THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CITY OF LEAVENWORTH, Appellant, v. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondent.	CASE NO. 31236-4 JOINT POSITION PAPER FOR SETTLEMENT CONFERENCE

The Appellant City of Leavenworth ("Leavenworth" or "City") and Respondent Washington State Department of Ecology ("Ecology") jointly requested a settlement conference pursuant to RAP 5.5, prior to the setting of a briefing and hearing schedule for this appeal. This joint position paper is presented in response to the Court's November 30, 2012 notice. The Parties request a settlement conference in support of a stay of this appeal to pursue settlement of the case.

I. BRIEF STATEMENT OF THE CASE

In 1960, Ecology's predecessor agency issued water right Certificate No. 8105 to Leavenworth for a maximum instantaneous quantity of 1.5 cubic feet per second (cfs) from Icicle Creek for municipal purposes, but without specifying the maximum annual quantity authorized under the water right. In 1995, Ecology issued decisions granting two new water rights to Leavenworth for a new groundwater source and additional summer peak-period withdrawals from Icicle Creek. These 1995 decisions included "tentative determinations" by Ecology that defined the

scope of Leavenworth's preexisting water rights. The tentative determination regarding Certificate No. 8105 stated that it had been issued without an annual quantity limit, but that a limit of 275 acre-feet per year could be inferred from other factors including past growth projections and average daily usage per customer. Although other language in the 1995 decisions expressed that Leavenworth's total annual quantity from all of its water rights, new and existing, totaled 1,465 acre-feet per year, Leavenworth contends that quantification or limitation of the annual quantity of its existing water rights was not revealed to the city as a consequence of the 1995 decisions. These decisions were not appealed by Leavenworth.

Many years later, Leavenworth reviewed the tentative determinations and conditions in the 1995 decisions and came to believe that they may have exceeded Ecology's statutory authority as to Leavenworth's preexisting water rights. Leavenworth attempted to resolve the issue through a request to the Department of Health for an amendment to its Water System Comprehensive Plan, which Ecology subsequently disputed. Leavenworth then brought a declaratory judgment action in Chelan County Superior Court against Ecology after efforts to resolve the quantity of its water rights were unsuccessful. Both parties filed cross-motions for summary judgment relating to several legal issues. Judge Lesley A. Allan issued an Order on Parties' Cross-Motions for Summary Judgment and on Motions to Strike (July 19, 2012 Order) partially granting and denying each parties' motions. After denying

Leavenworth's Motion for Reconsideration, this appeal was filed by Leavenworth. Ecology did not file a cross-appeal.

Leavenworth contends as follows:

1. That it did not understand that the 1995 decisions could have had the effect of reducing the annual quantity of its preexisting water rights, including both perfected and inchoate portions of Certificate No. 8105.

2. That a 1994 Stipulation and Order (1994 Stipulation) included the parties' agreement that Leavenworth's existing water rights, including Certificate No. 8105, were not affected by the two new water right permit decisions.

3. That Ecology had no statutory authority to reduce its preexisting water rights.

4. That the superior court has authority under the Uniform Declaratory Judgments Act to determine limits on Ecology's statutory authority and to determine whether the 1995 decisions had any effect on Leavenworth's preexisting water rights.

5. That the July 19, 2012 Order did not resolve the ultimate issue in the case, whether Ecology's tentative determination and cap condition in the 1995 decisions can or cannot be interpreted as limiting or reducing the quantity of the City's preexisting perfected and inchoate water rights.[1]

6. That the July 19, 2012 Order did not resolve other claims by the City in the case.

The ultimate remedy Leavenworth seeks is a declaration that its preexisting water rights, including the perfected and inchoate quantities of Certificate No. 8105, were not affected by the 1995 decisions, which

[1] A more detailed summary of the legal issues and positions of the parties is provided in Section III, below. The summary judgment record in this matter at the trial court level is exceptionally long. To reasonably limit the quantity of reading by the settlement conference judge in order to understand the scope of issues in this case, the parties have identified the July 19, 2012 Order and their briefing on Leavenworth's Motion for Reconsideration as that portion of the record that will be necessary or helpful to settlement discussions. Those portions of the record are attached as an appendix.

would result in a total annual quantity of up to 2,185.95 acre-feet per year for all of its water rights.

Ecology contends as follows:

1. That the 1994 Stipulation included Leavenworth's agreement to limit the annual quantity authorized under its portfolio of water rights, including the two new permits and all preexisting rights.

2. That, under the water right permitting statute, RCW 90.03.290, Ecology had the authority to tentatively determine the scope and validity of Leavenworth's preexisting water rights and to impose an aggregate cap condition in the 1995 decisions determining a specific annual quantity for Leavenworth's water rights.

3. That Leavenworth's declaratory judgment action is a belated appeal of the 1995 decisions and barred by the 30-day statute of limitations for appealing decisions on permit applications to the Pollution Control Hearings Board (PCHB).

Ecology is satisfied with the July 19, 2012 Order and interprets it as upholding the aggregate cap condition limiting Leavenworth's annual quantity of water rights to a maximum total of 1,465 acre-feet per year.

II. SETTLEMENT PROSPECTS AND TIME REQUIREMENTS

Both parties have expressed interest in pursuing a settlement process with the goal of identifying and funding projects in the Wenatchee River watershed that would augment Leavenworth's water rights for future growth, and make it unnecessary for Leavenworth to pursue this appeal. If the settlement process is successful, Leavenworth would voluntarily dismiss this appeal. If it is not successful, Leavenworth would notify the Court of its intention to pursue this appeal and the Court could then set a briefing schedule and hearing date. An outline of this settlement

process is being developed by the parties in cooperation with Ecology's Office of the Columbia River and the Wenatchee Water Work Group, a coalition of municipal water systems and irrigation districts, using an integrated Wenatchee River watershed planning process. The current draft of this outline is attached as Exhibit A.

The public nature of this planning process is essential to Ecology's willingness to participate in it and seek the funding necessary to carry it out. It is also one important reason the parties request a stay of this appeal for two or more years because in their experience these processes require at least that amount of time to complete. Third parties including the Yakama Nation, Confederated Tribes of the Colville Reservation, U.S. Fish and Wildlife Service, U.S. Bureau of Reclamation, National Marine Fisheries Service, the Washington Department of Fish and Wildlife, environmental groups, and other cities and irrigation districts in the Wenatchee River watershed will be informed and involved in this process, and a broad consensus is required in order to obtain funding from the State of Washington or other sources to implement the settlement once suitable projects to augment Leavenworth's water rights are identified.

The parties propose to keep the Court of Appeals informed of their progress on the settlement process once every six months (or more often if important events or milestones arise). If the Court of Appeals becomes dissatisfied with this progress, it can call a settlement or status conference at any time and has the authority to require more detailed status reports or to revoke the continuance and require the parties to comply with the Rules

tentatively determine the extent and validity of a water right permit applicant's preexisting water rights when Ecology evaluates the applicant's permit application for an additional water right. This authority does not include the authority to reduce preexisting water rights. Therefore, under RCW 90.03.290, Ecology was authorized to tentatively determine the extent and validity of Leavenworth's preexisting water rights, including Certificate No. 8105, when Ecology evaluated Permit Application Nos. G4-29958 and S4-28812 in 1993 and 1995.

B. Did Ecology have authority to determine an "aggregate cap" on the annual quantity of water allowed under all of Leavenworth's water rights, including its existing perfected and inchoate water rights, as a condition of Ecology's approvals of Leavenworth's Permit Nos. G4-29958 and S4-28812 for new water right permits?

Leavenworth's Position: No. The Water Code does not authorize Ecology to determine an "aggregate cap" as a binding limit on the annual quantity of a municipal water supplier's water rights. This is tantamount to an unauthorized adjudication of existing inchoate and perfected water rights, and is not, therefore, an appropriate condition to granting an application for additional water rights. Ecology can, instead, condition new annual quantity as "supplemental" or "non-additive" to existing water rights.

Ecology's Position: Yes. Ecology was authorized to determine an "aggregate cap" on the annual quantity of water allowed under all of Leavenworth's water rights as a condition in Ecology's approvals of its permit applications, to affirm that Leavenworth met the four criteria for

approval of permit applications under RCW 90.03.290. However, since the aggregate cap condition is based on a tentative determination of Leavenworth's preexisting water rights, the condition may be superseded in the future by a superior court's final determination of Leavenworth's water rights in a general adjudication of water rights.

July 19, 2012 Order: Under RCW 90.03.290, Ecology is authorized to approve an application for a new water right permit with a condition that limits the total annual quantity of water that may be used by the applicant under the applicant's entire portfolio of water rights, including the new permit and all preexisting water rights. This authority does not include the authority to reduce preexisting water rights. Therefore, under RCW 90.03.290, Ecology was authorized to include a condition limiting the total annual quantity of water that may be used by the City under all of the City's water rights as a condition in Ecology's 1995 revised approvals of the City's water right Permit Application Nos. G4-29958 and S4-28812. The Court interprets the 1,465 acre-feet per year language in Permit Nos. G4-29958 and S4-28812, and the Amended Reports of Examination (ROEs) associated with those permits, as a condition limiting the total annual quantity of water usage by the City under the new permits and all preexisting water rights as a condition of approval authorized by RCW 90.03.290.

of Appellate Procedure for the designation of clerk's papers and briefing in this matter. The parties will further explain the settlement process and their proposed status reports at the settlement conference to be held in this matter.

III. STATEMENT OF ISSUES AND POSITIONS OF THE PARTIES

A. Did Ecology have authority to tentatively determine the extent and validity of Leavenworth's preexisting water rights when Ecology evaluated Leavenworth's applications for new water rights? If so, are such tentative determinations binding and appealable as to the preexisting water rights?

Leavenworth's Position: Ecology's authority to make tentative determinations of existing water rights in the context of evaluating applications for new water rights is limited to determining how much, if any, additional water is required to meet the applicant's growth projections. Such determinations are not binding or appealable as limitations of the applicant's existing water rights, because only a superior court can adjudicate existing water rights.

Ecology's Position: Yes. Under RCW 90.03.290, Ecology has authority to tentatively determine the extent and validity of a water right permit applicant's preexisting water rights when Ecology evaluates a water permit application, but a final determination of the extent and validity of the water rights can only be made by a superior court in a general adjudication of water rights.

