POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PAINTED SUMMER HILLS, LLC Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY Respondent.	**PCHB NO. 09-006** **ORDER ON SUMMARY JUDGMENT**

This matter comes before the Pollution Control Hearings Board (Board) on cross motions for summary judgment filed by Respondent Department of Ecology (Ecology) and Appellant Painted Summer Hills, LLC (Painted Summer Hills) in this appeal contesting Ecology's decision reversing the Douglas County Water Conservancy Board's decision in No. DOUG-08-01 and denying a change in the manner of use of Ground Water Permit No. G4-29196P (permit).

Ecology asks the Board to hold that increasing the number of service connections is not changing the "manner of use" of a water right as contemplated under RCW 90.44.100, and to dismiss Painted Summer Hills' appeal. Ecology further requests that if the appeal is not dismissed on that basis, the Board should grant summary judgment to Ecology on the issue of *res judicata* and collateral estoppel, and dismiss the appeal on that ground.

Painted Summer Hills requests summary judgment in its favor as to all legal issues, thereby affirming the decision of the Douglas County Water Conservancy Board to change the manner of use under the permit to continuous community domestic supply to 19 homes.

Sarah E. Mack, Tupper Mack Brower PLLC, represented Painted Summer Hills. Ecology was represented at various times throughout the pendency of this motion by Maia D. Bellon, Alan M. Reichman, and Stephen H. North, Assistant Attorneys General.[1] Bill Clarke, attorney, represented amicus Washington REALTORS®. The Board considering the motions was comprised of Andrea McNamara Doyle, Presiding, and Kathleen D. Mix and William H. Lynch, Members. The Board reviewed and considered the pleadings and record pertinent to the motions in this case, including the following:

1. Respondent Ecology's Motion for Partial Summary Judgment or In the Alternative Motion to Stay;
2. Declaration of Melissa Downes in Support of Ecology's Motion for Partial Summary Judgment, dated May 12, 2009, including attached Exhibits A-N (*hereinafter Downes Declaration*);
3. Declaration of Debra Kroon in Support of Ecology's Motion for Partial Summary Judgment, dated May 12, 2009, including attached Exhibits 1-4;
4. Appellant's Motion for Summary Judgment with attached Memorandum in Support of Motion for Summary Judgment;
5. Declaration of Mike Sachs in Support of Appellant's Motion for Summary Judgment, dated February 9, 2009;
6. Declaration of Sarah Mack in Support of Appellant's Motion for Summary Judgment, dated May 15, 2009, including attached Exhibits 1-40 (*hereinafter Mack Declaration*);
7. Washington REALTORS® Motion for Leave to File Amicus Brief with attached Amicus Brief;[2]
8. Appellant's Memorandum in Opposition to Ecology's Motion for Partial Summary Judgment or Stay;
9. Supplemental Declaration of Sarah Mack in Opposition to Ecology's Motion for Partial Summary Judgment or Stay, dated June 12, 2009, including attached Exhibits 41-56 *(hereinafter Supplemental Mack Declaration)*;

[1] Ms. Bellon appeared through the initial stages of the proceeding. Mr. Reichman associated as counsel with Ms. Bellon in July 2009. Ms. Bellon withdrew as counsel in June 2010, and Mr. North substituted for Mr. Reichman in November 2010.

[2] Ecology's request for the Board to disregard the Declaration of Bill Clarke with attached exhibits, and the portions of the Amicus Brief referring to that declaration and evidence, was granted. The Board did not consider these items in its deliberations.

10. Ecology's Response to Appellant's Motion for Summary Judgment;
11. Declaration of Melissa Downes in Support of Ecology's Response to Appellant's Motion for Summary Judgment, dated June 10, 2009, including attached Exhibits 1-6 *(hereinafter Second Downes Declaration)*;
12. Declaration of Dan Haller in Support of Ecology's Response to Appellant's Motion for Summary Judgment, dated June 10, 2009.
13. Ecology's Reply to Appellant's Memorandum in Opposition to Ecology's Motion for Partial Summary Judgment or Stay;
14. Declaration of Maia Bellon in Support of Ecology's Reply to Appellant's Memorandum in Opposition to Ecology's Motion for Partial Summary Judgment or Stay, dated June 19, 2009, including attached Exhibits A-F;
15. Appellant's Reply Memorandum in Support of Motion for Summary Judgment;
16. Declaration of Timothy Reierson in Support of Appellant's Motion for Summary Judgment, dated June 22, 2009, including attached Exhibits A-D;
17. Second Supplemental Declaration of Sarah Mack in Support of Appellant's Motion for Partial Summary Judgment, dated June 22, 2009, including attached Exhibits 57-64 (*hereinafter Second Supplemental Mack Declaration*);
18. Ecology's Response to Washington REALTORS® Amicus Curiae Brief;
19. Ecology's Supplemental Brief Re: the Supreme Court's Decision in *Lummi Indian Nation v. State of Washington*, dated April 25, 2011;
20. Appellant's Response to Ecology's Supplemental Brief re: Lummi *Indian Nation v. State*.

The parties presented oral arguments on June 1, 2011.[3] Having fully considered the record and oral argument of counsel, the Board makes the following ruling.

BACKGROUND

In February 1987, Mr. Richard Freese filed an application with Ecology for a groundwater permit (No. G4-29196) seeking a right to withdraw groundwater for community domestic purposes and irrigation supply within 160 acres owned by Mr. Freese in unincorporated Douglas County. *Downes Decl., Ex. A; Mack Decl., Ex. 5*. The application sought "continuous community domestic supply" to serve "~[approximately] 11 homes" in the amount of 200

[3] Amicus Washington REALTORS® did not participate in the oral argument.

gallons per minute from a six-inch groundwater well, and "irrigation during irrigation season" in the amount of 1600 gallons per minute for "160 acres of row crop ground" from a twelve-inch irrigation well. *Downes Decl., Ex. A*.

At the time he applied for the water right, Mr. Freese was in the process of developing 40 acres of this 160 acre parcel as residential homesites. Between 1984 and 1987, he had obtained from Douglas County two short plats, each containing four five-acre parcels ("Freese Short Subdivsion No. 1" and "Freese Short Subdivision No. 2"). *Supplemental Mack Decl., Exs. 43-44*. Mr. Freese intended to develop the remainder of his property with orchards and residential homesites at the maximum density then allowed by Douglas County. Mr. Freese originally listed "approximately 11" homes on the water right application because he believed that Douglas County zoning would allow approximately 11 homes on the property. *Mack Decl., Ex. 5*.

On February 17, 1987, Ecology transmitted to Mr. Freese a Notice of Application and instructions for publication. *Mack Decl., Ex. 7*. The notice prepared by Ecology described the proposed use as "continuous community domestic supply and irrigation during irrigation season." It also identified the priority date (February 3, 1987), the means of withdrawal (two wells), and the amount to be appropriated (1800 gpm). It did not describe the number of homes to be served by the community domestic supply. *Id.* The notice was published February 26 and March 5, 1987, without any reference to the number of homes to be served by the community domestic supply. *Mack Decl., Ex. 8*.

On August 3, 1987, Mr. Reese obtained health department approval for a Class IV public water system ("Rising Sun Orchards Water System," PSW ID No. 39690R) with nine services to

serve the eight lots he had short-platted plus a mobile home located on the northern part of his property near the wells. *Mack Decl., Exs. 2, 5*.

