is evidence of some affirmative steps toward realization of the fixed and definitive plan within 15 years of the last beneficial use. *Id.* Mr. Haller additionally looked at the extent of the right based on the date the DFD was

established (date of fixing). *Id.* The DFD relinquishment exemption is highly fact-specific. *Id., Haller Testimony.*

27.

Mr. Haller, Ecology's lead engineer on Columbia River water supply development projects was faced with several complexities in evaluating the change applications. One of Ecology's main concerns with the Conservancy Board's decisions at issue in this appeal was a lack of documentation explaining the ownership interests and relationships between the various Griggs family members and the other business entities such as Orondo Fruit Company, G&C Farms, and Griggs Orchards. Ecology was also concerned that there was no written "business plan" as such, and it was difficult to see how any plan worked among these various business interests. After testimony at hearing, Ecology testified that it was not difficult to conclude that the family wholly owned and controlled these various business entities. Ecology also testified that the agency found it "compelling" that testimony at hearing showed that Bart Clennon was participating in the development of the new cherry and orchard, along with Marcus Griggs. It was not clear to Ecology until listening to the testimony at the hearing that all family members were in agreement about the development of an orchard with the new cherry. *Haller Testimony*.

28.

Mr. Haller was also trying to determine the point in time that Mr. Griggs' plans became conclusively "fixed" rather than merely speculative or investigatory. As part of his examination as to whether a DFD was established, Mr. Haller was concerned that the purchase and sale agreement between Mr. Griggs and Ms. Waddell contained language that allows the purchaser or

seller to terminate the transfer at any time at the purchaser's or seller's sole discretion. Mr. Haller decided that these options for termination did not allow the DFD to become fixed. Mr. Haller did not consider any fiduciary duties under a contract in reaching this conclusion. Mr. Haller also looked to Ms. Waddell's interest in the purchase and sale agreement and determined her sole interest was simply to sell her water right. *Haller Testimony*. Mr. Haller had some additional concerns about whether the size and type of orchard Mr. Griggs was planning to develop would reasonably require more than five years to complete, and whether any activity that constituted "land development" had taken place during this initial five-year period. *Haller Testimony*. Mr. Haller also believed that the lack of a change application or place of use identified in the Conservancy Board's record meant that no fixed plan existed. Mr. Haller conceded on cross-examination, however, that the Conservancy Board's decision does refer back to the Waddell-Griggs transfer. *Haller Testimony*. Mr. Haller acknowledges that the involvement of a patent creates a case of first impression. Mr. Haller also acknowledged that it is possible for the DFD to pre-exist the discovery of the new cherry, and then adopt the development of the new cherry as part of the DFD. *Haller Testimony*. Ecology agrees that the actions taken by the Griggs and Clennon families are not stalling tactics regarding the use of the water rights under appeal. *Downes Testimony*.

29.

In addition to the concerns raised by Ecology in its reversal letters, Ecology has since identified concerns about the adequacy of the public notice and consultation the Conservancy Board provided regarding the change applications. Generally speaking, Ecology's feedback to

conservancy boards takes two forms depending on where an application is in the process. While an application is pending before the conservancy boards, Ecology acts in a technical assistance role and provides input to the boards only when asked and on the issues or topics requested. Once a conservancy board makes its decision, Ecology assumes the lead role and provides feedback to the boards in the form of a decision approving, reversing, or modifying the conservancy board and setting forth the reasons why. *Haller Testimony;* RCW 90.80.055(1)(d), 90.80.070(4), and 90.80.080. Ecology looks for some specificity in a request from a conservancy board for technical assistance, such as developing a description of land with overlapping places of use and to state the place of use. This description is required under Ecology regulation in order to prevent enlargement and to evaluate waste. *Downes Testimony*. Conservancy boards are not required to follow Ecology policies and guidance that are not adopted as rules. *Rajala Testimony*; Attorney General Opinion 2006, No. 17.

30.

None of the technical assistance or other feedback Ecology provided to the Douglas County Conservancy Board on the subject applications, either before or after the Conservancy Board issued its decisions, raised any concerns regarding possible deficiencies in the notice process. These concerns were raised for the first time after Griggs filed his appeals of Ecology's decisions.

31.

After the Griggs applications were filed in February 2009, Ecology issued a request in April 2009, for all conservancy boards to include the State Department of Archeology and

Historic Preservation as an interested party for all new change applications received and processed. *Rajala Testimony, Ex. 63.* In June 2010, Ecology issued a directive to all Eastern Washington Water Conservancy Boards and Ecology staff, directing them to notify the Eastern Washington Council of Governments of all water right transfers filed with either a board or Ecology. *Rajala Testimony, Ex. 62*.

32.