July 19, 2012 Order: Under RCW 90.03.290, the statute governing applications for water right permits, Ecology has the authority to

C. Does res judicata apply to preclude Leavenworth's complaint for declaratory judgment?

Leavenworth's Position: No. Leavenworth's request for a Declaratory Judgment is not an appeal of the 1993 or 1995 ROEs or the 1995 Permits; it is a request for a declaration of the legal effect of those decisions. Further, the doctrine of res judicata does not apply to ministerial or administrative permit decisions such as the ROEs or permits, nor does the doctrine apply to ultra vires language regarding the quantity of Leavenworth's existing water rights in the 1995 ROEs and Permits. Ecology cannot have it both ways by claiming they were not adjudicating existing rights and then claiming a challenge to its decision is barred by res judicata.

Ecology's Position: Yes. The City is attempting to appeal the provision in the 1995- issued Amended ROEs and permits stating that "[t]he primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess of 1,375 acre-feet per year allocated under pre-existing water rights...." Ecology's decisions on permit applications must be appealed to the PCHB within 30 days of receipt, and the City received the Amended ROEs and permits in 1995. RCW 43.21B.230(1), .310(4). A declaratory judgment action must be brought within a "reasonable time," which is determined by analogy to the time allowed for appeal of a similar decision as prescribed by statute, rule of court, or other provision. *Cary v. Mason Cnty., 132 Wn. App. 495, 500-01, 132 P.3d 157 (2006)*. However, res judicata can only apply until such

time as a superior court makes a final determination of the extent and validity of the City's water rights in a general adjudication of water rights.

July 19, 2012 Order: Res judicata is not applicable to Ecology's tentative determinations described in Declaratory Order No. 1, above, because final determinations of the extent and validity of water rights can only be made through a general adjudication of water rights in superior court pursuant to RCW 90.03.105–.245. As a result, Ecology's tentative determinations of the extent and validity of Certificate No. 8105 in its decisions on Permit Application Nos. G4-29958 and S4-28812 are not binding in a future water-related dispute, litigation, or adjudication.

D. If Ecology's tentative determination of the extent and validity of Leavenworth's preexisting water rights in the 1993 and 1995 ROEs and 1995 Permits was not binding as to those existing water rights, and res judicata does not apply to preclude Leavenworth's complaint for declaratory judgment, what is the proper remedy?

Leavenworth's Position: Ecology would not have been required to deny Leavenworth's applications—it has approved many similar applications without making a binding determination of extent and validity of preexisting rights. The Court should enter a declaratory judgment, as a matter of law, that statements in the 1993 and 1995 ROEs and the 1995 permits relating to the annual quantity of the City of Leavenworth Water Right Certificate No. 8105 and the total annual quantity of Leavenworth's existing water rights do not limit the extent and/or validity of Certificate No. 8105 or of the total annual quantity of Leavenworth's existing water rights. The ROEs and Permits should not be voided.

Ecology's Position: If the Court rules in favor of the City on Issues Nos. 1-3, then the 1994 Stipulation and Agreed Order of Dismissal ("Agreement"), Amended ROEs, and Permits should be declared null and void so that the parties are restored to the positions they were in before Ecology issued its decisions on the City's permit applications. Through a declaratory judgment, the Court cannot erase or rewrite the provision in the Amended ROEs and permits stating that "[t]he primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess of 1,375 acre-feet per year allocated under pre-existing water rights. . . . " while maintaining the rest of the Amended ROEs and permits intact because that would be contrary to law, and also would give the City its "benefit of the bargain" that it obtained through the Agreement while depriving Ecology of its benefit of the bargain.

July 19, 2012 Order: Under RCW 43.21B.230(1) and 43.21B.310(4), Ecology's decisions on permit applications must be appealed to the PCHB within 30 days of receipt. Because the City received the Amended ROEs and permits in 1995 and failed to timely appeal those decisions to the PCHB, the City cannot seek judicial review of the Amended ROEs and permits or any of their provisions at this time. Therefore, the City is generally bound by the conditions in Permit Nos. G4-29958 and S4-28812 including, but not necessarily limited to, the amount of additional water granted (up to an additional 90 acre-feet per year), the total quantity of water the City can use each year under its collective water rights (1,465 acre-feet per year), reporting requirements,

and well construction requirements. Although Ecology's tentative determination of the annual quantity of Certificate No. 8105 does not have any res judicata effect, the Court interprets the City's declaratory judgment claim as a belated appeal of the condition limiting the annual quantity of the City's water rights described in Declaratory Order No. 2, above, that is barred by the 30-day statute of limitations of RCW 43.21B.230(1) and 43.21B.310(4). However, in the event of a future water-related dispute, litigation, or adjudication, Ecology cannot necessarily rely on its tentative determination of the annual quantity of Certificate No. 8105 as being binding.

E. What is the plain meaning of the 1994 Stipulation and Order as to the parties' intentions with respect to limiting the scope and validity of Leavenworth's existing water rights?

Leavenworth's Position: The plain language of the 1994 Stipulation and Order confirms that the parties did not intend to reduce, limit or eliminate any of Leavenworth's existing water rights.

Ecology's Position: The plain language of the Agreement confirms that the parties did intend for there to be an aggregate annual quantity cap of 1, 465 acre-feet per year for all of the City's water rights, including Certificate No. 8105 and Permit Nos. G4-29958 and S4-28812.

July 19, 2012 Order: Because of the foregoing findings and declarations, that portion of the third cause of action in the City's Second Amended Complaint seeking an interpretation of the 1994 agreement between the parties does not need to be determined.

F. Did Ecology violate the City's constitutional right to due process when Ecology issued its decisions on the City's water right permit applications?

Leavenworth's Position: If Ecology had authority to decrease or cap Leavenworth's preexisting water rights when it issued the 1995 decisions, it violated Leavenworth's due process rights by failing to adequately inform Leavenworth that those decisions would have that effect. The applications and notices of decision concerned only the new water rights, and the City was unaware that the quantity of its preexisting water rights were or could have been impacted by the 1995 decisions.

Ecology's Position: No. Ecology provided the City due process by providing notice and the opportunity to be heard through an appeal to the PCHB, a neutral quasi-judicial tribunal. The Amended ROEs and Permits included the provision stating that "[t]he primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess of 1,375 acre-feet per year allocated under pre-existing water rights . . . ." which provided notice that the Amended ROEs and permits were approved subject to the aggregate cap condition, and the City had the opportunity to appeal those decisions to the PCHB.

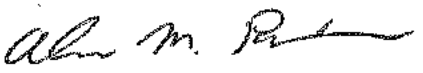
July 19, 2012 Order: Because of the foregoing findings and declarations of law, the Court also finds that it is unnecessary to determine whether Ecology violated the City's constitutional right to due process when Ecology issued its decisions on the City's water right permit applications.

IV. CONCLUSION

The Parties jointly request a stay (and continuance) of the appeal in order to pursue a settlement agreement using the process outlined in Exhibit A, which would eliminate the risk and expense to both parties of an appeal.

Respectfully submitted this 14th day of January, 2013.

ROBERT M. MCKENNA
Attorney General



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OUTLINE OF SETTLEMENT PROCESS
CITY OF LEAVENWORTH V. DEPARTMENT OF ECOLOGY

* The City of Leavenworth and the Department of Ecology (the Parties) agree to collaborate and attempt to find new source(s) of water supply for Leavenworth through the Wenatchee Integrated Plan process.

* The Parties agree that the initial goal is to secure 800 acre-feet per year of additional water right authority for Leavenworth. This annual quantity (Qa) figure is subject to further consideration and revision after potential water supply projects are identified and their feasibility is studied.

* Ecology (through its Office of Columbia River) agrees to provide $75,000 in funding to support the Wenatchee Water Work Group's process to identify potential water supply projects. This requested funding will support the Wenatchee Water Work Group's process to secure water supply for water users throughout the basin, and will not support only the effort to secure additional water supply for Leavenworth. This funding amount has already been identified in existing grant agreements between Ecology and the Chelan County Department of Natural Resources.

* Ecology agrees to partner with the Chelan County Department of Natural Resources to request capital budget funding from the Washington Legislature to support water supply project development. This requested funding, if appropriated by the Legislature, would support the Wenatchee Water Work Group's process to secure water supply for all water users throughout the basin. This funding will not exclusively support the effort to secure additional water supply for Leavenworth.

* After the Wenatchee Water Work Group identifies potential water supply projects that could benefit Leavenworth, and the feasibility of those potential projects is studied, the Parties will meet to determine if settlement is still possible based on securing new source(s) of water supply for Leavenworth through the Wenatchee Integrated Plan process. At that time, the Parties will determine (a) what potential projects, if any, will be pursued, and (b) what additional steps must be taken by the Parties in planning and project development efforts, and (c) whether to further negotiate the Qa figure of 800 acre-feet per year based on consideration and possible revision as discussed above.

* At this juncture, the Parties will decide whether to request further continuance of the Court of Appeals case and continue to pursue water supply projects through the Wenatchee Integrated Plan process, or to report to the Court that settlement efforts have ended and that the stay be lifted and litigation resumed.

* Leavenworth acknowledges that it may be required to expend money to secure water through any projects that are successfully developed through the Wenatchee Integrated Plan process. Potential costs and funding sources will be subject to future discussion between the Parties.

* Leavenworth agrees that during the pendency of this settlement process, and of the litigation in this case should it resume in the future, it will not seek amendment or adjustment of its Water System Plan through the Department of Health to increase the maximum Qa of its water rights in the water rights assessment section of the Water System Plan based on a Qa figure for its collective portfolio of water rights that exceeds 1,465 acre-feet per year.

* The Parties agree to meet at least once every six months to discuss progress in carrying out the steps outlined above, and report on and discuss the information gained through such steps, and to report on status of this settlement process to the Court of Appeals as directed by the Court. (However the parties can opt for more frequent meetings should the need arise.)