In December 1987, Ecology determined that Mr. Freese's original water right application was categorically exempt from environmental review under the State Environmental Policy Act (SEPA). *Reierson Decl., Ex. A*.

In January 1991, the application was amended with a handwritten notation indicating 12 homes instead of 11 were contemplated. *Downes Decl., Ex. A*.

Ecology issued a Report of Examination (ROE) on March 4, 1991, and Permit No. G4-29196P on June 13, 1991, authorizing "12 acre-feet per year for continuous community domestic supply to 12 homes" and "620 acre-feet per year for irrigation from April 1 to October 15 of 155 acres."[4] *Downes Decl., Exs. B & C.* The ROE and permit both contained a development schedule requiring project completion by February 1, 1993, and full beneficial use of the water by February 1, 1994. *Id.*

By the time the ROE issued, Mr. Freese had sold five of the eight short-platted lots, drilled both the irrigation well and the domestic well, installed water lines to serve all parcels within the 160 acres, and planted five acres of cherry trees. *Mack Decl., Ex. 5; Downes Decl., Ex. B*. Ecology considered the domestic portion of the project completed because all of the lines had been installed to the 12 lots, even though just four homes were being served. *Downes Decl., Ex. B*.

[4] Five acres of non-irrigable lands were subtracted from the total 160 acres. *Downes Decl., Ex. B*.

Over the years, Ecology has received and granted five permit extension requests in relation to the permit, allowing additional time for completion of construction and for putting water to beneficial use. *Downes Decl.* Mr. Freese's first extension request was approved in April 1993, and his second extension request was approved in March 1994. *Reierson Decl., Exs. B & C*.

In May 1994, Mr. Freese completed construction of the irrigation system. *Mack Decl., Ex. 11*.

In 2003, Mr. Freese requested and received from Ecology a third extension of time for the purpose of putting the water to full beneficial use. At that time, he informed Ecology that he was supplying water to five homes and had planted 80 acres in apples. The extension was granted until February 1, 2007. *Mack Decl., Exs. 12 & 13*.

Through two assignment requests, in 2006 and 2007, Mr. Freese assigned the permit to Painted Summer Hills. *Downes Decl., Exs. D-G*.

Painted Summer Hills applied for a permit extension on December 12, 2006, seeking that the permit development schedule be extended to December 2011. *Downes Decl., Ex. H*. Ecology extended the proof of appropriation phase of construction to July 1, 2009. *Downes Decl., Ex. I.*

In February 2007, Ecology received a land development package from Douglas County Transportation & Land Services, regarding Painted Summer Hill's newly proposed major subdivision for 16 lots (15 of the lots being associated with residential development and a 16th lot associated with a common facility that would serve the new subdivision). *Downes Decl., Ex. J*.

The package included a description of the project and an environmental checklist prepared under the State Environmental Policy Act (SEPA). The 15 lot residential subdivision will be located on a portion of the place of use where irrigation had previously occurred under the subject permit. *Id.* The approved subdivision's 15 residential lots are each approximately one acre in size, and the reserve lot is approximately 42.5 acres in size. *Mack Decl., Exs. 4 & 22*. The subdivision will be served by a Group A community water system and individual onsite septic systems. *Id.*

In the intervening years since Mr. Freese began developing his property, Douglas County land use regulations have been amended. *Sachs Decl*. County regulations now encourage lot clustering and allow slightly greater densities where residential lots are clustered. *Id.* The Douglas County Hearing Examiner determined that Painted Summer Hills' plat is consistent with the Douglas County comprehensive plan policies and goals, and consistent with allowable density and all other applicable zoning requirements. *Sachs Decl*.; *Downes Decl., Ex. L*.

In April 2008, Painted Summer Hills filed a change application for the permit with the Douglas County Water Conservancy Board (Conservancy Board). The change application sought to increase the number of residential connections to be served under the permit from 12 to 19, under the "manner of use" category on the application form. *Downes Decl., Ex. K*. All existing parameters of the water right permit – including maximum instantaneous rate (Qi), maximum annual quantity (Qa), points of withdrawal, place of use, time of use, and purpose of use – would remain the same. *Id.*

On October 13, 2008, the Conservancy Board issued a Report of Examination and Record of Decision (Conservancy Board decision or ROE) that approved a "manner of use" change by allowing the project to increase the number of community domestic connections to be supplied with water from 12 to 19. The Conservancy Board considered whether the total withdrawal from the wells after the change would enlarge the right conveyed by the original permit and concluded that it would not because the instantaneous and annual quantity of water authorized to be withdrawn under the permit would not change. The Conservancy Board also concluded that using the same quantity of water to supply 19 homes instead of 12 homes, in accordance with current conservation and water use efficiency standards, would be consistent with securing maximum net benefits for the people of the state. *Sachs Decl.; Downes Decl., Ex. L*. The Conservancy Board decision also included a provision stating "Completion of construction shall occur by July 1, 2010, and water shall be put to full beneficial use by July 1, 2017." *Downes Decl., Ex. L*.

On December 24, 2008, Ecology reversed the Conservancy Board decision on several grounds. *Downes Decl., Ex. M.* Ecology's decision letter provides the following explanation for reversing the Conservancy Board and denying the subject change:

1) The [Conservancy] Board has authorized a project alteration on an unperfected ground water right for community domestic supply by allowing an increase in service connections. The Washington State Supreme Court has ruled in the R.D. Merrill case that the types of unperfected ground water right changes allowed under RCW 90.44.100 cannot alter the original project.
2) The Boards (sic) approval, which increases service connections from 12 to 19, is in conflict with RCW 90.03.260(4), which limits the number of service connections for the purposes of community domestic supply to the number specified in the application.

3) Except for municipal waters (sic) suppliers (which the subject applicant is not), Ecology considers an increase in connections to be enlargement of the water right. The Washington State Supreme Court has ruled in the Schuh case that enlargement of rights, even when the annual quantity remains the same, is precluded by the water code.
4) The sale of an undeveloped permit, and the request by the new owner to alter the project may constitute speculation in water rights. The Washington State Supreme Court ruled in the R.D. Merrill case that RCW 90.44.100 cannot be used to speculate in water rights. The Board's ROE does not consider whether the transfer is speculative, nor is there sufficient information in the Board record for Ecology to determine so.
5) The Board has authority under WAC 173-153-160(6)(e)(iii) (sic)[5] to set development schedules for changes. However, the Board does not have authority under RCW 90.03.320 to make findings of diligence, good faith and public interest required for extensions of existing development schedules for permits. Nor is the Board empowered to collect the statutorily prescribed fees for such extension requests under RCW 90.03.470(6). *Id.*

Painted Summer Hills timely appealed the decision to the Pollution Control Hearings Board.

On March 29, 2009, Painted Summer Hills also applied for another permit extension, seeking an additional five years, until July 1, 2014, to build on the progress made in development of the permit. *Mack Decl., Ex. 23.* In June 2009, Ecology granted a shorter extension of the proof of appropriation stage of the permit than requested, until July 1, 2010. *Second Downes Decl., Ex. 1*.