The Colville Confederated Tribes ("Colvilles") have an interest in reviewing proposed water right changes/transfers to evaluate the potential impacts to tribal lands or water rights, lands or water rights of tribal members, and the potential effects on endangered species. *Passmore Testimony*. In many instances, the Colvilles have information that would be helpful or important to the evaluation of an application. Generally, two weeks' prior notice before a conservancy board acts on an application is sufficient time for the Colvilles to review and comment on a pending application for change/transfer. The Colville Confederated Tribes received no notification regarding the subject water right changes prior to the Douglas County Conservancy Board's approval of the three transfers. *Passmore Testimony; Ex. 57*. The Colvilles received notice of the applications and decisions after the appeals were filed. *Ex. 69.* They decided not to intervene in the present appeal, largely because they generally support downstream transfers, such as are at issue here, due to their beneficial effects on instream flows. *Passmore Testimony*. A conservancy board is required to provide notice to any Indian tribe with reservation lands or lands held in trust for the tribe within the area in which the conservancy board would have jurisdiction, if not for the express exclusion of conservancy board jurisdiction

in these areas, after an application for a transfer is filed with the conservancy board. A conservancy board is also required to provide notice of the application to any tribe that has requested that it be notified of applications. RCW 90.80.070(3); WAC 175-153-070(23). Conservancy boards have been trained to provide notice to the tribes. *Rajala Testimony*.

33.

Ecology does not claim it was unaware that Mr. Griggs' proposed place of use in applications DOUG 09-03 and DOUG 09-04 is located in a different water resources inventory area (WRIA) than the existing places of use. *Downes Testimony*. It is clear from the face of Mr. Griggs' applications that they involve an out-of-WRIA transfer. *Exs. 18, 19*. Ecology received and reviewed these applications three separate times. The applications were reviewed shortly after they were initially filed with the Conservancy Board in 2009 and forwarded to the agency, again in June 2010 when the Conservancy Board issued its first Records of Decision and Reports of Examination (later withdrawn), and finally in the fall of 2010 when the Conservancy Board issued its second Records of Decision and Reports of Examination. *Downes Testimony, Haller Testimony, Exs. 23, 25, 81, 82*.

34.

None of the technical assistance or other feedback Ecology provided to the Conservancy Board on the subject applications, either before or after the Conservancy Board issued its decisions, raised any concerns regarding the need to discuss the out-of-WRIA nature of the transfer in more detail. These concerns were raised for the first time after Griggs filed his appeals of Ecology's decisions.

35.

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

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the parties and the subject matter of this case pursuant to RCW 43.21B.110; WAC 371-08-315. The Board reviews the matter *de novo*, and makes its findings of fact based on the preponderance of the evidence unless otherwise required by law. WAC 371-08-485. As the party appealing Ecology's decisions, Appellants have the burden of proof. *Id.*

2.

The standard of review applied by the PCHB in the area of water rights is well-established as being both procedurally and substantively *de novo*. *Yakama Indian Nation v. Ecology*, PCHB Nos. 93-157, 93-166 – 168, 93-173 – 177, 93-205 – 212, 93-215 – 222, 97-117 and 118 (Order on Motions for Summary Judgment, October 9, 1998). The PCHB was created by the Legislature to provide independent expert and uniform adjudication of actions by Ecology. RCW 43.21B.010. The Board cannot fulfill its independent role unless it has the opportunity to develop its own factual record and provide a substantive *de novo* standard of review. *Yakama Indian Nation*, at p. 9.

3.

The questions remaining for resolution by the Board, after motion practice and the parties' various stipulations, can be paraphrased as follows:

Determined Future Development: Whether a determined future development (DFD) excuses five or more years of any non-use of the Waddell Trust portion of the Waddell or Thorson claim, or the Orondo Fruit Company's portion of the Certificate CG-300570-C.

Annual Consumptive Quantity: Whether an annual consumptive quantity (ACQ) analysis is necessary for the transfer of any of the subject rights and, if so, whether it can be satisfied for one or more of them.

Procedural Concerns at Conservancy Board: Whether any procedural failures on the part of the Douglas County Conservancy Board, either singularly or in combination, provide an adequate basis for Ecology's reversal of the decisions.

4.

Determined Future Development

In Washington, a water right will relinquish and revert back to the state after five or more consecutive years of voluntary nonuse, unless sufficient cause is shown or a statutory exception applies. RCW 90.14.160- .180. An exception from relinquishment exists for a water right "[i]f such right is claimed for a determined future development to take place … within fifteen years of … the most recent beneficial use of the water right." RCW 90.14.140(2)(c).

5.

Although the Legislature has not defined a "determined future development" (DFD), the Washington Supreme Court has interpreted both the standard for evaluating exceptions to relinquishment, as well as analyzed the DFD exception itself, in *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999). As an exception, the statutory

provision must be narrowly construed in order to give effect to the legislative intent, which the Court recognized was based on the purpose and policy of water law to maintain beneficial use of the water. *R.D. Merrill*, 137 Wn.2d at 140. Where an appropriator ceases to use the water, it should be available for other appropriators who can and will use it beneficially. *Id.*

6.