* Leavenworth agrees that if sufficient additional water supply is secured through this process, it will voluntarily dismiss its appeal; if not, Leavenworth retains the right to pursue the appeal. With respect to determining what quantity of water is "sufficient," the Parties agree that they may adjust the Qa figure of 800 acre-feet per year stated above after the project identification and feasibility stage. "Secured" means that a water supply has been identified, purchased and transferred to Leavenworth with the City's consent.

APPENDIX

STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

CITY OF LEAVENWORTH,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Defendant.

NO. 09-2-00748-3

ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT, AND ON MOTIONS TO STRIKE

Clerk's Action Required

THIS MATTER CAME ON FOR HEARING pursuant to CR 56 upon Plaintiff City of Leavenworth's Motion for Partial Summary Judgment (Re: Phase I Issues) dated June 27, 2011, and Defendant Department of Ecology's Motion for Summary Judgment dated June 24, 2011. The Court also considered motions that each party filed requesting the Court to strike portions of the other party's declarations.

Defendant Department of Ecology (Ecology), the moving party on its summary judgment motion and responding party as to the City of Leavenworth's partial summary judgment motion, appeared by and through its attorneys of record, Alan M. Reichman and Sarah Bendersky, Assistant Attorneys General. Plaintiff City of Leavenworth (City), the moving party on its partial summary judgment motion and responding party as to Ecology's summary judgment motion, appeared by and through its attorneys of record, Thomas M. Pors

of the Law Office of Thomas M. Pors, and Michael C. Walter of Keating, Bucklin & McCormack, Inc., P.S.

THE COURT CONSIDERED the following pleadings, memoranda, and briefs regarding Ecology's Motion for Summary Judgment:

1. Department of Ecology's Motion for Summary Judgment, dated June 24, 2011;

2. Department of Ecology's Memorandum in Support of its Motion for Summary Judgment, dated June 24, 2011;

3. Plaintiff Leavenworth's Response to Ecology's Motion for Summary Judgment (Re: Phase I Issues), dated July 22, 2011; and

4. Department of Ecology's Reply Memorandum in Support of Motion for Summary Judgment, dated August 5, 2011.

THE COURT ALSO CONSIDERED the following pleadings, memoranda, and briefs regarding the City's Motion for Partial Summary Judgment:

1. Plaintiff City of Leavenworth's Motion for Partial Summary Judgment (Re: Phase I Issues), dated June 27, 2011;

2. Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment, dated July 22, 2011; and

3. Reply of the City of Leavenworth to Defendant Department of Ecology's Response/Opposition to the City's Motion for Partial Summary Judgment, dated August 5, 2011.

THE COURT ALSO CONSIDERED the following pleadings, memoranda, and briefs regarding the City's Objections/Requests to Strike:

1. Leavenworth's Objection to Ecology's PCHB Legal Authority and Reichman Declaration Exhibits 11 and 12, and Request to Strike, dated July 22, 2011;

2. Department of Ecology's Memorandum in Opposition to City of Leavenworth's Request to Strike, dated August 4, 2011;

3. Leavenworth's Objection to Evidence (07-20-11 Stephen Hirschey Declaration and 07-21-11 Daniel R. Haller Declaration) and Request to Strike, dated August 5, 2011;

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4. Department of Ecology's Memorandum in Opposition to Leavenworth's Request to Strike Declarations, and, in the Alternative, Request to Strike Portions of Leavenworth's Declarations, dated August 19, 2011;

5. Leavenworth's Additional Objection to Evidence (07-29-11 Daniel R. Haller Declaration) and Request to Strike, dated September 9, 2011; and

6. Department of Ecology's Memorandum in Opposition to Leavenworth's Additional Objection to Evidence (07-29-2011 Daniel R. Haller Declaration) and Request to Strike, dated September 21, 2011.

THE COURT ALSO CONSIDERED the following affidavits, declarations, and evidentiary material, including exhibits appended to each, in support of Ecology's Motion for Summary Judgment, and in Response/Opposition to the City's Motion for Partial Summary Judgment:

1. Declaration of Melissa Downes in Support of Department of Ecology's Motion for Summary Judgment, dated June 17, 2011;

2. Declaration of Robert F. Barwin in Support of Department of Ecology's Motion for Summary Judgment, dated June 17, 2011;

3. Declaration of Alan M. Reichman in Support of Department of Ecology's Motion for Summary Judgment, dated June 20, 2011;

4. Declaration of Alan M. Reichman in Support of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment, dated July 19, 2011;

5. Declaration of Stephen Hirschey in Support of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment, dated July 20, 2011;

6. Declaration of Daniel R. Haller, dated July 21, 2011; and

7. Second Declaration of Daniel R. Haller, dated July 29, 2011.

THE COURT ALSO CONSIDERED the following affidavits, declarations, and evidentiary material, including exhibits appended to each, in support of the City's Motion for Partial Summary Judgment, and in Response/Opposition to Ecology's Motion for Summary Judgment:

1. Declaration of Terrence M. McCauley, dated June 22, 2011;

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2. Declaration of Connie Krueger, dated June 23, 2011;

3. Declaration of Elmer Larsen, dated June 22, 2011;

4. Declaration of Jill Van Hulle, dated June 21, 2011;

5. Declaration of Chantell Steiner, dated June 22, 2011;

6. Declaration of Thomas M. Pors, dated June 26, 2011;

7. Declaration of Michael J. Cecka, dated June 20, 2011;

8. Declaration of Stephen Hirschey, dated May 13, 2011;

9. Declaration of Mark Varela, dated June 22, 2011;

10. Second Declaration of Michael J. Cecka, dated July 19, 2011;

11. Second Declaration of Terrence M. McCauley, dated July 19, 2011;

12. Second Declaration of Jill Van Hulle, dated July 19, 2011;

13. Second Declaration of Thomas M. Pors, dated July 21, 2011;

14. Third Declaration of Michael J. Cecka, dated August 3, 2011;

15. Third Declaration of Thomas M. Pors, dated August 4, 2011; and

16. Third Declaration of Jill Van Hulle, dated August 3, 2011.

THE COURT DECIDED THESE MOTIONS after hearing argument by counsel for the parties on September 27, 2011, after proper and timely notice of the parties' motions, and considered that argument in addition to and in conjunction with the foregoing pleadings memoranda, declarations, and other evidentiary materials. On December 15, 2011, the Court issued a memorandum decision, which is attached hereto and hereby incorporated into this Order. The parties presented separate proposed orders to the Court and, on February 16 and June 7, 2012, the Court held presentation hearings and instructed the parties with respect to the language and content of this Order.

BASED ON THE FOREGOING and pursuant to CR 56, the Court finds that there is no question of material fact with respect to the issues raised in Ecology's Motion for Summary Judgment, and in the City's Motion for Partial Summary Judgment (Re: Phase I

Issues), that all of the issues and claims raised are questions of law based on undisputed facts and/or interpretations of statutory and/or case law, and that Ecology is entitled to judgment as a matter of law only on the issues concerning the agency's authority under RCW 90.03.290 and the effect of the City's failure to appeal Ecology's 1995 Amended Reports of Examination to the Pollution Control Hearings Board, as set forth below, but is not otherwise entitled to the relief requested in its Motion for Summary Judgment.

FURTHERMORE, and based on the forgoing and pursuant to CR 56(c), the Court finds that the City is entitled to judgment as a matter of law only on the res judicata and water system planning claims and issues in its motion, as set forth below, but is not otherwise entitled to the relief requested in its Motion for Partial Summary Judgment.

NOW, THEREFORE, IT IS HEREBY:

ORDERED, ADJUDGED, AND DECREED that all objections to and requests to strike portions of declarations are **DENIED**. In its consideration of the parties' cross-motions for summary judgment, the Court has disregarded any irrelevant legal conclusions and opinions offered by lay witnesses. It is hereby further

ORDERED, ADJUDGED, AND DECREED that all objections to and requests to strike legal authorities cited and discussed in memoranda are **DENIED**. It is hereby further

ORDERED, ADJUDGED, AND DECREED that Ecology's Motion for Summary Judgment, dated June 24, 2011, is hereby **GRANTED in part and DENIED in part**, and that the City's Motion for Partial Summary Judgment (Re: Phase I Issues), dated June 27, 2011, is hereby **GRANTED in part and DENIED in part.** It is hereby further

ORDERED, ADJUDGED, AND DECREED that pursuant to the third cause of action in the City's Second Amended Complaint for Reformation, Declaratory Judgment, and Other Equitable Relief (Second Amended Complaint) the Court hereby finds and makes declarations of law under Chapter 7.24 RCW as to each of the following:

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1. That under RCW 90.03.290, the statute governing applications for water right permits, Ecology has the authority to tentatively determine the extent and validity of a water right permit applicant's preexisting water rights when Ecology evaluates the applicant's permit application for an additional water right. This authority does not include the authority to reduce preexisting water rights. Therefore, under RCW 90.03.290, Ecology was authorized to tentatively determine the extent and validity of the City's preexisting water rights, including Certificate No. 8105, when Ecology evaluated the City's Permit Application Nos. G4-29958 and S4-28812 in 1993 and 1995;

2. That under RCW 90.03.290, Ecology is authorized to approve an application for a new water right permit with a condition that limits the total annual quantity of water that may be used by the applicant under the applicant's entire portfolio of water rights, including the new permit and all preexisting water rights. This authority does not include the authority to reduce preexisting water rights. Therefore, under RCW 90.03.290, Ecology was authorized to include a condition limiting the total annual quantity of water that may be used by the City under all of the City's water rights as a condition in Ecology's 1995 revised approvals of the City's water right Permit Application Nos. G4-29958 and S4-28812. The Court interprets the 1,465 acre-feet per year language in Permit Nos. G4-29958 and S4-28812, and the Amended Reports of Examination (ROEs) associated with those permits, as a condition limiting the total annual quantity of water usage by the City under the new permits and all preexisting water rights as a condition of approval authorized by RCW 90.03.290;

3. That *res judicata* is not applicable to Ecology's tentative determinations described in Declaratory Order No. 1, above, because final determinations of the extent and validity of water rights can only be made through a general adjudication of water rights in superior court pursuant to RCW 90.03.105-.245. As a result, Ecology's tentative determinations of the extent and validity of Certificate No. 8105 in its decisions on Application

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Nos. G4-29958 and S4-28812 are not binding in a future water-related dispute, litigation, or adjudication.