After the summary judgment briefing in this matter was complete, the parties jointly requested a stay pending the outcome of the State Supreme Court's decision in *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010) which involved, among other things, challenges related to RCW 90.03.260, the service connection provisions of the Municipal Water

[5] This appears to be a typographical error, where WAC 173-153-**130(f)(iii)** was the likely intended reference.

Law of 2003.[6] The Board entered a stipulated Stay of Proceedings on August 3, 2009, and then allowed supplemental briefing in this matter after the Supreme Court's decision issued.

As part of its summary judgment material, Ecology has prepared a series of four maps depicting the history of the lot configurations and water service within the place of use associated with Permit No. G4-29196P. The first shows the outline of the original Lots 1-12 platted within the permit's place of use. The second shows the two original parcels that are currently supplied with water under the permit. The third depicts the 16-lot subdivision associated with Painted Summer Hills' project, which is located within the footprint of three of the original parcels. And the fourth depicts the 19 parcels to be served with water under the permit, including (1) the two lots associated with the original project; (2) the 16 lots within the PSH subdivision; and (3) the one remaining lot from the original project to be served with water under the permit. *Kroon Decl., Exs. 1-4*.

Painted Summer Hills plans to serve a total of 19 connections under the Permit, including three original parcels [original lots 5 (Hull) and 8 (Brissey), which are currently being served with community domestic water, and original lot 12 (Sole)], plus the new 16 lot subdivision. *Kroon Decl., Ex. 4*. Nine of the original project parcels, where water lines had previously been installed, will not be served with community domestic water from the Permit. *Downes Decl*.; *Kroon Decl., Ex. 1*.

Ecology staff determined that it is not in the public interest to allow Painted Summer Hills to "leapfrog over" other applicants in line for new water rights, or to add domestic

[6] Chapter 5, Laws of 2003 (58th Leg. 1st Spec Session) (2E2SHB 1338).

connections to an existing water right because "any quantity of water not put to beneficial use for 12 connections under the permit would ideally return to the State for future reallocation to the next new water right applicant in line." *Second Downes Decl*.

As of June 2009, Ecology had on file 283 pending new surface and groundwater right applications in the same Water Resources Inventory Area where Painted Summer Hills' permit is located (WRIA 41), although the great majority of WRIA 41 overlies distinct bodies of public ground water that are managed separately from the area where the Painted Summer Hills wells are located. *Second Downes Decl.; Reierson Decl., Ex. D.*

In the event Ecology were to evaluate a pending application for a new water right from the same deep basalt aquifer source that serves this permit while it is still in permit status, the full 12 acre-feet per year authorized for domestic supply under this permit would be considered already allocated and not available for appropriation, regardless of the number of homes served. *Reierson Decl*. Ecology does not consider return flows when analyzing an application for a new water right for domestic purposes because it assumes all of the water used is consumed and not available for return. *Second Supplemental Mack Decl., Ex. 63 (Decl. of Cook, ¶10)*.

At the time a water right application is filed, it is much easier to estimate a number of residential connections than it is to estimate a per connection water use. This is because the number of residential lots can be fixed through land use planning and county subdivision approvals, whereas actual per capita water use is highly variable, based on the size of the family that lives in a home, how much lawn one chooses to irrigate, what type of lawn and/or landscaping one chooses to plant, and any number of other uncertainties. *Haller Decl*.

Although it may be easier to estimate the number of residential lots than the expected water use at the time a water right application is filed, accurately predicting how many homes will be built in a subdivision (and therefore how many residential connections will be needed) is an inherently uncertain undertaking. A frequent development pattern in rural residential developments such as Douglas County involves one person purchasing two adjoining lots, for example to have an unobstructed view, more privacy, or a larger yard. The extra parcel may then never have a house constructed on it, but it may have irrigated residential landscaping instead. *Reierson Decl*.

ANALYSIS

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution.

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

The parties and the Board all agree that the material facts necessary to resolve the legal issues presented by this case are not in dispute, and therefore summary judgment is appropriate.

The standard of review applied by the PCHB in the area of water rights is both procedurally and substantively *de novo*. WAC 371-08-485. 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.

As the appealing party, Painted Summer Hills has the burden of proof.

Scope of Issues That May be Raised on Appeal

A threshold question presented by this case involves whether Ecology should be precluded, based on the content of Ecology's initial decision letter, from raising certain legal claims on appeal to support its reversal of the Conservancy Board. Specifically, Appellant contends that Ecology should not be allowed to assert new grounds for denial of the change on appeal because those reasons were not explicitly identified in the agency's original decision.[7]

Ecology responds that the legal issues it raises on appeal are not new but rather simply restatements or refinements of the positions expressed by the agency in its decision letter. Ecology further contends that, even if the issues are characterized as new, the Board can decide them under its *de novo* scope of review.

As we recently noted in *Orondo Fruit Company v. Ecology*, another case involving an Ecology reversal of a water conservancy board decision, the Legislature has directed that Ecology must review a conservancy board decision "for compliance with applicable state water

[7]The specific legal issues Appellant claims are new and should therefore be precluded from this appeal include the following: 1.B & 1.C (manner of use); 2.B & 2.C (collateral attack, or res judicata/collateral estoppel); 3.B & 3.C (municipal water supplier); 7.E & 7.F (speculation); and 7.H & 7.I (public interest).

law" within a prescribed time period (45 days plus a possible 30-day extension). RCW 90.80.080. *Orondo Fruit Company v. Ecology*, PCHB Nos. 10-164 and 10-165 (2011). If Ecology 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]

Within this context, and in light of the Board's *de novo* review, the PCHB has given considerable latitude to all parties to frame legal issues after an appeal is filed with the Board. The Board has not previously restricted the issues parties may raise in an appeal, and we did not do so in *Orondo Fruit Company,* even though the procedural defects Ecology raised in that appeal regarding the conservancy board process were wholly unrelated to the reasons Ecology had identified in its decision reversing the conservancy board. *Orondo Fruit Company v. Ecology*, PCHB Nos. 10-164 and 10-165, at FOF 29-30.

While we recognized in that case the troubling possibility of Ecology raising a series of ever-changing reasons for denial during the conservancy board review process (before Ecology takes final action on the conservancy board decision), that does not appear to be the concern in the case at hand. In the current case, we find the legal issues Ecology has raised on appeal are

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

reasonably related to the explanation in its decision letter. In that respect, they are better characterized as an effort to recast a discussion written by and for non-lawyer participants in an administrative process into the legal framework required by litigation.

Ecology's original rationale for reversing the Conservancy Board based on an alleged unlawful increase in the number of service connections under RCW 90.44.100 is reasonably related to Issue 1.A, concerning Ecology's allegation of an improper "manner of use" change. The agency's original explanation that service connections are a limiting attribute of the original permit is reasonably related to Issue 2.A, involving Ecology's allegations of a violation of *res judicata* or collateral estoppel. Ecology's original explanation that the Conservancy Board improperly treated a community domestic water right as a municipal water right by allowing an increase in service connections is reasonably related to Issue 3.A, concerning improper application of RCW 90.03.260(4). Ecology's original rationale that approval of the change may have enabled speculation, contrary to *R.D. Merrill* and RCW 90.44.100, is reasonably related to Issue 7.D, concerning the prohibition of speculation under Washington case law and the Water Code. Finally, Ecology's original reason for reversal due to an alleged failure to meet the requirements of RCW 90.44.100 is reasonably related to Issue 7.G, concerning "public interest" requirements.