According to *R.D. Merrill*, the party asserting a DFD exception must demonstrate that the plan was fixed and determined within five years of the most recent beneficial use of the water right, and must also take action to develop the plan within fifteen years from the date of last use in order to avoid relinquishment. *R.D. Merrill*, 137 Wn.2d at 143 & 145-146. Based on *R.D. Merrill* and *City of Union Gap v. Department of Ecology*, 148 Wn. App. 519, 195 P.3d 580 (2009), the party claiming the DFD exception must also have a legally sufficient interest in the water right to do so. When reviewing whether the relinquishment exception for determined future development applies, the Board will look at the totality of the circumstances. *Protect Our Water v. Department of Ecology*, PCHB No. 03-102 (Findings of Fact, Conclusions of Law and Order, August 26, 2004, at 12) (interpreting *R.D. Merrill*). The conduct of both parties may be relevant to determine whether a determined future development exists. *City of Union Gap v. Department of Ecology*, (Order Granting Summary Judgment, January 5, 2006, at 15) aff'd, 148 Wn. App. 519 (2008).

7.

In this case, Ecology questions whether the DFD exception applies to either the Waddell or Thorson claims, or to the Certificate G3-00570-C, for a variety of reasons: first, because the

agency is unconvinced that either Mr. Griggs' or the Waddell Trust's plans were conclusively or authoritatively fixed within five years of the nonuse of the subject water rights; second, that Mr. Griggs lacks the requisite ownership of the water rights associated with the Waddell Trust property to assert a DFD for the portion of the Waddell and Thorson claims he is purchasing; and third, that more than five years is unnecessary to plant a new cherry orchard. After reviewing the evidence presented at hearing, we conclude that the Appellants have demonstrated that the DFD exception to relinquishment of these rights applies in this case.

8.

The evidence amply demonstrated that Griggs' plans to develop the new cherry into a marketable crop crystallized in the spring of 2003. At that point in time Griggs confirmed that the new cherry variety could be reproduced, and OFC decided to transfer the excess portion of its newly acquired water right onto Mr. Griggs' vacant land, as well as locate the additional water that would be needed to support a new orchard. We conclude the DFD was conclusively and authoritatively fixed at this time, and all subsequent actions taken by the Griggs and Clennon families, and their related business entities, are properly characterized as steps to implement their plan. From 2003 forward, Mr. Griggs or OFC developed enough stock for a test plot, planted a test plot on land owned by John Griggs, filed a patent application, sought to acquire, and did acquire, additional water rights, placed an order for thousands of trees to form the new orchard, and planted thirty acres of the new cherries on land leased from DNR. The Board concludes that all of these facts serve as affirmative steps toward realization of the development plan, and objective evidence indicating actual implementation of a plan, which had already been

determined, as discussed in *R.D. Merrill* and *City of Union Gap*. There is no evidence that Mr. Griggs or OFC have ever deviated from this plan or taken any actions inconsistent with their plan to develop new cherry orchards with the new cherry variety. In fact, the evidence demonstrates that they have been, and continue to be, diligently pursuing the plan. Because Certificate G3-00570-C was issued to Mr. Griggs, he had the sufficient ownership interest to assert the DFD exception to relinquishment for this water right.

9.

In determining whether a DFD exists regarding the Waddell and Thorson claims, the Board looks at the conduct of both Ms. Waddell and Mr. Griggs to see if Mr. Griggs established a sufficient ownership interest in these claims. We agree with Ecology's analysis based on *City of Union Gap* that Ms. Waddell's plan to sell the water rights associated with the Waddell Trust parcels, alone, does not establish a valid DFD that can be claimed for those rights. *City of Union Gap*, 148 Wash. App. at 530. In *City of Union Gap*, the Court stated that "it is the water rights *owner* who must demonstrate the existence of a 'determined future development.'" *Id.* The Board believes it is important to clarify its understanding of the Court's use of the term "owner" in interpreting RCW 90.14.140(2)(c). In the case of a transfer, it will be the purchaser of the water right that will most likely have the fixed plan for a determined future development because the purchaser has identified the need for water for some beneficial use. The purchase and sale agreement of the water right will typically be conditioned on Ecology's approval of the transfer of the water right. In making its decision to approve a transfer of a water right, Ecology makes a tentative determination of the validity and extent of the water right. It is only after Ecology's

tentative determination, and subsequent approval of the transfer, that the parties will know with certainty the extent of the water right that is being purchased. When the purchaser and seller have executed a purchase and sale agreement, and are only awaiting Ecology's approval of the transfer, the terms of the agreement are known and the decision is essentially out of the hands of the parties. At this point in time, the purchaser has a sufficient ownership interest in the water right to assert the determined future development exception to relinquishment. The purchaser has entered into a bargain for the purpose of acquiring water and is taking responsibility to put this water to beneficial use. This action to establish ownership and exercise control of the water right appears consistent with the Court's decision in *City of Union Gap*. Once the purchaser has established a sufficient ownership interest in the water right, there is no reason why the purchaser's fixed plan for the use of that water should not be applicable. The Board rejects Ecology's argument that the determined future development exception can only be asserted when the water right transfer has been finalized by Ecology. This is consistent with the Legislature's intent to assist water rights in gaining sufficient certainty of ownership to become more freely transferable, thereby increasing the economic value of the uses to which they are put. RCW 90.14.020(7).

10.