4. That under RCW 43.21B.230(1) and 43.21B.310(4), Ecology's decisions on permit applications must be appealed to the Pollution Control Hearings Board (PCHB) within 30 days of receipt. Because the City received the Amended ROEs and permits in 1995 and failed to timely appeal those decisions to the PCHB, the City cannot seek judicial review of the Amended ROEs and permits or any of their provisions at this time. Therefore, the City is generally bound by the conditions in Permit Nos. G4-29958 and S4-28812 including, but not necessarily limited to, the amount of additional water granted (up to an additional 90 acre-feet per year), the total quantity of water the City can use each year under its collective water rights (1,465 acre-feet per year), reporting requirements, and well construction requirements. Although Ecology's tentative determination of the annual quantity of Certificate No. 8105 does not have any *res judicata* effect, the Court interprets the City's declaratory judgment claim as a belated appeal of the condition limiting the annual quantity of the City's water rights described in Declaratory Order No. 2, above, that is barred by the 30-day statute of limitations of RCW 43.21B.230(1) and 43.21B.310(4). However, in the event of a future water-related dispute, litigation, or adjudication, Ecology cannot necessarily rely on its tentative determination of the annual quantity of Certificate No. 8105 as being binding;

5. That because of the foregoing findings and declarations of law, the Court also finds that it is unnecessary to determine whether Ecology violated the City's constitutional right to due process when Ecology issued its decisions on the City's water right permit applications;

6. That statements, figures, and representations in Washington Department of Health-approved water system plans on the status of water rights do not, in themselves, limit the scope and validity of the water rights that are reported in the plans; and

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7. That statements, figures or representations in the City's 2002 Water System Plan relating to the City's water rights were provided for planning purposes, and did not cause a relinquishment or abandonment of the City's water rights.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, because of the foregoing findings and declarations, that portion of the third cause of action in the City's Second Amended Complaint seeking an interpretation of the 1994 agreement between the parties does not need to be determined.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, because of the foregoing findings and declarations, the first and second causes of action in the City's Second Amended Complaint seeking reformation of the 1994 agreement between the parties do not need to be determined.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that, because of the foregoing findings and declarations, the fourth cause of action in the City's Second Amended Complaint, requesting a constitutional writ, does not need to be determined.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall be deemed the prevailing party on the cross-motions for summary judgment and neither party is, therefore, entitled to attorneys' fees and costs as authorized by law.

DATED this 19 day of July 2012.

LESLEY ALLAN

HONORABLE LESLEY A. ALLAN
JUDGE

Presented by:

ROBERT M. MCKENNA
Attorney General

ALAN M. REICHMAN, WSBA #23874

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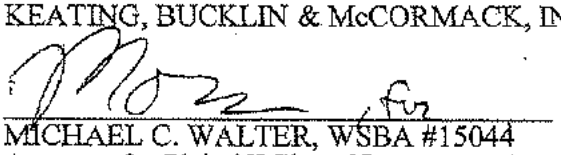
Assistant Attorney General
Attorney for Defendant Department of Ecology

Notice of presentation acknowledged and waived;
Approved for entry by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.



MICHAEL C. WALTER, WSBA #15044
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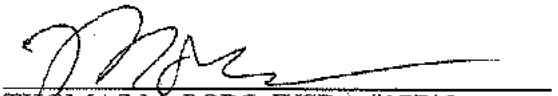

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Superior Court of the State of Washington
For Chelan County

Lesley A. Allan, Judge
Department 1
T.W. Small, Judge
Department 2

John E. Bridges, Judge
Department 3
Bart Vandegrift
Court Commissioner

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December 15, 2011

Mr. Thomas M. Pors
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Mr. Alan M. Reichman
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Re: City of Leavenworth v. Department of Ecology
Chelan County Superior Court Cause No. 09-2-00748-3

Dear Mr. Pors and Mr. Reichman:

This matter came before the court on September 27, 2011 on the parties' cross-motions for summary judgment. Plaintiff City of Leavenworth ("the city") appeared and was represented by its attorney, Thomas Pors. Defendant Department of Ecology ("the department") appeared and was represented by its attorneys, Alan Reichman and Sarah Bendersky. The court has considered all pleadings submitted in connections with the motions, relevant authorities and arguments of counsel. This letter constitutes the court's memorandum decision.

This case involves a dispute regarding the city's water rights. The state, acting through the department, regulates the use of water and allocates water rights pursuant to a statutory scheme. As noted by counsel at the hearing in this matter, water law has developed over a long period of time and is seemingly dissimilar to any other area of law in this state. The lengths of the briefs submitted by counsel suggest that it is a complicated area of law, not susceptible to clear explanation, even by those ostensibly well-versed in its nuances. That being said, the court will attempt to sort through the myriad arguments made by the parties to resolve the issues presented herein.

The core facts of the case begin with Surface Water Certificate 8105 ("certificate 8105" or "8105"), which granted certain water rights to the city with a priority date of June 20, 1960.[1] The specific water right is described in 8105 as "1.50 cubic feet per second for municipal supply." The certificate does not include a statement of the maximum yearly amount of water that can be used.

In 1983 and again in 1989, the city filed applications for additional water rights. Ultimately, on June 10, 1993, the department issued two contemporaneous decisions or "Reports of Examination" ("ROE's") addressing these applications. The ROE's granted to the city the right to obtain water from additional locations to meet peak demand, but did not increase the overall water available to the city. In these ROE's, the department made findings that a reasonable annual quantity of water available under certificate 8105 can be calculated at 275 acre-feet.

In July 1993, the city appealed from the two ROE's to the Pollution Control Hearings Board ("PCHB"). The city contended that the total quantity of water available to the city should be higher than 1,375 acre-feet per year. Subsequent to the filing of the appeals, the city and the department entered into settlement negotiations. Ultimately, the parties reached a settlement of the PCHB case and entered into a Stipulation and Agreed Order of Dismissal on February 9, 1994.

On April 10, 1995, the department issued two amended ROE's, which amended the prior ROE's of June 10, 1993. These two decisions were sent to the city via certified mail on or about April 12, 1995, each with a nearly identical cover letter. These letters stated that the respective applications had been granted and also contained the following language: "This letter and enclosed Amended Report of Examination constitute our determination and order. You have the right to obtain review of this order." The letters went on to advise of the timelines (30 days) and manner for seeking review with the PCHB. The city did not appeal from either of the amended ROE's.

The two amended ROE's contained the same language as the original ROE's regarding certificate 8105: specifically, that 275 acre-feet was a reasonable calculation of the quantity of water available annually pursuant to that certificate. The amended ROE's also both found that the city currently has 1,375 acre-feet of water available annually. Further, the amended ROE's granted the city up to 90 acre-feet per year in "additive" or "primary" water for a total maximum of 1,465 acre-feet per year.

In 2002, the Department of Health ("DOH") approved the 2002 Leavenworth Water System Plan. In that plan – apparently prepared by the city – the city represented that certificate 8105 provided for a maximum annual water quantity of 275 acre-feet. All apparently was well until 2008, when the city requested DOH to amend its water system plan to indicate that certificate 8105 provided for a maximum annual quantity of more

[1] The city also holds at two previously-issued certificates which are referenced in various exhibits, but are not directly implicated in this dispute.

than 1,085 acre-feet, for a total city water portfolio of 2,185.95 acre-feet per year. When consulted by DOH, the department (of ecology) objected to the requested amendment. After apparent fruitless discussions, the city initiated this action.

Both parties have filed motions for summary judgment on various issues. The court will attempt to address all necessary issues in logical order.[2]

The first issue is whether the department possessed the authority to tentatively determine or otherwise quantify the water available under certificate 8105 in the course of considering the city's two applications for additional water rights. The court concludes that the department acted within its authority in making this tentative determination.

In deciding whether to grant or deny a water rights application, the department is required by statute to consider four criteria:

1. That water is available;

2. That is being requested for a beneficial use; and

3. That appropriation will not impair existing rights; or

4. That appropriation will not be detrimental to the public welfare.

RCW 90.03.290. "Beneficial use" is a term of art in water law and encompasses both the purposes for which water may be used and the amount of water necessary for a particular purpose. *See Dept. of Ecology v. Grimes*, 121 Wn.2d 459, 469 (1993). The department also has the authority to impose conditions on the granting of a permit. *Dept. of Ecology v. Theodoratus*, 135 Wn. 2d 582, 597 (1998).

It is axiomatic that in order to determine whether an application for water qualifies as a beneficial use, the department must consider – among other things – the amount of water that the applicant already has available to meet its uses. Although providing water to municipal customers unquestionably falls within the types of use that are potentially "beneficial,"[3] an application would nonetheless be denied if an applicant already possessed sufficient water rights to meet its needs. Thus, as occurred here, when faced with an application for additional water rights, the department must determine what

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[2] Both parties have submitted numerous declarations and exhibits as part of the summary judgment motions. Both parties have also moved to strike portions of the other's declarations. A substantial portion of the declarations appear to ultimately have very little relevance to the predominantly legal issues submitted for decision on summary judgment. The court therefore denies all motions to strike but has disregarded in its consideration of this case any irrelevant legal conclusions and opinions offered by lay witnesses.

[3] *See* RCW 90.54.020(1)

water is already available to the applicant. This is precisely what the department undertook to do with regard to the city's two applications. Its ROE's included specific findings regarding the amount of water available to the city under its three preexisting certificates, including 8105.

This issue is further complicated, however, by case law related to this topic and the statutory scheme for adjudication of water rights. First, it is undisputed that the department lacks authority to ultimately adjudicate water rights; rather, that authority is reserved to the superior courts by statute. *See* Chapter 90.03 RCW. Further, there is no statutory scheme that provides for the department to "tentatively determine" water rights. However, the concept of the department making a tentative determination of water rights has been discussed in case law.

Most prominent is the decision in *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219 (1993). In *Rettkowski*, the Court held that the department has no authority to tentatively determine the relative priority of water rights in a dispute between competing users in a regulatory action.[4] However, the *Rettkowski* Court noted that the concept of tentative determinations had been developed in the context of permitting cases. *Id.* at 227-28. The discussion of tentative determinations in *Rettowski* implicitly approves of the department's authority to engage in this type of analysis in the permitting context.