Even if we were to consider each of these as entirely new issues, which we do not, the procedural step of listing all issues for hearing in the pre-hearing order for this appeal has given the parties adequate time to prepare and address all issues raised by the other side, and we conclude the record has been sufficiently developed to fairly consider the issues. *Cf.* RAP 2.5

("…A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground."); *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) (While the general rule is that parties may not raise a new issue for the first time in a petition for review, a party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground).

Notably, Appellant has not claimed any prejudice. Nor has Appellant identified any other legal basis (such as waiver or failure to exhaust) that would warrant precluding Ecology from pursuing the legal issues it has raised in this appeal. While it is true that Ecology is required to act within a prescribed time period, and to provide a detailed explanation for its reversal of a conservancy board decision, we do not read RCW 90.80.080 or WAC 173-153-150 to result in a waiver by Ecology of any legal issue not explicitly enumerated in its decision or to impose any sort of exhaustion of remedies requirement.[9]

For these reasons, we grant summary judgment to Ecology on Issues 1.B & 1.C, 2.B & 2.C, 3.B & 3.C, 7.E & 7.F, and 7.H & 7.I, and hold that Ecology is not precluded from raising claims related to manner of use, collateral attack, municipal water supply, speculation, and public interest.

[9] We reiterate our recognition in *Orondo Fruit Company* of the inherent tension between Ecology and water conservancy boards, where both entities are reviewing and deciding the same change applications, and highlight the additional tension created by the fact that neither entity is required to afford applicants the full procedural due process protections of the administrative procedures act at either level of review. Resolution of these inherent tensions, however, are better addressed through the legislative process than through individual appeals.

Manner of Use (Issue 1)

In reaching a decision in this case, the Board recognizes that the Washington Courts have treated "manner of use" and "purpose of use" as distinct and different concepts, so it is unnecessary for the Board to revisit the question of whether RCW 90.44.100 authorizes a change in the purpose of use of a groundwater right, or whether "manner of use" and "purpose of use" have the same meaning.[10] *See City of West Richland v. Ecology*, PCHB No. 01-033 (Summary Judgment Order, August 4, 2003), *aff'd*, *City of West Richland v. Ecology*, 124 Wn. App. 683, 103 P.3d 818 (2004) (interpreting *R.D. Merrill v. Pollution Control Hearings Board*, 137 Wn.2d 118, 969 P.2d 458 (1999)); *Familigia LLC v. Department of Ecology,* PCHB No. 03-072 (Order on Reconsideration, January 30, 2004), citing *Familigia LLC v. Department of Ecology* (Order on Summary Judgment, Concurrence and Dissent, October 31, 2003). As discussed in this opinion, the Board concludes that increasing the number of homes being served under a community domestic water right is within the meaning of "manner of use" under RCW 90.44.100.

"Manner of use" is undefined in statute. Neither the *R.D. Merrill* nor *City of West Richland* cases define what constitutes "manner of use." Ecology argues for a very narrow interpretation of "manner of use." It asserts that "[a] change to the "manner of use" associated

[10] The Appellant ably demonstrates that the Washington Supreme Court's discussion of whether RCW 90.44.100 authorizes a change in purpose of use in *R.D. Merrill v. Pollution Control Hearings Board*, 137 Wn.2d 118, 969 P.2d 458 (1999) is *dicta* because the purpose of use was not changed for the two unperfected permits under review in that case. Ecology also acknowledges that the change in the two groundwater permits from single domestic use to group domestic use in *R.D. Merrill* was not a change in purpose of use, but maintains the Court's statement that the purpose of use of an unperfected groundwater right cannot be changed was necessary for its decision and is therefore binding. Ecology's Response at 14-15. Nevertheless, the Board believes the Court of Appeals decision in *City of West Richland v. Ecology*, 124 Wn. App. 683 (2004) is binding on the Board with respect to this issue.

with a water right is changing the way in which the water is collected or distributed, such as through the use of a pond, or the method of conveying the water, or the method of application of water, such as through flood, drip, or circle-sprinkler irrigation. These examples of a manner of use change are directly related to changing the infrastructure that affects how the water right is used, such as the addition of storage to a system in order to enable more of the water right to be exercised earlier in the season." Ecology's Memorandum in Support of Motion, at 10. Ecology also suggests that the manner of use of a water right is closely related to the timing or season of use of a water right. Ecology states that changing the season of use from a summer irrigation right to a year-round use is an example of a change in the manner of use. Ecology's Memorandum in Support of Motion at 10-11.

Ecology argues that increasing the number of residential service connections is not the mode, method, or means by which an appropriator uses water, nor does it change the timing of when the water right will be exercised, therefore the Appellant's proposed change is not a change in the manner of use. Ecology's Memorandum in Support of Motion at 12.

Painted Summer Hills disagrees with Ecology's interpretation of "manner of use" by first looking to the language of RCW 90.44.100. RCW 90.44.100(1) states that the holder of a groundwater right "may, without losing the holder's priority of right, construct wells **or other means of withdrawal** at a new location in substitution for or in addition to those at the original location, **or the holder may change the manner** or the place **of use of the water**" (emphasis added). Appellant's Reply Memorandum at 8-9 n.3. The statute sets forth the means of withdrawal and the manner of use of the water as separate components. Furthermore, the

Appellant notes that RCW 90.44.050, 90.44.060, 90.44.080, 90.44.090, 90.44.100, and 90.44.110 use some variation of the phrase "well or other means of withdrawal." The term "manner of use" cannot mean "means of withdrawal" because such an interpretation makes "manner of use" superfluous in RCW 90.44.100. Appellant's Memorandum in Support of Motion at 32-33. A statute should be read to give each word and clause effect so no part is rendered meaningless or superfluous. *Hangartner v. Seattle*, 151 Wn.2d 439, 451, 90 P.3d 26 (2004).

Ecology conceded during oral argument that the manner of use of a surface water right can be changed even though that term is absent from RCW 90.03.380. Presumably a change in the "manner of use" for a surface water right is the same as for a groundwater right. The Board is unaware of any instance where Ecology required a water right holder to amend his or her water right when changing from flood irrigation to sprinkler irrigation, or why such a requirement would be necessary. The Board rejects Ecology's narrow interpretation of "manner of use" as the mode, method, or means by which an appropriator uses water because it is not supported by the law or Ecology's own practices.

In *R.D. Merrill*, the Court essentially defined "manner of use" as something other than "purpose of use." After discussing Ecology's responsibility to tentatively determine the existence and extent of a water right, the Washington Supreme Court in *R.D. Merrill* discussed language within RCW 90.03.380 and 90.44.100. The Court observed RCW 90.03.380 expressly allows a change in purpose of use, and noted that "[p]urpose of use is often tied to time of use." 137 Wn.2d at 128. The Board therefore also rejects Ecology's suggestion that "manner of use"

is related to the timing of when a water right is exercised because, as the Court noted in *R.D. Merrill*, timing is more related to the purpose of use. Turning to RCW 90.44.100, the Court stated that "RCW 90.44.100 does not authorize amendments for changes in *purpose* of use,"[11] and then stated that "[c]hanges in well location(s), *or* the manner *or* place of use of the water, *i.e.*, changes permitted under RCW 90.44.100, do not alter the original project or the quantity of water needed." 137 Wn.2d at 130-131(emphasis added). It is important to note that the Court was not just referring to manner of use as changes that do not alter the original project, but also to changes in well location and changes in the place of use. In addition, the Court did not make any distinction between perfected and unperfected water rights for those attributes of a water right that can be changed or transferred under RCW 90.44.100.