Ecology decided the purchase and sale agreement between Mr. Griggs and Ms. Waddell did not allow the DFD to become fixed because it contains language that allows either of them to terminate the transfer at any time at their discretion. The Board does not believe that the presence of this type of language in a purchase and sale agreement of a water right, which often

appears in a contract to allow the parties to void the agreement when there is a material change in facts, is by itself sufficient to conclude that a determined future development is not fixed. Every contract contains an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991); *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). Ecology's argument regarding the inclusion of contract language allowing either party to terminate the agreement at their discretion does not provide a basis to defeat Mr. Griggs' claim of a DFD exception to relinquishment where he has established both a fixed development plan and an ownership interest in the Waddell and Thorson claims and Certification G3-00570-C before five years of nonuse of the relevant portions of the claims and certificate had elapsed.

11.

We conclude that Griggs had a sufficient ownership interest in the Waddell and Thorson claims to claim a DFD exception for them, based on the executed purchase and sale agreement with Molly Waddell. Ecology cites the cases of *City of Union Gap* and *Protect Our Water v. Ecology,* PCHB No. 03-102 (2004), as examples where the PCHB has found various agreements insufficient to meet the ownership requirements necessary to claim a water right for a DFD exception from relinquishment. These cases are easily distinguishable and do not support Ecology's position on this point.

12.

In *City of Union Gap*, unlike in this case, no purchase and sale agreement was entered into before the end of the five year period of nonuse. The parties' initial agreement was conceptual and did not include a purchase price, payment method, or the quantity of water rights to be transferred. Even once the agreement was reduced to writing, nearly seven years after the water rights were last used, the parties still had no agreement on the purchase price, terms of payment, or the quantity of water supply. Terms were never reached even after the conservancy board approved the application for transfer of the water right. *City of Union Gap*, 148 Wash. App. at 524. Under these circumstances, the Court concluded that because the seller (Ahtanum) did not have a plan other than to sell its water rights, and the purchaser (City of Union Gap) did not have a legal interest in the water rights sufficient to claim them for the City's DFD (or to claim the municipal water supply purposes exception), the water rights were subject to relinquishment for nonuse. *City of Union Gap*, 148 Wash. App. at 532.

13.

In *Protect Our Water*, Ecology had argued to the Board that the water right purchaser (the District) established a fixed development plan on the date it passed a resolution to acquire some property and an option to purchase the appurtenant water right. The Board disagreed with Ecology but concluded the District established a firm, definitive plan for the right on the date it later exercised the option by signing an agreement to purchase the water right. Although this decision did not explicitly analyze the issue in terms of "ownership" of the right, it is implicit in the Board's ruling that an "option" to purchase a water right at some future date was insufficient

for the District to claim a right for a DFD, whereas an agreement to purchase the right was sufficient. *Protect Our Water*, PCHB No. 03-102, at p. 6.

14.

Mr. Griggs acquired a sufficient ownership interest in the Waddell and Thorson claims in November 2008, when he and Molly Waddell executed the purchase and sale agreement. This occurred less than five years after the last beneficial use of the water by the Waddell's lessee, which was during the 2004 irrigation season (ending under the Waddell and Thorson claims on October 1 and October 15, 2004, respectively). Mr. Griggs also filed applications to change those water rights in February 2009, specifying both the intended use and place of use for the rights in furtherance of his plans for new irrigated orchards. The Orondo Fruit Company portion of the Griggs certificate has been part of the plan for the new cherry orchard since early 2003, and is also within five years from the last beneficial use of water under that certificate in 2002.[5] We conclude under these facts and circumstances that a determined future development excuses five or more years of any nonuse of water of Griggs' portion of the Waddell and Thorson claims and of the Orondo Fruit Company's portion of Certificate G3-00570-C.

15.

The fact that the DFD was fixed before (rather than after) Mr. Griggs acquired an interest in the Waddell and Thorson claims does not change our analysis. Unlike some of the other cases where a DFD exception was found not to be valid, here, both the determined future development,

[5]Ecology testified that the orchard portion of the Orondo Fruit Company right ended in 2002. *Haller Testimony*. The Board also notes that the Record of Decision from the Douglas County Conservancy Board states: "The earliest any portion of the water could be said to have not been used in part would be the end of the 2001 irrigation season which is October 15, 2001." *Ex. 36*.

and the applicant's interest in the water right, existed before the end of the five-year period of nonuse of the water right. Cf. *Pacific Land Partners v. Dep't of Ecology*, 150 Wash. App. 740, 208 P.3d 586 (2009) (Rejecting a DFD claim where the applicant acquired the water right through purchase of the appurtenant land more than five years after the last beneficial use of the water, and also failed to fix a definitive plan for use of the water for six more years after acquiring his ownership interest in the water right).

16.

While in some cases, purchase of property (and the appurtenant water rights) may be both the necessary and sufficient step to demonstrate a "fixing" of a DFD, in this case, the act of purchasing the water rights from the Waddell Trust is not the date that fixes or defines the DFD, but rather is evidence of one of many necessary steps being taken to implement a development plan that was already well underway.