Concomitantly, the department also possesses the authority to impose conditions when issuing a permit. *Dept. of Ecology v. Theodoratus*, 135 Wn.2d at 597. Again, inherent in the general scheme of water rights permits, one such condition could be the total amount of water that could be used by a particular entity. Thus, the department was authorized to determine the total amount of water that should be utilized by the city, or an "aggregate cap."

Thus, this court concludes that analysis of the city's existing water rights – through a tentative determination – was a proper exercise of the department's authority in considering the city's water rights applications. The court also concludes that the department was authorized to issue a permit for additional water rights with a cap on the total amount of water the city could use annually.

The next issue presented for consideration is whether the city should be allowed to now challenge the two amended ROE's issued in 1995. As set forth in the cover letters transmitting the ROE's, any appeal was required to be filed with the PCHB within 30 days of receipt of the documents. It is undisputed that the city did not file an appeal this period. As a practical matter, the city does not seek to challenge the grant of additional

[4] Of potential significance to the future of this dispute is the similar observation by the *Rettowski* Court that PCHB is likewise without authority to conduct adjudicative hearings regarding such rights. 122 Wn.2d at 228-29.

water in the amount of 90 acre-feet per year, which was the net effect of the two ROE's.[5] Rather, the city seeks only to challenge the department's quantification of the city's rights under certificate 8105. Thus, the true issue may better be framed as: what is the effect of the department's tentative determination regarding certificate 8105 under the facts of this case?

On this issue, the department contends that the two ROE's – including the annual quantification of certificate 8105 – should be given res judicata effect and the city should be precluded from challenging the quantification. The department contends that the tentative determination stands as, in essence, a final determination of the city's rights under 8105 until such time as a general adjudication of all water rights in the Wenatchee River Basin might theoretically occur at some future date. Conversely, the city argues that the doctrine of res judicata cannot apply to a tentative determination.[6]

In this court's view, the department fundamentally misapprehends a crucial element of the doctrine of res judicata: specifically, that there must be a final adjudication of the particular claim or dispute at issue. *Pederson v. Potter*, 103 Wash.App. 62, 67 (2000). As previously noted, it is well-established that the department has no authority to make a final determination of a party's water rights; rather, that responsibility is reserved and entrusted to the superior courts in the context of a general adjudication. *See Rettkowski, supra;* Chapter 90.03 RCW. Here, the department has failed to explain how, if it is precluded from making such a final determination, its quantification of certificate 8105 can be considered to have res judicata effect.

In this regard, it is important to distinguish between the quantification of certificate 8105 and the ultimate decision reached in the two 1995 ROE's. Specifically, because the city failed to timely appeal from the 1995 amended ROE's, it is generally bound by the conditions of those permits. These include such things as the amount of additional water granted (up to an additional 90 acre-feet per year), the total it can use each year (1,465 acre-feet), reporting requirements, well construction requirements, etc. The city cannot seek judicial review of the ROE's or any of their provisions at this time.

Perhaps to clarify, although the department's tentative determination of a quantification for certificate 8105 does not have any future res judicata effect, the city cannot mount a belated piecemeal attack to that determination to the extent that is constitutes one of the factors considered by the department in issuing the amended ROE's. Conversely, in the event of some future water-related dispute, litigation or adjudication, the department cannot rely on this quantification of 8105 as binding.

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[5] In fact, the city strenuously opposes the department's suggestion that, if the annual quantification for certificate 8105 is held to be of no effect, that the two 1995 ROE's must also be reversed, vacated or withdrawn.

[6] *See, generally,* the various briefs of the parties.

In light of the foregoing analysis, the court does not believe that it is required to address any of the remaining issues. Briefly, the department and city agree that any statements by the city in its water system applications regarding the quantification of certificate 8105 do not have the legal effect of limiting the city's rights under 8105. Further, because the court has concluded that the department's tentative determination has no res judicata effect and that the city may challenge that quantification in future water-related disputes, the due process and contract-based claims have effectively been resolved.

Counsel shall prepare and present an appropriate order. Thank you.

Sincerely,

Lesley A. Allan
Superior Court Judge

C: Superior Court file

Honorable LESLEY A. ALLAN

SUPERIOR COURT OF STATE OF WASHINGTON
FOR CHELAN COUNTY

CITY OF LEAVENWORTH, Plaintiff, vs. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Defendant.	NO. 09-2-00748-3 PLAINTIFF CITY OF LEAVENWORTH'S MOTION FOR RECONSIDERATION Noted for: August 9, 2012 ORAL ARGUMENT REQUESTED

I. INTRODUCTION AND RELIEF REQUESTED

The City of Leavenworth, pursuant to CR 59(a) and LR 59(3) respectfully requests the Court's reconsideration of it July 19, 2012 Order on Parties' Cross-Motions for Summary Judgment and On Motions to Strike and its December 15, 2011 letter opinion.

The principal issue in this case is the legal effect, or lack of effect, of Ecology's tentative determination and total quantity condition in the 1995 ROEs on other preexisting City of Leavenworth water rights.[1] In other words, did Ecology have authority, for purposes other than deciding and conditioning applications S4-28812 and G4-29958, to determine, limit or reduce the

[1] For brevity, this issue is referred throughout this motion as the "Principal Issue."

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quantity of Leavenworth's preexisting inchoate and perfected water rights? The Court's July 19, 2012 Order on Parties' Cross-Motions for Summary Judgment and On Motions to Strike ("July 19 Order") does not clearly decide this crucial issue at the heart of this dispute. In addition, two of the Court's declaratory rulings contradict each other regarding the Principal Issue. This Motion for Reconsideration seeks resolution of the Principal Issue at the trial court level to provide the parties with necessary and clear guidance regarding the City's assessment and future use of its water rights, or to properly frame and ripen the legal issues for an appeal by either party.

Declarations and deposition testimony establish that Leavenworth's Certificate 8105 was not merely an undetermined quantity – it was intended as a water right to meet future growth requirements and had been beneficially used and/or was inchoate and in good standing to levels beyond the 275 acre-foot numerical limit assigned to it by Ecology's tentative determinations in 1995.[2] If the ultimate effect of the 1995 decisions was to limit Certificate 8105 to only 275 acre-feet per year (AFY), then this water right was not only "tentatively determined" it was adjudicated and reduced by Ecology's actions. This has several consequences that require reconsideration of the July 19 Order.

The Principal Issue described above was only partially resolved by the Court's December 15, 2011 letter opinion and the July 19 Order,[3] raising the distinct possibility of a remand to this Court for further proceedings if reconsideration is denied and the City appeals. First, Declaratory Ruling Nos. 1 and 2 are inconsistent in their guidance to the parties concerning Ecology's authority to impact the quantity of the City's preexisting water rights. Second, Declaratory

[2] *See, e.g.*: Varela Decl. ¶¶ 7, 12 and 13 and Exs. A and B; Van Hulle Decl. ¶¶ 10, 12 and Ex. B; McCauley Decl. ¶¶ 12-14; Pors Decl. ¶¶ 4-5 and Ex. A.

[3] A copy of the July 19, 2012 Order is attached as **Appendix A.** The December 15, 2011 letter opinion is attached to this Order.

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Ruling No. 4 mistakenly construes the City's declaratory judgment claim concerning the Principal Issue as a belated appeal of the 1995 decisions[4].

If the Court denies this motion for reconsideration and continues to construe the City's declaratory judgment claim as a belated appeal, the July 19 Order effectively establishes that the City is bound by the total annual quantity conditions in the 1995 Permits. By necessity, this has the effect of reducing the City's preexisting water rights, making it necessary for the Court to decide whether Ecology violated the City's constitutional right to due process, because the City was not notified of the resulting reduction of preexisting water rights or given a meaningful opportunity to challenge that reduction. Finally, if the Court does not reconsider its Declaratory Ruling No. 2, then it also becomes necessary for the Court to interpret the 1994 Stipulation as to the parties' intent regarding the City's preexisting water rights concurrent with the 1995 decisions. This intent is material to the question of whether the Department of Ecology was authorized by the City to determine or reduce its preexisting water rights as a consequence of the 1995 ROEs and Permits.

The City moves the Court for reconsideration so that this threshold Principal Issue can be resolved before an appeal is taken, which may avoid the need for an appeal. If the Court does not grant reconsideration and revise the July 19 Order as requested, the City believes that the Court of Appeals or Supreme Court may remand the case to this Court for a decision on this unresolved Principal Issue, increasing the costs and delays to the parties for a final resolution of this case.

The City requests that the Court grant reconsideration and modify its July 19 Order as explained in this Motion, and as set forth in the attached sample modified Order.[5]

II. PROCEDURAL HISTORY

[4] This was never the City's intent, nor was it ever argued by the City. To the contrary, the City's briefing made clear that it was not using the declaratory judgment claim as any type of belated or untimely appeal of the 1995 decisions. Rather, the City asked the Court to construe the legal effect of those decisions on the Principal Issue. *See, Section II, Procedural History, and Section III.C, below.*

[5] A copy of a modified version of the Court's July 19 Order, with the revisions requested by the City in this Motion is attached as **Appendix B**.