The Appellant further directs the Board to observe that the Supreme Court in *R.D. Merrill* rejected Ecology's interpretation that RCW 90.44.100 should be read narrowly so that only changes to inchoate rights could be allowed where there was some type of hydrologic or engineering difficulty. The Court stated that "nothing in the statute indicates such a narrow reach." 137 Wn.2d at 133.

Alteration of the project (Issue 4)

Ecology refers back to *R.D. Merrill's* discussion of changes that do not alter the original project, and contends that the Appellant's proposed change fundamentally alters the original intent of the original project because it establishes a new, larger subdivision that is overlayed on the existing parcels. Ecology's Memorandum in Support of Motion at 12. Under Painted

[11] Emphasis provided by the Court.

Summer Hills' change application, water will be provided to a newly configured 16-lot subdivision and nine of the original subject project parcels will not be served. Ecology maintains that when water was applied for the proposed subdivision in 1987, the current proposal did not exist and therefore is an alteration of the original project. Ecology further argues that "regardless of whether the purpose of use of the water right permit remains the same," the proposed project alters the original project associated with the Permit and cannot be authorized. *Id.* at 14-15.

Ecology's interpretation of RCW 90.44.100 and *R.D. Merrill* are incorrect. As mentioned earlier, the Court in *R.D. Merrill* was not just referring to manner of use when it discussed changes in RCW 90.44.100 that do not alter the original project, but also to changes in well location and changes in the place of use. A word in a statute should not be read in isolation from its context. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). When read in context of the decision, it is clear the Court was recognizing that the changes listed in RCW 90.44.100 are *changes which do not alter the original project in a way that changes the purpose of use,* or the quantity of water needed. It is unnecessary to engage in an analysis regarding original intent if the Court's prohibition against a change in purpose of use for a groundwater right under RCW 90.44.100 is simply recognized.

Ecology tries to bolster its position regarding the need to look to original intent to determine if the original project is impermissibly altered by a proposed change by stating that the "nature and amount of the proposed use" must be set forth in an application for a water right under RCW 90.03.260, and that existing and potential appropriators rely upon the notice of intent they receive to determine whether such use will be detrimental to their interests and rights

to the water source. Ecology's Memorandum in Support of Motion, at 16-17. This argument, however, is misplaced because it is really just recognizing the existing requirement for a water right applicant to state the *purpose* of the proposed use and the quantity of water requested. An application for a water right does not contain separate categories for nature of the use and purpose of the use. A water right application informs existing water right holders of the proposed purpose of use, the quantity of water requested, and other aspects of the proposed water right. Ecology makes this same point by citing the Supreme Court's decision of *Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993), where the court provided that "beneficial use" consists of the purpose of use and the amount of water that may be used as limited by "reasonable use." Ecology's Memorandum in Support of Motion at 17. Furthermore, Ecology does not consider return flows when analyzing an application for a new water right for domestic purposes because it assumes all of the water used is consumed and not available for return. *Second Supplemental Mack Decl., Ex. 63 (Decl. of Cook, ¶10)*. If, as in the present case, the purpose of use is not changed, the quantity of water is not increased, and return flows are not affected, it is difficult to see how the expectations of existing water right holders are compromised.

Ecology's argument also overlooks the fact that the statutory requirement to identify the projected number of service connections on an application did not exist at the time this permit was applied for. More importantly, the the Notice of Application prepared for publication by Ecology did not identify the number of homes to be served by the community domestic supply, so it is difficult to see how existing and potential appropriators relying upon the notice of intent

could have been misled as to the project or its possible impact on their rights or interests (whereas it did identify the priority date, the means of withdrawal, and the 12 acre-feet per year quantity to be appropriated).

Ecology further argues that "regardless of whether the purpose of use of the water right permit remains the same," the proposed project alters the original project associated with the permit and cannot be authorized. Changes in the manner of use, the location of a well, and the place of use, however, are specifically authorized by RCW 90.44.100 without any restriction as to whether the groundwater permit or certificate is perfected or unperfected. As the Appellant asserts, it is difficult given this explicit statutory authority to see how the Legislature could have intended a prohibition against altering an original project under RCW 90.44.100. Project alterations are not prohibited under RCW 90.44.100. The proposed changes are not inconsistent with the groundwater code because they do not change the priority date of the water right, the source of water, the quantity of water, changes otherwise expressly limited in RCW 90.44.100,or the purpose of use;[12] and the proposed changes do not impair existing water rights or negatively impact the public interest.

Ecology attempts to limit the impact of its position by stating that it is not arguing that any modification of a developing project is impermissible, such as changes in site conditions. Ecology asserts that whether a modification is substantive enough to '"alter the intent of the original project" is a *fact-specific determination based on the proposal as a whole*.' Ecology's Memorandum in Support of Motion, at 16 (emphasis added). Despite Ecology's protestations to

[12] The Board recognizes that Ecology allows the purpose of use of a perfected groundwater right to be changed pursuant to RCW 90.03.380.

the contrary, if Ecology's interpretations of RCW 90.44.100 and *R.D. Merrill* are accepted, then potentially *any* change to the original project, no matter how small, would be an alteration of the original project in violation of RCW 90.44.100 unless it is a change in the mode, method, or means by which an appropriator uses water. Ecology's interpretations introduce great uncertainty and subjectivity into the water right change process if a proposed change must be compared to the original intent of a project through a fact-specific determination based on the proposal as a whole. Appellant points out, and the Board agrees, that the proposed changes approved in *R.D. Merrill* were much larger than what is proposed by Painted Summer Hills.

Ecology's positions are also misplaced for purposes of implementation of the water codes. Ecology contended during oral argument that the agency is responsible to protect all water right holders. However, no evidence of impairment of existing water right holders has been forthcoming, and the fundamental policies of RCW 90.54.020 are not violated. Ecology also maintains that allowing additional connections enables property owners making the new service connections to leapfrog over other applicants for water rights. RCW 90.03.380(5)(a) refutes any legal impropriety of this characterization of the present change application because it expressly states that "[p]ending applications for new water rights are not entitled to protection from impairment, injury, or detriment when an application relating to an existing surface or ground water right is considered." The change/transfer statutes are written broadly for the purpose of allowing flexibility on the ownership and use of water. The Legislature has found

that water right transfers[13] and changes can result in a more efficient use of water resources and "can help alleviate water shortages, save capital outlays, reduce development costs, and provide an incentive for investment in water conservation efforts by water right holders." RCW 90.80.005. Nothing in the law states that proposed changes/transfers must be narrowly construed. While an agency has some discretion in interpreting ambiguous statutes, it may not alter or amend an act, and its interpretation must be within the framework and policy of the statute. *Smith v. Greene*, 86 Wn.2d 363, 371, 545 P.2d 550 (1976); *Allen v. Employment Security Department*, 83 Wn.2d 145, 151, 516 P.2d 1032 (1973). Ecology's arguments are really aimed at land use actions rather than the operation of the water codes because the proposed change does not result in more water being used or any impact on return flows.