17.

Ecology's concern that Mr. Griggs' plan is not complex enough in scope to require more than five years is not well-founded. Ecology relies on *R.D. Merrill* to suggest that only fixed development plans requiring more than five years to come to fruition are eligible to be qualify for the DFD exception to relinquishment,[6] and points to two other cases demonstrating that agricultural operations have difficulty meeting this standard because they typically can be put in

[6] The Board notes that Ecology's Policy 1280 does not include this requirement for a plan to qualify as a DFD. The Board did make this same statement, citing the *Merrill* decision, in *Pacific Land Partners v. Ecology*, PCHB No. 02-037 (Final Findings of Fact, Conclusions of Law & Order on Remand from Superior Court, May 9, 2005, at 18), but it is unnecessary in reaching a decision in this case to reexamine that point.

place in less than five years. *Wirkkala v. Ecology*, PCHB Nos. 94-171 through 174. (Order Granting Summary Judgment, November 2, 1994), and *Pacific Land Partners*, supra. Mr. Griggs' plan to develop a new orchard with Orondo Ruby® cherries is, unlike the plans advanced in *Wirkkala* and *Pacific Land Partners*, sufficiently complex so as to require more than five years to come to fruition. The evidence supports that the Griggs and Clennon families have been diligently pursuing the various steps required to bring their plans to fruition for nearly ten years, including arranging for the propagation and delivery of the new variety of orchard stock, acquiring and transferring necessary water rights, and preparing the land for planting. The pursuit of a patent for the new variety, although admittedly not essential for planting the new orchard, clearly added a level of complexity requiring additional time and effort. This was not a situation where the Griggs and Clennon families were looking to plant any type of cherries, they were looking to plant a particular type of cherry. It would not have been prudent for them to have planted an orchard of different cherries for the purpose of maintaining their water right, only to remove those cherry trees at a later date once the new cherry stock was available. Ecology also points to the lack of any "land development" by Griggs during the initial five year period for fixing a plan as a reason for finding that a DFD should not apply, given that the proposed project involves agriculture. However, in *R.D. Merrill*, the Supreme Court rejected the assertion that development must be actual physical development during its discussion of what affirmative steps needed to occur within the 15-year period. The court listed a number of factors, not meant to be exhaustive, that could serve as objective evidence of implementation of the fixed plan. 137 Wn.2d at 145-46. Although physical development is a factor to consider when

looking at the fixing and implementation of a DFD, an activity such as land clearing is not necessarily required during the five-year period of non-use or the 15-year period to take steps to realize the DFD. Ultimately, based on the facts and circumstances presented, we conclude that, to date, the time taken by Griggs to pursue the DFD is commensurate with the time necessary to implement the plan. *Wirkkala v. Ecology*, PCHB No. 94-171, *et. seq*., at p. 5.

18.

Annual Consumptive Quantity

A change in the place of use, point of diversion, and/or purpose of use of a surface water right may be permitted under certain circumstances so long as the change does not increase the annual consumptive quantity of water used under the water right. RCW 90.03.380(1). State law provides a formula for calculating the "annual consumptive quantity" (ACQ) for purposes of determining how much of a given water right is available for change:

> For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right…. If the water right has not been used during the previous five years but the nonuse of which qualifies for one or more of the statutory good causes or exceptions to relinquishment in RCW 90.14.140 and 90.44.520, the period of nonuse is not included in the most recent five-year period of continuous beneficial use for purposes of determining the annual consumptive quantity of water under this section. *Id.*

19.

In this case, the ACQ must be calculated for the Griggs' portion of the Waddell and Thorson claims in order to determine how much of each of those rights is available to change

under applications DOUG 09-03 and DOUG 09-04. Because there is no pending application to change the place of use of the Orondo Fruit Company's portion of Certificate G3-00570-C, it is unnecessary to calculate the ACQ for that right at this time.

20.

Having concluded that a determined future development excuses from relinquishment any nonuse of the Waddell and Thorson claims for irrigation since October 2004, for purposes of calculating the annual consumptive quantity under RCW 90.03.380(1), the proper five-year period of continuous beneficial use would therefore look back from October 2004, and include the five irrigation seasons of 2000 through 2004.[7] Throughout the course of this proceeding, the parties have largely stipulated as to the nature and location of the irrigation occurring on the Waddell Trust properties, the Becks' parcel, and the PUD parcels, during this time period, and it is therefore appropriate to remand to Ecology for determination of the ACQ based on these stipulations and consistent with this decision. In doing so, we note that irrigation that occurred on the land acquired by the PUD from the Waddells should be excluded from the ACQ calculation. The evidence demonstrated that the water rights appurtenant to these parcels were conveyed to the PUD at the same time the property was conveyed, and used by the Waddells as

[7] In reaching this conclusion, we note that the Board's decision in *Bickford v. Ecology* regarding the proper five-year period of continuous beneficial use is not controlling, because it applied an earlier version of the law that did not expressly exclude the period of non-use that is excused from relinquishment now contained in the last sentence of RCW 90.03.380(1). *Bickford v. Ecology,* PCHB No. 09-063, Order Granting Summary Judgment and Dismissal of Appeal (November 20, 2009) (holding that the ACQ law, at that time, made no distinction between continuous, but nominal, beneficial use after an orchard had been removed and the right claimed for a determined future development versus continuous beneficial use before the orchard was removed).

part of the verbal agreement that allowed them to continue cultivating the property after the PUD took ownership of it.