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It is uncontested that the City did not appeal the 1995 ROEs or permits for applications S4-28812 and G4-29958, and that an appeal of those ROEs would no longer be timely. The City has never argued to the contrary. Procedurally, this case is not an appeal of the 1995 ROEs or permits and the City does not seek to set aside those decisions. At the time of the 1993 appeal, the 1994 Stipulation and the 1995 ROEs and Permits, City officials did not understand – and had no reason to believe – that Ecology was taking any action to reduce the City of Leavenworth's preexisting inchoate and perfected water rights.[6] This understanding was buttressed by Section I.D of the 1994 Stipulation, which provided that the City's existing water rights "are not the subject of, nor affected by, this appeal."[7] The City filed a water system plan amendment with Department of Health (DOH) in 2008 after discovering errors in the water right assessment of the previous water system plan, and DOH referred that amendment to Ecology. Ecology disputed the City's amendment, claiming that Certificate 8105 was limited to 275 acre-feet per year (AFY) as a result of the 1995 ROEs. Thus, Ecology clearly took the position in 2008-09 that the quantity of Certificate 8105 was affected by the 1995 decisions on applications S4-28812 and G4-29958. That is the action, relating to Certificate 8105, that is being contested by the City. This declaratory judgment action followed.[8]

The City's declaratory judgment case doesn't challenge or seek to modify or set aside the 1995 decisions; rather, it challenges Ecology's recent determination that the annual quantity of Certificate 8105 was limited by those decisions and Ecology's authority to determine or reduce the quantity of the City's preexisting water rights for purposes other than deciding the City's applications for new water rights, especially its authority to reduce the City's preexisting "pumps and pipes" water right certificate. Put another way, the Principal Issue in this case under the Declaratory Judgments Act is whether Ecology's tentative determinations and cap conditions in

[6] Cecka Decl. ¶¶ 5-7; McCauley Decl. ¶¶ 16-18; Varella Decl. ¶¶ 3-5.
[7] Cecka Decl. ¶ 14; McCauley Decl. ¶ 34.
[8] The Department of Ecology, acting through its legal counsel, agreed to this declaratory judgment procedure as the means of resolving the Principal Issue. Third Declaration of Thomas M. Pors, ¶ 4. Ecology's counterclaim admits that the Court has jurisdiction over these declaratory judgment claims.

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the 1995 decisions could have (or did not have) the legal effect of limiting and reducing the City's preexisting water rights, including inchoate and perfected quantities of Certificate 8105. If Ecology lacked this authority to limit and reduce the City's preexisting water rights, then the 1995 decisions could not have that effect, regardless of whether the City appealed those decisions. Declaratory Ruling No. 4, however, misconstrues the City's declaratory judgment claim on the Principal Issue as a belated appeal of the 1995 ROEs. As explained below, this ruling has substantive consequences to the City's preexisting water rights that are inconsistent with the other rulings in the July 19 Order. For instance, in Declaratory Ruling Nos. 2 and 4, the Court ruled, "This authority does not include the authority to reduce preexisting rights," and in Declaratory Ruling No. 3 the Court ruled that Ecology's tentative determinations are not binding in a future water-related dispute, litigation or adjudication; yet this is such a future water-related dispute and litigation.

III. GROUNDS FOR RECONSIDERATION

A. Reconsideration Standards

Motions for reconsideration are governed by CR 59(a), which lists nine separate grounds for reconsidering a trial court decision, two of which are applicable here. A reconsideration motion may be granted for any one of the nine grounds "materially affecting the substantial rights" of the parties. *Id.* The trial court has broad discretion to allow reconsideration of its decisions, and a decision on such a motion will not be overturned except for a showing of abuse of discretion. *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997). As discussed below, there is a good basis to grant reconsideration under both CR 59(a)(8) and CR 59(a)(9) and to revise the July 19 Order and letter opinion to resolve the Principal Issue and declaratory claims.

B. Error of Law -- CR 59(a)(8).

1. Declaratory Ruling No. 2 is inconsistent with Ruling No. 1 and erroneous to the extent that it permits Ecology to do what it has no authority to do – determine,

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limit or reduce the City's preexisting inchoate and perfected water rights for purposes other than deciding the new water right applications. It should be revised as requested below.

2. Declaratory Ruling No. 4 erroneously interprets the City's declaratory judgment action as a belated appeal of the 1995 decisions and barred by the 30-day statute of limitations, which is inconsistent with Declaratory Ruling No. 3 that Ecology's tentative determinations are not binding in a future water-related dispute, litigation or adjudication. It should be revised as requested below.

3. If the Court does not reconsider its Declaratory Ruling Nos. 2 and 4, it was error not to consider the City's due process claims.

4. If the Court does not reconsider its Declaratory Ruling Nos. 2 and 4, then it was error not to decide that portion of the City's third cause of action seeking a declaratory judgment interpreting the 1994 Stipulation and Order, because the parties agreed in that document not to affect the City's existing water rights.

C. Substantial Justice Not Done -- CR 59(a)(9).

The Principal Issue in this case was not decided by the July 19 Order, prompting the need for this motion. Substantial delay and expense to the Parties can be avoided if reconsideration is granted, including the avoidance of an appeal or a potential remand by the Court of Appeals to the superior court for a decision on the Principal Issue.

IV. DISCUSSION

A. <u>Ecology's 275/1,375 AFY Tentative Determinations and 1465 Annual Cap Condition Reduced the City's Pre-Existing Inchoate and Perfected Water Rights in Violation of Law</u>.

It is uncontested that Certificate 8105 was issued based on the former "pipes and pumps" administrative policy of certifying water rights once works for diverting and distributing water for municipal supply purposes were constructed, rather than after the water had been put to actual beneficial use. The application demonstrates an intention to use 1.5 cfs year-round for growth, up to the full potential annual quantity (Qa) of 1085.95 acre-feet.[9] The former Ecology official who investigated and wrote the initial draft of the 1993 ROEs, Stephen Hirschey, stated in his

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declaration: "Theoretically, the City could have used the Certificate 8105 water right to divert 1.5 cfs from Icicle Creek continuously, so long as the diverted water was put to beneficial use."[10] Ecology's expert witness Robert Barwin agreed with this premise and also admitted that Certificate 8105 was a "pumps and pipes" certificate.[11] Another former Ecology employee, Jill Van Hulle, reviewed Ecology's files concerning Certificate 8105 and agrees that it authorizes a continuous diversion of 1.5 cfs so long as the diverted water is put to beneficial use. She also declared that the application and application supporting documents in Ecology's files demonstrate that, at the time this water right was issued, it was intended to supply the City's future growth demands up to the full potential instantaneous quantity (Qi) (1085.95 AFY).[12] Over the years, the City perfected most of the 1085.95 acre-feet attributable to Certificate 8105, including a total quantity of 1748 AFY in 1987.[13] The City continued to plan for the growth of its water system to serve new customers, and demonstrated future demand projections for the full annual quantity of this water right.[14]

RCW 90.03.330(3) provides that pumps and pipes certificates like Certificate 8105 are "rights in good standing," reflecting the Legislature's view that such water rights are at least partially inchoate and not susceptible to Ecology revision on the agency's own authority. Ecology admitted that RCW 90.03.330(3) has retroactive effect.[15] Contrary to Ecology's argument that RCW 90.03.330(3) could not undo decisions it already made, the City notes first that the present dispute regarding the annual quantity of Certificate 8105 dates to the City's 2008 water system plan amendment, five years after the adoption of RCW 90.03.330(3). Second, Ecology retroactively corrected a similar limitation on annual quantity that it had previously

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[9] Pors Decl., ¶ 9 and Exh. E; Van Hulle Decl., ¶ 12.
[10] Hirschey Decl., ¶ 6. Another former Ecology employee, Jill Van Hulle, reviewed Ecology's files concerning Certificate 8105 and agrees that it authorizes a continuous diversion of 1.5 cfs so long as the diverted water is put to beneficial use. She also declared that the application and application supporting documents in Ecology's files demonstrate that, at the time this water right was issued, it was intended to supply the City's future growth demands up to the full potential instantaneous quantity (Qi) (1085.95 AFY). Van Hulle Decl., ¶¶ 10 and 12.
[11] Third Pors Decl., Exh. AA, p.130, l. 8 to p. 131, l. 2, and p. 155, l. 5 to p. 156, l. 13.
[12] Van Hulle Decl., ¶¶ 10 and 12.
[13] Varela Decl., ¶ 7.
[14] Varela Decl., ¶ 12; Krueger Decl. ¶ 12; Larsen Decl. ¶ 5; McCauley Decl. ¶ 12.
[15] Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Summary Judgment, p. 18, ls. 10-15.

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imposed on Grand Coulee City when it approved a change to that city's water right certificate in 2004. Citing RCW 90.03.330, Ecology revoked its previous limitation on annual quantity and determined that the city's water right certificate 3397, originally issued without an annual quantity limit like Leavenworth's Certificate 8105, had an annual quantity equal to its continuous diversion, precisely what Leavenworth is seeking in this case.[16] It is perplexing to the City that Ecology has steadfastly refused to take the same action with Leavenworth that it took with Grand Coulee City – *i.e.*, to agree that it had no authority to impose an annual quantity limitation on Certificate 8105.

It necessarily follows that because Certificate 8105 represented a partially perfected and partially inchoate right up to its continuous diversion, Ecology could not "ascertain an appropriate Qa figure" for this water right without diminishing it. The Court correctly states in Declaratory Ruling No. 1 that Ecology's limited authority to make tentative determinations when deciding applications for new water rights "does not include the authority to reduce preexisting water rights." What is missing from that ruling and Declaratory Ruling No. 2 is that the perfected and inchoate quantity of Certificate 8105 could not be diminished by Ecology as a result of its decisions in 1993 and 1995. Without additional language to that effect in the final order, Ecology would essentially be using the tentative determinations and cap conditions to circumvent the general adjudication process by conducting piecemeal adjudications of municipal pumps and pipes certificates, in violation of RCW 90.03.330 and the Supreme Court's warnings in *Rettkowski v. Ecology*, 122 Wn.2d 219, 229-30, 858 P.2d 232 (1993).

B. Ecology Cannot Accomplish Through an Annual Cap Condition What it Lacks Authority to do Otherwise – Reducing Pre-Existing Water Rights.

While Ecology has limited authority to impose conditions on new water rights consistent with its statutory authority, *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 597 (1998), that authority cannot be used to circumvent the proscription on Ecology conducting its own ad hoc adjudications of existing water rights. There is no indication whatsoever in RCW 90.03.290 or in the Supreme Court opinions relied upon in this case (principally *Rettkowski* and *Theodoratus*)

[16] Van Hulle Decl., ¶ 9.

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that Ecology can lawfully adjudicate or reduce preexisting rights in the context of conditioning a new water right application.[17] As described above, the July 19 Order creates a conflict between these two principles and precedents, whereas it should attempt to harmonize them. As currently written, however, the July 19 Order violates the proscription against determining and reducing existing rights by interpreting the 1,465 acre-feet language in Permits S4-28812 and G4-29958 as a condition limiting the total annual quantity of water usage by the City under the new permits "and all preexisting water rights." Unless this declaratory ruling is revised, it grants Ecology a back door method to achieve a result that neither the Legislature nor the Supreme Court intended, which has adverse consequences to Leavenworth by effectively reducing its preexisting water rights.