A hypothetical example illustrates how another proposed water right change could be denied by Ecology under its interpretation of the law. A commercial nursery might sell plants at wholesale to landscapers and developers, and also sell plants at retail to the general public. The nursery decides that it needs to shift its emphasis away from selling plants at wholesale because of the decline in home construction and increase its retail sales to the general public. As part of its plan, the nursery constructs some new retail space and parking on property which previously grew plants, and converts its old retail space to office space for its operation. The nursery owners also move the site of their proposed home from a parcel adjacent to where the new retail space is located to a different parcel on the other end of the property. The proposed project does not alter the amount of water needed but water connections would need to be added to the new

[13] RCW 90.80.010(7) includes changes within the definition of "transfer."

building for retail sales and the proposed re-located residence. Some of the land previously irrigated is converted to commercial space. Under Ecology's arguments, this hypothetical project would not be allowed because it would be an alteration of the original project. Just as in the current case, development of the nursery would be occurring in a fashion that was not originally contemplated. The amount of water authorized under the permit is not increased under the hypothetical change or the current case. The hypothetical project, like the current case, is primarily a land use decision and more appropriately regulated by local land use codes rather than through the water right process.

So what does manner of use mean?[14] As mentioned earlier, "manner of use" is undefined in statute. The Board also finds that resorting to dictionary definitions to interpret the term "manner" is unhelpful. While the Board is unable to set forth a comprehensive definition of "manner of use" at this time, the majority determines that a change in the manner of use cannot alter the original project in a way that changes the purpose of use. Changes in projects that alter the original intent of the proposal may be authorized, so long as they remain within the same purpose of use. Appellant's proposed project seeks to increase the number of connections to a

[14] The "manner of use" language within RCW 90.44.100 has resulted in years of confusion for water right holders, the Department of Ecology, the Board, and the courts as everyone struggles to find some meaning for what constitutes a change in "manner of use." In addition, RCW 90.44.100 does not address changes in purpose of use even for perfected groundwater rights. Ecology maintained in *R.D. Merrill* that a change in the purpose of use of a perfected groundwater right is authorized pursuant to RCW 90.03.380, which is the change statute for surface water rights. RCW 90.44.060 states that groundwater withdrawals are governed by RCW 90.03.250 through 90.03.340, which clearly does not include RCW 90.03.380. Ecology's reliance upon RCW 90.03.380 for changes in the purpose of use for perfected groundwater rights, therefore, is certainly strained. We suggest that much of this confusion can be eliminated if the Legislature enacts a single change/transfer statute for both surface water and groundwater rights, or in the alternative, amends RCW 90.44.100 by: (1) deleting the word "manner" so that changes in the manner of use for both surface water rights and groundwater rights are identical; and (2) specifically authorizing a change in the purpose of use of a groundwater right under whatever circumstances the Legislature decides is appropriate. Whether changes/transfers of groundwater right claims should be subject to RCW 90.44.100 should also be considered.

community domestic water right, which does not change the purpose of use. The Board concludes that increasing the number of service connections of a community domestic water right is a change within the manner of use and is authorized pursuant to RCW 90.44.100. Painted Summer Hills is entitled to summary judgment on Issues 1 and 4.

Collateral Attack on Permit Terms (Issue 2)

Issue 2.A asks whether Painted Summer Hills is precluded from "challenging the 12 residential connection limit" included in the permit under the doctrine of *res judicata* or collateral estoppel. Closely related to this issue, Issue 2.D asks whether, under applicable statutes at the time of issuance of the permit, the authorization of "12 acre-feet per year for continuous community domestic supply to 12 homes" imposed a "residential connection limit" restricting the exercise of the water right.

Ecology argues that it exercised its conditioning authority when it provided a specific condition in Mr. Freese's permit limiting use of the water right to serve 12 homes. Because Mr. Freese did not appeal the ROE and permit, Ecology reasons, Painted Summer Hills is now barred from challenging this attribute of the water right identified in the original permit. Ecology's position is based on its underlying view that the application seeking to change the "manner of use" of the permit is an attempt to challenge or collaterally attack what it considers to be an immutable limitation on the exercise of the right.

Painted Summer Hills contends that the 12 residential connections identified in the permit never operated as an upper limit on the number of connections that could be served by the authorized source and quantity of water within the authorized place of use. Additionally, to the

extent the residential connection numbers contained in the permit may constrain the exercise of the right, Painted Summer Hills argues they are not an immutable attribute but rather one that may be changed through the change process. In the absence of any statutory or case law expressly prohibiting a water right holder from changing the number of service connections served by a community domestic water right, Painted Summer Hills reasons it is lawful to make such a change to a groundwater right by satisfying the requirements of RCW 90.44.100.

Res judicata is a doctrine of claim preclusion. It bars relitigation of a claim that has been determined by a final judgment. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). *Res judicata* applies where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication. *Id.*

Collateral estoppel is a doctrine of issue preclusion. It bars relitigation of issues of ultimate fact that have been determined by a final judgment. Collateral estoppel requires that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice. *Id.*

We are not persuaded by Ecology's attempt to apply these legal theories to this situation. In this case, there has been no earlier cause of action in which the question was litigated as to whether the connection numbers contained in Mr. Freese's permit were a maximum limit in the first instance, or whether they were immutable and unchangeable in perpetuity. Ecology also

fails to explain how, in the absence of any prohibition against changing a particular attribute, seeking to change a water right attribute is "challenging" it when there is a specific statutory process outlined to do so. Under Ecology's notion of *res judicata,* the doctrine would act to bar all changes to any other attribute of a water right (*e.g.*, place of use, point of withdrawal, or season of use, etc.) that permittees seek to change through RCW 90.44.100, if they had not initially challenged or appealed that aspect of the original permit. Clearly that is not how the statutory scheme authorizing changes to water rights works, or how the doctrine of *res judicata* applies in the context of water right changes. Because we conclude Ecology's position misapplies the doctrines of *res judicata* and collateral estoppel, and ignores the explicit statutory authorization for changing a groundwater permit, Appellant is entitled to summary judgment on Issue 2.A.

We hold that an application seeking to change the number of service connections in a groundwater permit is not properly characterized as a "challenge" to the original permit and is thus not barred by *res judicata* or collateral estoppel. In this respect, it is immaterial whether the language in the original permit is a condition limiting the exercise of the water right for purposes of deciding whether the requested change satisfies the requirements of the RCW 90.44.100.[15]

Even if it were a limitation on the exercise of the right in the first instance, we are not persuaded by Ecology's interpretation the permit as creating an immutable upper limit on the number of homes that may be served using the authorized quantity of water set forth in the permit. While Ecology's interpretation of the specific terms and meanings of a water right is

[15] This is in contrast to an appeal of an enforcement action where Ecology might allege a permittee has violated the conditions of a water right permit by connecting to more residences than the number identified in the permit.

entitled to deference, such deference is not without limits. *See e.g., Five Corners Family Farmers v. Ecology*, PCHB No. 09-106 (2010). Here, despite Ecology's repeated references in the briefing to the ROE and permit specifically conditioning the right to serve "*up to*" 12 homes, "*no more than*" 12 homes, "*only*" 12 homes, or "*a maximum of*" 12 homes, the ROE and permit language, on its face, does not support Ecology's view of 12 homes as a maximum residential connection limit. These limiting words do not appear in either the ROE or the permit, which state instead: "12 acre-feet per year for continuous community domestic supply *to 12 homes*." (emphasis added).