21.

Procedural Concerns at Conservancy Board

After reversing the Conservancy Board's decisions on DOUG 09-03 and 09-04 based on the concerns identified in the decision letters and discussed above, and after Mr. Griggs and Orondo Fruit Company appealed the decisions to this Board, Ecology later identified several more procedural errors it believes also warrant reversal of the Conservancy Board decisions. These issues were contained within Issue 6 set forth in a modification of the pre-hearing order as follows:

Issue 6: …

a. Did the Conservancy Board's lack of jurisdiction pursuant to RCW 90.80.055(2) provide Ecology with an adequate basis for reversal?
b. Did the Conservancy Board's lack of notice to the Colville Tribe pursuant to RCW 90.80.070(3), WAC 173-153-070(23), and WAC 173-153-140(1)(e) provide Ecology with an adequate basis for reversal?
c. Did the Conservancy Board's omission of a narrative description of some, but not all, overlapping water rights pursuant to WAC 173-153-130(6)(c)(ii) provide Ecology with an adequate basis for reversal?
d. Did the Conservancy Board's failure to require signatures of all those with an interest in a place of use pursuant to WAC 173-153-130(6), WAC 508-12-130, and RCW 90.03.260(7), provide Ecology with an adequate basis for reversal?
e. Did the Conservancy Board's failure to consult with Ecology on an out of Water Resource Inventory Area transfer pursuant to RCW 90.08.070(2) provide Ecology with an adequate basis for reversal?
f. Did the Conservancy Board's lack of notice to interested parties pursuant to RCW 90.80.080(1), WAC 173-153-070(22), and WAC

173-153-140(1) provide Ecology with an adequate basis for reversal?

22.

Respondent argues that the *de novo* nature of the PCHB's review allows Ecology to raise any new basis for reversing conservancy board decisions, regardless of whether the reasons were identified by Ecology to the applicant in the first instance. Ecology asserts that the short time frame the agency has to review conservancy board decisions, and the fact that its decisions are not intended to be framed as precise legal appeal issues, justify allowing the agency to later identify new and different reasons to uphold the reversal. Finally, Ecology argues the collective harm of the several alleged procedural errors in this case highlights the need for further PCHB guidance on conservancy board process requirements and seeks a decision that will provide such guidance to the conservancy boards.

23.

Appellants view the Board's *de novo* process differently than Ecology does. They argue that when the PCHB reviews an Ecology decision to reverse a water conservancy board, the PCHB conducts *de novo* review, *i.e.*, review not limited to the record before the conservancy board, but that the PCHB's review should be limited to the grounds for denial actually identified by Ecology in its decision. In this manner, Appellants argue, the *de novo* appeal process may be used to rehabilitate an application with further facts and process sufficient to satisfy the Board that the applications comply with applicable water law requirements and therefore should be approved. Ecology responds that although the Board's *de novo* standard may sometimes be used

to correct errors during the appeals phase, it cannot be used to "turn back the clock" to correct notice errors that may have affected the due process of third parties whose rights are intended to be protected by the statutory notice requirements.

24.

The Legislature has directed that Ecology must review a conservancy board decision "for compliance with applicable state water law" within a prescribed time period (45 days plus a possible 30-day extension). RCW 90.80.080. If it fails to do so, the conservancy board's decision becomes the agency's decision. *Id.* When reversing a conservancy board decision, Ecology's own regulations require the agency to provide "a detailed explanation of the reasons for the reversal." WAC 173-153-150(6). Additionally, Ecology has published staff guidance for administration of the water conservancy board regulations in which it states that "all procedural and substantive defects must be detailed" when Ecology reverses a conservancy board decision.[8] This regulation and staff guidance is consistent with the Administrative Procedures Act, which requires an agency that makes its decision without the benefit of an adjudicative proceeding to furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant. RCW 34.05.416. In keeping with these requirements, we note that Ecology has previously identified public notice errors, problems related to a conservancy board acting outside its authority, and other procedural deficiencies in its reversal of conservancy board decisions. *See e.g., Concerned Morningside*

[8] We take judicial notice of Ecology's published *Staff Guidance for Administration of Chapter 173-153 WAC Water Conservancy Board* (October 31, 2006) posted on Ecology's website at http://www.ecy.wa.gov/rograms/wr/conservancy_boards/pdf/staff_guidance_final10312006.pdf.

Citizens v. Ecology, PCHB No. 03-016, (Order Granting Summary Judgment, Oct. 31, 2003), at FOF VIII.

25.