This conflict can be avoided, and these two opposing concepts can be harmonized in this case, by reconsidering and revising the July 19 Order.[18] Ecology can make tentative determinations and limit annual quantity for purposes of deciding a new water right application without resulting in a *de facto* adjudication or reduction of preexisting water rights. The following simple solution is consistent with all relevant sections of the Water Code and with Supreme Court precedent.

1. Ecology cannot determine the validity or quantity of a city's preexisting water rights, or diminish them, absent an adjudication or an application to change the water right in question. *Rettkowski v. Ecology*, 122 Wn.2d at 227; RCW 90.03.330(2).

2. When a new water right is applied for by a city with a portfolio of existing water rights, the new water right can be conditioned as to instantaneous and annual quantity so long as it does not violate the preceding rule. Ecology can determine, at the time of the new water right decision, the total amount of water that can be used from the new water right and all preexisting water rights, but that limitation

[17] See Plaintiff's Motion for Partial Summary Judgment, at pp. 28-36; Plaintiff's Response to Ecology's Motion for Summary Judgment at pp. 11-28; and Leavenworth's Reply to Ecology's Memorandum in Response to City 's Motion for Summary Judgment at pp. 9-21.

[18] *See* Appendix B.

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applies only to the use of the new water right and is not a de facto adjudication or diminishment of the preexisting water rights.

3. To illustrate these two rules, Ecology could legitimately determine as a condition of the 1995 ROEs and Permits that Leavenworth's projected 20-year growth demands could be met by a total annual quantity of 1465 AFY, and that limitation applies, along with the respective instantaneous quantity limits, to water right permits S4-28812 and G4-29958. Once the City uses a total of 1465 acre-feet of water in a given year from any combination of sources, permits S4-28812 and G4-29958 can no longer be used to divert water for municipal purposes, until the following year. However, the City's preexisting water rights, including Certificate 8105, can continue to be utilized in that year for municipal purposes so long as they are in good standing and have available annual capacity that is either perfected or inchoate. Thus, for example, if the City's accumulated total water usage in a given year from all sources reaches 1465 acre-feet on October 1st, the wells authorized by permit G4-29958 could not be used, and the additional instantaneous quantity of 3.18 cfs from permit S4-28812 could not be diverted from Icicle Creek until the next year. This would restrict the City to a withdrawal from Icicle Creek up to 3.02 cfs for the remainder of the year (a reduction from 6.20 cfs) under its preexisting water rights.

This illustration demonstrates that when Ecology is deciding new water right applications it is possible for the Department to make tentative determinations of the quantity of existing water rights without determining or diminishing the quantity of those preexisting water rights. These tentative determinations and annual limitations can be made without violating the proscription against adjudicating existing water rights if they are made for the purpose of determining the need for additional quantities of water under the new applications to meet projected future demands. That use of tentative determinations is allowed by RCW 90.03.290, whereas a reduction of existing water rights is not. Ecology contested this principle in its briefing by arguing that it would be inequitable for the City to keep the additional 90 AFY of

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primary water rights (the remainder was supplemental to existing rights) granted to the City in permits S4-28812 and G4-29958 if Ecology's tentative determination and annual quantity limitation was not an enforceable limitation of Certificate 8105. The preceding illustration debunks that myth and demonstrates that there is no scenario in which permits S4-28812 and G4-29958 could be used to exceed the 1465 AFY of water rights that Ecology determined in 1995 was needed for the City's 20-year growth forecast. Once the 1465 acre-feet limit is reached, those permits could no longer be used. The 1995 permits are limited by the 1465 AFY annual limitation, and the City is not challenging that limitation for those permits.[19]

It must be noted that Ecology's practice of limiting municipal quantities of water to a specific future growth forecast or water use efficiency standard (water duty) has changed and evolved over the years, and Ecology no longer possesses exclusive jurisdiction over what usage of water is reasonable.[20] Cities also do not arbitrarily stop growing when they reach a certain date or an arbitrary quantity of projected water usage set forth in a decades old water right permit. Prompted by the Growth Management Act and their own economic development goals, cities are constantly planning their next water sources to meet future needs. It is also true that it has become harder and harder to obtain new water supplies via additional water rights because of instream flow regulations and in some cases over-appropriation of water, and due to rapidly developing scientific analyses used to determine impacts or impairment to existing rights. That is why the Legislature protected existing municipal inchoate water rights represented by pumps and pipes certificates in the Municipal Water Law, so that the water rights already allocated to municipal water systems are not arbitrarily diminished by administrative actions of Ecology. The Supreme Court held that RCW 90.03.330 was a constitutional exercise of the Legislature's authority to resolve uncertainties concerning municipal water rights and ambiguities in the Water Code. *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247, 241 P. 3d 1220 (2010). It would be inconsistent with the Municipal Water Law and Supreme Court precedent to find that Ecology had authority to diminish the City's preexisting water rights via the total annual quantity

[19] Therefore, as argued in the next section, the City's declaratory judgment claim is not an appeal of the 1995 decisions.
[20] Third Van Hulle Decl, ¶ 8.

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condition in the 1995 ROEs and permits for S4-28812 and G4-29958. And, Ecology can point to no law – statutory, judicial or other – that clearly gives it such authority.

Based on the foregoing, Declaratory Ruling No. 2 should be modified to reflect that the annual quantity limitation in the 1995 ROEs and permits for S4-28812 and G4-29958 applies to the new water rights, but does not diminish the City's preexisting water rights. The City urges the Court to reconsider Declaratory Ruling No. 2 in the July 19 Order and suggests the following revision:[21]

> 2. That under RCW 90.03.290, Ecology is authorized to approve an application for a new water right permit with a condition that limits the total annual quantity of water that may be used by the applicant under the applicant's entire portfolio of water rights, including the new permit and all preexisting water rights. This authority does not include the authority to adjudicate or reduce preexisting water rights. Therefore, under RCW 90.03.290, Ecology was authorized to include a condition ~~limiting~~ allowing the use of Permits G4-29958 and S4-28812 only until the total annual quantity of water ~~that may be~~ used by the City under all of the City's water rights reaches 1,465 acre-feet per year ~~as a condition in Ecology's 1995 revised approvals of the City's water right Permit Application Nos. G4-29958 and S4-28812~~. This condition in Ecology's 1995 revised approvals of the City's water right application nos. G4-29958 and S4-28812 does not and cannot alter the inchoate or perfected quantity of the City's preexisting water rights. The Court interprets the 1,465 acre-feet per year language in Permit Nos. G4-29958 and S4-28812, and the Amended Reports of Examination (ROEs) associated with those permits, as a condition limiting the use of those permits until the total annual quantity of water usage by the City under the new permits and all preexisting water rights reaches 1,465 acre-feet per year. ~~as a condition of approval authorized by RCW 90.03.290;~~

C. The City's Declaratory Judgment Action is not a Belated Appeal of the 1995 Decisions.

As stated above and in its briefing on the Parties' cross motions for summary judgment, the City is not challenging the 1995 decisions and does not seek to change them in any way; therefore the City's declaratory judgment claims should not be characterized as a belated appeal. The 1995 ROEs and Permits were issued on the City's applications S4-28812 and G4-29958.

[21] *See* Appendix B, at pp. 6-7.

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These were not applications to change to Certificate 8105 and they were not an adjudication of the City's preexisting water rights. Conditions in the 1995 decisions cannot be appealed by the City, but the effect of certain language in those decisions on the City's preexisting water rights can be determined under the Declaratory Judgments Act, especially where the Court has ruled that Ecology lacked authority to reduce the City's preexisting water rights. The Principal Issue in this case – the legal effect or lack of effect of Ecology's tentative determination and total quantity condition in the 1995 decisions on other preexisting City of Leavenworth water rights – is a proper issue for resolution by the Court without changing or modifying the 1995 decisions, and is therefore not barred by the 30-day statute of limitations.

Declaratory Ruling No. 4 also provides "in the event of a future water-related dispute, litigation, or adjudication, Ecology cannot necessarily rely on its tentative determination of the annual quantity of Certificate 8105." This declaratory judgment action is such a future water-related dispute. It relates to the Principal Issue, not the conditions of the 1995 decisions. In Declaratory Ruling No. 3 of the July 19 Order, the Court ruled correctly that res judicata is not applicable to Ecology's tentative determinations in those decisions because final determinations of the extent and validity of water rights can only be made through a general adjudication. If Ecology's tentative determinations are not binding in a future water-related dispute or litigation, then the Court can and should rule that Ecology's tentative determinations and cap conditions are enforceable limits on the quantity of permits S4-28812 and G4-29958, but not on Certificate 8105 or the City's other preexisting water rights.

The City urges the Court to reconsider Declaratory Ruling No. 4 in the July 19 Order and suggests the following revision:

> 4. That under RCW 43.21B.230(1) and 43.21B.310(4), Ecology's decisions on permit applications must be appealed to the Pollution Control Hearings Board (PCHB) within 30 days of receipt. Because the City received the Amended ROEs and permits in 1995 and failed to timely appeal those decisions to the PCHB, the City cannot seek judicial review of the Amended ROEs and permits or any of their provisions at this time. Therefore, the City is generally bound by the conditions in Permit Nos. G4-29958 and S4-28812 as to the sources of water approved in those decisions. The condition ~~including, but not necessarily limited to,~~ limiting the amount of additional water granted (up to an additional 90 acre-feet per year of primary annual quantity), and the condition limiting the total quantity of water the

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City can use each year under its collective water rights ~~(~~to 1,465 acre-feet per year,~~)~~, ~~reporting requirements, and well construction requirements~~ are interpreted as prohibiting the use of the additional water sources approved in Permit Nos. G4-29958 and S4-28812 after the City's total annual water usage reaches 1,465 acre-feet, until the next calendar year. Because Ecology had no authority to reduce the City's preexisting water rights in the ROEs and Permits for G4-29958 and S4-28812, the City may use its other water rights, including Certificate 8105, nothwithstanding the conditions in the 1995 ROEs and Permits. The Court does not make any decision in Phase I of this case regarding the annual quantity of perfected and inchoate water rights under Certificate 8105, but does rule that the 275 acre-feet per year tentative determination and 1465 acre-feet per year annual limitation in Permits G4-29958 and S4-28812 is not a limitation on the City's use of Certificate 8105.[22] ~~Although Ecology's tentative determination of the annual quantity of Certificate No. 8105 does not have any res judicata effect, the Court interprets the City's declaratory judgment claim as a belated appeal of the condition limiting the annual quantity of the City's water rights described in Declaratory Order No. 2, above, that is barred by the 30-day statute of limitations of RCW 43.21B.230(1) and 43.21B.310(4). However, in the event of a future water related dispute, litigation, or adjudication, Ecology cannot necessarily rely on its tentative determination of the annual quantity of Certificate No. 8105 as being binding;~~

D. If the Court does not Reconsider Declaratory Ruling Nos. 2 and 4 as Requested Above, it Should Reconsider Declaratory Ruling No. 5 Regarding Violation of the City's Right to Due Process.