Ecology's interpretation of the words "continuous community domestic supply *to 12 homes*" as an immutable attribute also bears no relation to water availability, beneficial use, impairment of other rights, or detriment to the public welfare. This interpretation serves no apparent purpose other than to restrict the maximum residential density that may be developed using this water right, yet it has the effect of frustrating the implementation of local comprehensive plans and development regulations that have evolved since the permit was originally issued.

Ecology identifies no statutory authority for its interpretation of the permit as a maximum, immutable limit on the number of service connections. RCW 90.03.260(4) is the most relevant statutory provision, yet it does not support Ecology's position. In the recent challenge to this statute, the plaintiff Tribes had argued that RCW 90.03.260(4) facially violated the due process clause of the state and federal Constitutions because it eliminated their opportunity to challenge water right changes that would increase the number of service

connections in municipal water rights. In rejecting the Tribes' claims regarding this provision, the King County Superior Court ruled broadly that "there is no prior statutory law providing that service connections or populations were an attribute limiting the exercise of a water right." *Mack Decl., Ex. 37*, at 14-15. The Supreme Court affirmed this aspect of the King County Superior Court's decision and held that the pre-2003 water code contained no provision making service connection numbers "binding" attributes limiting the exercise of a municipal water right. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010). While this ruling was specific to municipal water rights, neither the Court nor Ecology has identified any basis for distinguishing between municipal water rights and non-municipal water rights in this particular regard.

While RCW 90.03.260(4) now requires an application for community or multiple domestic water supply to identify "the projected number of service connections sought to be served," this provision did not exist in 1987 when the application was filed, or in 1991 when the permit was issued. More importantly, the new provision in RCW 90.03.260(4) also does not prohibit changes to the number of service connections identified in an application. Rather, it provides clarification that for municipal water suppliers with an approved water system plan or approval from the department of health to serve a specified number of service connections, "the service connection figure in the application or any subsequent water right document is not an attribute limiting exercise of the water right so long as the service stays consistent with the approved water system plan or specified number." RCW 90.03.260(4). In other words, municipal water suppliers need not go through the change process to increase the number of service connections originally projected in their applications. At most, this statute provides

support for the proposition that non-municipal water suppliers must go through the change process to alter the number of service connections from the amount projected in their water right applications.

Ecology's reliance on negative legislative history to "suggest() that the Legislature believed that connection limits in water right documents held by non-municipal water suppliers were limiting attributes of those water rights" because it failed to pass HB 1713 in 2005, is contrary to well-established principles of statutory construction, and we find it unavailing. *Squaxin Island Tribe v. Ecology*, PCHB No. 05-137 (Order on Motions, May 19, 2006) (citing *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992)).

Appellant is entitled to summary judgment on Issue 2.D.

Municipal Water Supplier Provisions (Issues 3 and 5)

Ecology asserts that because RCW 90.44.100 does not specifically allow changes to the number of connections, and because changes in the number of connections do not constitute a change in manner of use, it is necessary to look to RCW 90.03.260(4) for this authorization. Ecology maintains that RCW 90.03.260(4) restricts the allowable changes to water rights under RCW 90.44.100. Ecology argues that non-municipal water suppliers are not afforded the same flexibility as municipal water right suppliers to set the number of service connections they serve and notes that non-municipal water suppliers are not required to implement conservation and planning provisions which are mandated for municipal water suppliers. Ecology's Reply Memorandum at 22. Ecology contends that because the Permit is not a municipal water right,

the exception to connection limits in RCW 90.03.260(4) does not apply. Ecology's Response to Appellant's Motion at 28-29.

The Board finds that Ecology's arguments regarding RCW 90.03.260(4) are misdirected. RCW 90.03.260(4) was enacted by the Legislature in 2003 as part of the Municipal Water Supply Law. The language in this subsection pertains to the information that must be provided in an application for a new water right. The Legislature clarified that by listing the expected number of service connections, municipal water suppliers that had approved water system plans or approvals from the Department of Health were not limited by the number of service connections in the exercise of their water right. As discussed above, no prior law states that the number of service connections or populations is an attribute limiting the exercise of a water right. The process for obtaining approval of residential service connections to a water system is accomplished by obtaining approval from the Department of Health through the water system plan process. Washington Realtors Amicus Curiae Brief. In adding the amendatory language to RCW 90.03.260, the Legislature did not place any prohibition on a non-municipal water system from increasing the number of its service connections and then conforming its water right to a municipal water right. RCW 90.03.260(4) does not amend or reference RCW 90.44.100 and is not a limit on the exercise of any rights under this statute. A court will not add words or clauses to an unambiguous statute when the Legislature has not included the language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The Board notes that if Painted Summer Hills does increase the number of its residential service connections to 15 or more, it is subject to more stringent requirements as a Group A

water system. If Painted Summer Hills asks Ecology to conform its water right to a municipal water right under RCW 90.03.560, it will also become subject to the conservation and planning provisions which are mandated for municipal water suppliers.

There appears to be some concern with the fact that if Painted Summer Hills becomes a municipal water supplier, it would be allowed to change the inchoate portion of its water right to one or more of the purposes of use associated with a municipality under RCW 90.03.015(4), and that the ability to make this change would lead to speculation in water. That issue is not before the Board in this case. The only proposal before the Board is an increase in the number of residential service connections, clearly still within the original community domestic purpose of use. The Board does take notice RCW 90.03.570 allows an unperfected surface water right for municipal supply purposes to change or transfer pursuant to RCW 90.03.380 under certain circumstances. The Board grants summary judgment to Painted Summer Hills on Issues 3 and 5.

Enlargement (Issue 6)

One of Ecology's reasons for reversing the Conservancy Board was that the agency considers an increase in the number of service connections to be an unlawful enlargement of the water right. In its reversal letter, Ecology references the State Supreme Court's ruling in the *Schuh* case for the proposition that enlargement of rights, even when the annual quantity remains the same, is precluded by the water code.

This Board has previously recognized as a legal principal in water rights law, that "enlargement" prohibits changes to a groundwater right if the combined total quantity withdrawn from the original well and any additional well(s) enlarges the right conveyed by the original

permit or certificate. *Cornelius v. Ecology*, PCHB No 06-099 (Order on Summary Judgment as Amended on Reconsideration, January 18, 2008). The principal derives from the water code's prohibition on "enlargement" of a water right through a permit amendment which states: "Where an additional well or wells is constructed, the original well or wells may continue to be used, but the combined total withdrawal from the original and additional well or wells shall not enlarge the right conveyed beyond the original permit or certificate." RCW 90.44.100(2)(c).