Within this framework, the PCHB can and does give considerable latitude to all parties to frame legal issues after an appeal is filed with the Board. In most cases, the procedural step of listing all issues for hearing in the Pre-Hearing Order gives the parties adequate time to prepare and address any issue raised by another party. That said, in this case it is very troubling that Ecology's review of the conservancy board decision may have caught the applicants in the middle of a "bring me a rock" exercise, with a series of changing reasons for reversal. However, rather than attempt to define a new standard for what issues may be raised on appeal of a conservancy board decision (a standard that then may potentially be used in other types of appeals), we will simply address the additional procedural concerns raised by Ecology, as we conclude that none of those procedural issues warrant denial of the application.

26.

The Board recognizes that there is inherent tension between two entities that are reviewing and deciding a transfer application, especially considering the lack of resources by both entities. The fact that conservancy boards are not required to follow guidance and policies issued by Ecology, but Ecology then turns and considers this very same guidance and set of policies when undertaking its own review likely adds to this tension. The Conservancy Board in this case failed to notify the Colville Tribe of the pending application despite having received training to do so. Ecology, on the other hand, does not generate a single list of concerns when

reviewing a conservancy board decision, but produces multiple lists of concerns. Although the Board recognizes the arguments of both parties, it has not held, and does not hold now, that parties are restricted in the issues it may raise in an appeal. A list of legal issues set forth in a pre-hearing order well in advance of the hearing provides the necessary time for all parties to prepare their respective cases. The Board, in considering the procedural concerns independent of the other reasons advanced by Ecology, concludes they do not warrant denial of the applications.

27.

All but one of the alleged procedural defects (Issues 6a, 6b, 6c, 6d, & 6f) relate to the boundary of the subject right's place of use. These alleged deficiencies all rely on Ecology's assumption that the place of use of the subject rights contains parcels outside the boundaries of the property owned by the Waddells (or their predecessors and successors in interest), and therefore required more notice and/or signatures to process the change applications. The evidence at hearing, however, demonstrated that this is not, and never has been, the reality of the where the water was actually claimed or put to beneficial use under either the Waddell or Thorson claim.

28.

The Waddell claim, which originally identified an entire quarter section as the lands on which the claim would be used, has never been exercised beyond the boundaries of property owned by the Waddells or their successors within a portion of the quarter section. Likewise, the Thorson claim, which originally identified all of Okanogan County as the lands on which the

claims would be used, has never been exercised beyond the boundaries of the property owned by Thorson and his successors within the same quarter section.

29.

Ecology argues that neither the Conservancy Board, nor Ecology or this Board has authority to conclusively evaluate and exclude potential areas within the place of use identified on a claim during the change process. Ecology argues that, barring a superior court order or a successful claim amendment, conservancy boards, Ecology, and the PCHB must accept and consider the original place of use written on the original claim form when evaluating a change application. Interestingly though, Ecology makes this argument with respect to only the Waddell claim, arguing that the entire quarter section should be considered the claimed place of use but does not extend this argument to the Thorson claim by arguing that all of Okanogan County should be considered the claimed place of use.

30.

Ecology's reasoning is strained and overlooks several important points. First, the fundamental tenant of water law that beneficial use is the basis, the measure, and the limit of the right dictates that claims cannot enlarge the claimant's right beyond what was perfected by beneficial use.

31.

Second, the claim form is an estimation, and this Board has previously held that, as such, the details set forth in a statement of claim are not controlling in an adversary hearing before this Board or a court. *Moeur v. Ecology*, PCHB No. 02-097 (2003), citing *MacKenzie v. Ecology*,

PCHB 77-70 (1979). Importantly, the Conservancy Board's evaluation of the claim's place of use is not advanced as a "conclusive" determination of the water right but rather as part of its tentative determination in the same manner as Ecology and this Board are empowered to evaluate the extent and validity of the right without making the "conclusive" determinations reserved for superior courts in a formal adjudication.

32.

Third, where the information on the claim form was incorrect at the time the claim form was filed, either obvious on its face or different than what the claimant intended, the amendment may be considered ministerial in nature. *Willowbrook Farms LLP v. Ecology*, 116 Wash. App. 392 (2003) (Requiring the claim amendment statute be liberally construed to effect its purposes and allowing a "ministerial" claim amendment to correct an error in the legal description of the place of use to add a quarter section of land because the original description was smaller than both the intended and actual the number of irrigated acres and quantity of water used for irrigation). *See also, Sweet Grass Investments, LLC v. Ecology*, PCHB No. 05-076 (Summary Judgment Order, October 3, 2005) (Holding that an amendment may be considered ministerial if it seeks to correct information not previously provided in a claim form that substantially meets statutory requirements, or if it seeks to change attributes of the water right because of claimant error or inaccuracy if the information on the claim form was inaccurate at the time the claim form was filed and the error was committed by the claimant not in the exercise of judgment or discretion, but in the act of filling out the water right claim form itself.)

33.

In this case, the necessary claim amendment can and should be accomplished as a condition of approval of the change application. Ecology identifies no authority for the proposition that the amendment must be completed *prior to* rather than *as part of* the change application. Particularly where there is no evidence that anything other than a ministerial correction is needed to correctly describe, and *narrow,* the actual place of use within the original, generalized description identified on the claim form, we see no reason to deny the application on this basis. RCW 90.80.070(4) allows conservancy boards to include any conditions that are deemed necessary for the transfer to qualify for approval under the applicable laws of the state, and we therefore conclude it was not improper for the conservancy board to process the change application based on its evaluation of the actual place of use and to expect the conforming amendments to the claims to be achieved as part of the approval process.

34.

To the extent that issues 6a, 6b, 6c, 6d, & 6f rely on Ecology's erroneous interpretation of the place of use of the Waddell and Thorson claims, we conclude the procedural deficiencies alleged by Ecology in these legal issues do not warrant reversal of the Conservancy Board's decisions approving the change applications. To the extent that issues 6b and 6f raise additional and different concerns about the Conservancy Board's notice to the Colville Confederated Tribes and other interested parties, unrelated to the place of use, we address those separately here.

35.

State law requires conservancy boards, in addition to publishing notice of change applications, to send notice of an application to any Indian tribe with reservation lands within the area in which the board would otherwise have jurisdiction (but for the legislature's exclusion, in RCW 90.08.055, of tribal lands from conservancy board jurisdiction). RCW 90.80.070(3). Ecology's regulations more specifically require conservancy boards to notify tribes with reservation or trust lands contiguous with or encompassed within the geographic area of a conservancy board's jurisdiction. WAC 173-153-070(23). Both the law and Ecology's regulations also require conservancy boards to provide notice to any other Indian tribes who have requested to be notified of applications. RCW 90.08.070(3), WAC 173-153-070(22).

36.

Ecology's regulations additionally require conservancy boards to "ensure that copies of applications are provided to *interested parties in compliance with existing laws*. *To assist the boards in this, [E]cology will provide a list of parties which have identified themselves to [E]cology as interested in the geographic area of the board*." RCW 173-153-070(22) (emphasis added). No evidence was provided to this Board that, at the time of the Griggs applications, either the Eastern Washington Council of Governments or the Department of Archeology and Historic Preservation were included on Ecology's list of parties interested in the geographic area of the Douglas or Okanogan County Conservancy Boards. Even though they are clearly now required to receive notice of applications on a going-forward basis, we conclude that the failure

to notify these entities of the Griggs applications in early 2009 does not warrant reversal of the Conservancy Board's approval of the applications.

37.

Once conservancy boards render their decisions, state law requires the boards to "promptly transmit notice by mail to any person who objected to the transfer or who requested notice of the board's record of decision." RCW 90.80.080(1). Ecology's regulations require conservancy boards to "hand deliver or send by mail records of decision and reports of examination to: (a) The applicant; (b) The [E]cology regional office; (c) Any person who protested the transfer; (d) Any person who requested notice of the board's record of decision; (e) Any tribe with reservation or trust lands contiguous with or wholly or partly within the area of the jurisdiction of the board." WAC 173-153-140(1)(e).

38.

The record demonstrates that the Colville Confederated Tribe received a copy of the Conservancy Board's decisions in March 2011, reviewed the decisions, and decided not to intervene in this appeal or otherwise object to the approval of the change applications. Under these particular facts and circumstances, we conclude the delay in providing notice of the application and decision to the Colville Tribe does not warrant reversal of the Conservancy Board's approval of the change applications.

39.

Issue 6e: Out-of-WRIA Transfer

RCW 90.80.070(2) provides: "If an application is for a transfer of water out of the water resources inventory area that is the source of the water, the board shall consult with the department regarding the application." Neither the statute, nor any Ecology regulation, defines the nature or scope of the "consultation" requirement. Ecology argues that consultation did not occur in this case, and that the Conservancy Board's failure to consult with Ecology is grounds for reversal. Ecology takes this position even though the evidence reveals the agency was fully informed from the initial stages that the change application involved an out-of-WRIA transfer and had repeated opportunities to identify any potential concerns Ecology might have about the out-of-WRIA nature of the transfer. Ecology identifies no additional information it needed, or purpose that would have been achieved from more discussions between the Conservancy Board and Ecology on this point. Under these facts and circumstances, we conclude RCW 90.80.070(2) does not provide a basis for reversing the Conservancy Board's approval of the change applications.

40.

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

ORDER

1. Ecology's decision reversing the Douglas County Conservancy Board's approval of Mr. Griggs' change applications DOUG 09-03 and DOUG 09-04 is REVERSED. The change applications are REMANDED to Ecology for approval, subject to such reasonable conditions and limitations as Ecology may impose related to ACQ consistent with this opinion.

2. Ecology's modification of the Douglas County Conservancy Board's approval of Mr. Bickford's change application DOUG 09-06 relinquishing the Orondo Fruit Company's portion of Certificate G3-00570C is REVERSED. The change application is REMANDED to Ecology for approval consistent with this opinion.

SO ORDERED this 20th day of September, 2011.

POLLUTION CONTROL HEARINGS BOARD
ANDREA MCNAMARA DOYLE, Presiding
WILLIAM H. LYNCH, Member
KATHLEEN D. MIX, Chair