In the *Cornelius* case, the Board rejected the claim that enlargement of a water right occurs as a matter of law whenever a change in the point of withdrawal enables a water right holder to exercise a greater quantity of an existing right than is being exercised at the original point of withdrawal. *Cornelius*, PCHB No. 06-099 (Order on Summary Judgment as Amended on Reconsideration, January 18, 2008), at 29. The same reasoning applies here, and we conclude that enlargement does not occur merely because a change in the manner of use enables a water right holder to exercise a greater quantity of an existing right than might have been exercised under the original manner of use. In both situations, the applicants were not seeking to increase the quantity of previously authorized groundwater but rather to use it more efficiently to serve a greater number of residential users. Like Ecology's decision in the *Cornelius* case, it is undisputed that the Conservancy Board's decision in this case does not increase the quantities of water authorized to be withdrawn under the permit.

Ecology's reliance on *Schuh* is misplaced, because it does not stand for the proposition that "enlargement" is prohibited even if the quantity of water is not increased as Ecology contends. In *Schuh v. Ecology*, 100 Wn.2d 180, 667 P.2d 64 (1983), Mr. Schuh sought to

transfer the permit from a piece of property within the boundaries of the Columbia Basin Project to a property outside the federal project area. The original permit granted the right to withdraw a maximum quantity, *less the amount of water available from the Columbia Basin Project*. The Board concluded that this meant the authorized quantity of groundwater available for assignment was therefore the net amount (after subtracting from the maximum the quantity available from the federal project). Because the applicant sought to transfer the entire maximum quantity outside the federal project area, thereby shedding itself of the previous limitation on the maximum quantity, the Board held that the application was properly denied under the terms of RCW 90.44.100.

We conclude that changing residential connections from 12 to 19 does not constitute enlargement of the water right under the permit, and summary judgment should be granted to Painted Summer Hills on Issue 6.

Speculation (Issue 7)

Ecology reversed the Conservancy Board and contends the requested change to the permit should be denied because allowing an increase in the number of service connections is contrary to speculation prohibited by the water code.

We find no legal basis in the record for characterizing Mr. Freese's original project as speculative, and similarly no basis for characterizing either the assignment to Painted Summer Hills – or its project – as speculative. This case stands in stark contrast to the situation in *City of West Richland v. Department of Ecology*, 124 Wash. App. 683, 103 P.3d 818 (2004), where the court denied a change in the purpose of use of an unperfected groundwater right, based on its

view that the change statute cannot be used to speculate in water rights. *City of West Richland*, 124 Wash. App. at 693. In that case, the original water right holder had acquired the right under the Family Farm Act for agricultural irrigation of a family farm, and then in the face of an action by Ecology to cancel the rights for failure to meet extended development schedules, sought to gain financially by transferring the right to the City for municipal water supply purposes.

This Board has previously rejected a claim of impermissible speculation where the water right holder was continuously engaged in some affirmative effort to puts its water right to beneficial use. *Pend Oreille PUD No. 1 v. Ecology*, PCHB Nos. 97-177, 98-043, 98-044 (2000), at COL 31-32.

In the present case, the undisputed evidence shows that both parties (Freese and Painted Summer Hills) acquired the water right for the same purpose and place of use: community domestic supply to a residential subdivision within the same footprint of land. Ecology has never sought to cancel Mr. Freese's permit for failure to meet development schedules, and no allegations have been made that Painted Summer Hills has not maintained the permit in good standing or is not using reasonable diligence to apply the water to beneficial use.[16] The specific locations of the homes to be served are identified in the record, and they are all within the authorized place of use of the permit. The facts do not support a claim that this change amounts

[16] Both in its briefing and at oral argument, Ecology attempts to bolster its claim of speculation by emphasizing that for a considerable period of time until Painted Summer Hills acquired Mr. Freese's water right, neither Mr. Freese nor Painted Summer Hills engaged in developing the domestic portion of the water right under the *original* project. Yet this argument is undercut by the fact that Ecology granted no fewer than five extensions to the development schedule, including at least three that extended the proof of appropriation deadline, and made no move to cancel the permit for lack of diligence.

to an impermissible speculation in water rights, or that it is proposed for a speculative use, and we therefore grant summary judgment to Appellants on the issues of speculation.

Public Interest (Issue 7.G)

Ecology also reversed the Conservancy Board on the grounds that the change is contrary to the public interest pursuant to RCW 90.44.100, which disallows a change in a groundwater right if the proposed change would prove detrimental to the public interest. RCW 90.44.100 (cross-referencing the findings prescribed in the case of an original application at RCW 90.03.290). Ecology's claim is based on the testimony of Ecology staff explaining that it is not in the public interest to allow Painted Summer Hills to leapfrog over other applicants in line for new water rights, or to add domestic connections to an existing water right because "ideally" any water authorized under the permit that is not needed to serve the original 12 connections should return to the State for future reallocation.[17]

The Conservancy Board, in contrast, concluded that using the same quantity of water to supply 19 homes instead of 12 homes, in accordance with current conservation and water use efficiency standards, would be consistent with securing maximum net benefits for the people of the state.

Ecology's argument that the public interest is hurt by not being able to retract some portion of Painted Summer Hill's inchoate water and reallocate to the next person in line is at odds with the statutory scheme. As previously discussed, the Legislature has directed that

[17] Ecology also relies on its concerns about project alteration, enlargement, and speculation to argue that these alleged deficiencies demonstrate that the change in contrary to the public interest. Because we have already rejected each of these claims, they cannot form a separate basis for Ecology's public interest concern, so there is no need to address them again in this context.

pending applications for new rights are not entitled to protection in the context of consideration of existing rights. RCW 90.03.380(5). Additionally, the Legislature has further directed that no applicant for a change, transfer, or amendment of a water right may be required to give up any part of a valid water right as a condition of processing the application. RCW 90.03.380(6). Furthermore, there are no assertions that the Chapter 90.54 RCW is violated by the proposed change. Appellant is entitled to summary judgment on Issue 7.G.

Development Schedule (Issue 8)

Issue 8 addresses the development schedule contained in the Conservancy Board's ROE for the permit. The parties originally disputed whether the development schedule exceeded the Conservancy Board's authority under RCW 90.80 and WAC 173-153, whether it constituted an invalid "permit extension," and, if so, whether the proper remedy is reversal, or modification, of the Conservancy Board's decision (Issues 8.A, 8.B, and 8.C). These issues all appear to be moot, however, as the record before the Board indicates that Painted Summer Hills subsequently applied for an extension of the entire permit from Ecology (after the summary judgment motions were filed), and Ecology granted an extension in June 2009, until July 1, 2010. The record is unclear regarding the status of the permit extension after July 1, 2010, as neither party addressed this in their supplemental briefing or at oral argument, indicating that Issue 8 has been abandoned.

ORDER

1. Summary judgment is granted to Ecology on Issues 1.B & 1.C, 2.B & 2.C, 3.B & 3.C, 7.E & 7.F, and 7.H & 7.I, to the extent that Ecology is not precluded from raising

claims related to manner of use, collateral attack, municipal water supply, speculation, and public interest.

2. Summary judgment is granted to Painted Summer Hills on all remaining aspects of Issues 1 through 7.

3. Issue 8 is deemed moot, or otherwise abandoned.

SO ORDERED this 6th day of October, 2011.

POLLUTION CONTROL HEARINGS BOARD
ANDREA MCNAMARA DOYLE**,** Presiding
WILLIAM H. LYNCH, Member
_____See partial concurrence and dissent_____
KATHLEEN D. MIX, Chair