The City conditionally requests reconsideration of Declaratory Ruling No. 5 if the Court does not reconsider and revise Declaratory Ruling Nos. 2 and 4 as requested above. As Declaratory Ruling Nos. 2 and 4 are currently written, the City's preexisting inchoate and perfected water rights were effectively diminished as a result of the 1995 decisions, taking a valuable property right of the City without procedural or substantive due process.

It is undisputed that Ecology provided no notice to Leavenworth officials that it was adjudicating or tentatively determining or limiting or reducing the City's existing perfected or inchoate annual quantity of water rights in the context of deciding applications G4-29958 and S4-28818 in 1993 and 1995. Ecology's expert witness who is familiar with these application files could not identify any written notification to the City that such a decision was being made,

[22] *See*, Appendix B, at p. 8.

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other than the ROEs themselves.[23] Leavenworth officials most involved in the applications received no communications from Ecology regarding any potential consequence to their existing water rights from the 1993 or 1995 ROEs.[24] They justifiably presumed that the City's existing water rights were not affected, in part because of the language in the 1994 Stipulation and Order.[25] Had Ecology informed Leavenworth that it was diminishing the City's existing water rights as a consequence of the 1993 and 1995 ROEs, the City would have made sure that its historical production of water was not ignored by Ecology, and would have fought for the full extent of its perfected and inchoate annual quantity of water rights.[26] The multitude of communications between the City and Ecology over the course of several years relating to applications G4-29958 and S4-28818 and resolution of the PCHB appeal was focused only on the City's need for additional instantaneous water rights (peak capacity),[27] its application to have new water rights exempt from the Wenatchee basin instream flow rules,[28] and Ecology's efforts to help the City conserve water through installation of customer meters. Because there was no notice to the City that Ecology was attempting to limit or reduce its preexisting annual quantity of perfected and inchoate water rights, the City understandably believed that Ecology was merely stating a fact with regard to the annual quantity of certificate 8105, not making an appealable determination, and City officials trusted Ecology to know these things and report them accurately.[29]

The 1993 and 1995 ROEs provided notice to the City only that Ecology had issued its decision regarding applications G4-29958 and S4-28818, including conclusions relating to the 4-part test of RCW 90.03.290 and the quantity of additional water rights being granted to the City. While the notices sent to the City with these ROEs do make reference to application numbers G4-29958 and S4-28818 and do inform the City that an appeal can be filed within 30 days, they do not mention anywhere that a decision has been made that effectively reduces the annual

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[23] Pors Decl., Exh. J, p. 123:15 to p. 125:1 (dep. of Daniel J. Haller, P.E.).
[24] Cecka Decl., ¶ 6; McCauley Decl, ¶ 17; Varela Decl., ¶ 5.
[25] See Footnote 7, above.
[26] Cecka Decl., ¶¶ 6-7; McCauley Decl., ¶ ¶ 18-19; Larsen Decl., ¶ 15.
[27] Cecka Decl., ¶ 5; Varela Decl., ¶ 3.
[28] Cecka Decl., ¶ 5; Varela Decl., ¶ 4.
[29] Cecka Decl., ¶ 8; McCauley Decl., ¶ 17; Varela Decl., ¶ 5; Larsen Decl., ¶ 13.

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quantity of Certificate 8105.[30] Thus, Ecology provided notice of a decision and appeal rights relating to the two new applications, but not relating to the City's existing water rights. This was a valuable property right of Leavenworth citizens, taken without notice or an opportunity to be heard or to appeal. This lack of notice is one of the bases for the City's due process claims. *See*, Second Amended Complaint, ¶¶ 4.21 – 4.22, 6.9 – 6.10, 6.12, and relief ¶¶ 3, 7.

The legal basis for the City's due process claims is set forth in its Second Amended Complaint (see above sections) and at pp. 46-49 of Plaintiff's Motion for Partial Summary Judgment, and is not repeated here. To summarize, water rights are important property rights protected by the U.S. Constitution, Fourteenth Amendment and the Washington Constitution, Article 1, section 16, and a city cannot be deprived of its water rights without due process of law. *Bach v. Sarich*, 74 Wn. 2d 575, 445 P.2d 648 (1968). Due process requires a notice of government action and an opportunity to be heard prior to any final agency action. In this regard, basic notions of due process and fundamental fairness required Ecology to provide the City with notice that it was diminishing its water rights and give the City the opportunity to challenge that determination. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("[t]he opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement."). Without notice that its preexisting water rights were being limited or reduced, the City was unaware of this potential consequence of the 1995 decisions and was precluded from preparing any defense to such action or seeking review.

If the Court does not reconsider and revise Declaratory Ruling Nos. 2 and 4, then the City requests reconsideration of Declaratory Ruling No. 5 and a trial on the issue of Ecology's violation of the City's due process rights relating to the effective loss of perfected and inchoate annual quantities of water under Certificate 8105.

E. If the Court Finds that Ecology had Authority to Reduce the City's Preexisting Inchoate and Perfected Water Rights with an Annual Cap Condition, it was Error not to Interpret the Parties' 1994 Stipulation as an Agreement not to Diminish the City's Existing Water Rights.

[30] Pors Decl., Exh. W.

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In the event that the Court rejects the City's motion for reconsideration of Declaratory Ruling Nos. 2 and 4 and does not decide the Principal Issue (or decides it in favor of Ecology), the City's claim for declaratory judgment interpreting the 1994 Stipulation and Order must be determined because the resulting diminishment of Certificate 8105 is contrary to the express written agreement of the parties. Even though Declaratory Ruling No. 2 includes the statement "This authority does not include the authority to reduce preexisting rights," the remainder of Ruling No. 2 in the July 19 Order has the effect of diminishing the City's preexisting inchoate and perfected rights by limiting the total annual quantity of water that may be used by the City. This is contrary to the plain meaning of the Parties' prior agreement , the 1994 Stipulation and Order, which expressly provides:

> "D. Leavenworth has existing water rights ***which are not the subject of, nor affected by, this appeal***, to wit:
>
> . . .
>
> 3) ***Surface Water Certificate No. 8105*** (Certificate Record No. 17, page no. 8105) authorizes diversion of 1.50 cfs from Icicle Creek and seepage waters from an infiltration gallery adjacent to the creek channel for the purposes of municipal supply. The priority date is June 20, 1960."[31] (Emphasis added)

At a minimum, the Court should incorporate into the final order its interpretation of the 1994 Stipulation and Order as evidence of the parties' unambiguous intent that the City's existing water rights, including Certificate 8105, would not be affected by the appeal and subsequent issuance of the ROEs and permits for applications G4-29958 and S4-28812. This would be consistent with a plain meaning interpretation of the 1994 Stipulation and Order. *See* Plaintiff's Motion for Partial Summary Judgment, at pp. 50-52.[32]

V. CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, the City of Leavenworth respectfully requests that the Court:

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[31] Pors Decl., Exhibit M.

[32] If the Court does interpret the 1994 Stipulation but finds that the City agreed to a reduction of its existing water rights, the City conditionally requests reconsideration of the Court's determination that it was unnecessary to decide the City's reformation claims, and believes that they must be considered at trial.

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1. Reconsider Declaratory Ruling Nos. 2 and 4 in the July 19 Order in order to decide the Principal Issue and modify them as set forth above and in the attached Appendix B.

2. If the Court does not reconsider Declaratory Ruling Nos. 2 and 4 as requested above, the City requests reconsideration of the Court's ruling that it was unnecessary to interpret the 1994 Stipulation and Order.

3. If the Court does not reconsider Declaratory Ruling Nos. 2 and 4 as requested above, the City requests reconsideration of Declaratory Ruling No. 5 that it is unnecessary to determine whether Ecology violated the City's constitutional right to due process, and to set those claims for trial.

RESPECTFULL SUBMITTED this 26 day of July, 2012.

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STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

CITY OF LEAVENWORTH, Plaintiff, v. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Defendant.	NO. 09-2-00748-3 DEPARTMENT OF ECOLOGY'S RESPONSE TO CITY OF LEAVENWORTH'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Department of Ecology (Ecology), by and through its counsel, Alan M. Reichman Assistant Attorney General, submits this memorandum in response to Plaintiff City of Leavenworth's Motion for Reconsideration (City's Motion). The Court should deny the City's request for revision of the July 19, 2012 Order on Parties' Cross-Motions for Summary Judgment and on Motions to Strike (Order). The Order should not be reconsidered because it incorporates and accurately effectuates the Court's December 15, 2011 letter decision (Memorandum Decision), which is well-reasoned and legally correct. Under CR 59(a)(8), the City has failed to show that the Order is based on any errors of law. And, under CR 59(a)(9), the City cannot show that substantial justice has not been done based on its erroneous contention that the "principle issue" in this case was not decided by the Order.

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Contrary to the City's arguments, the City's "principle issue" was squarely and correctly resolved by the Court in the Memorandum Opinion and its rulings on the scope of Ecology's authority are accurately spelled out in Declaratory Rulings Nos. 1 and 2 in the Order. In evaluating the City's water permit applications, Ecology had authority under RCW 90.03.290 to tentatively determine the maximum annual quantity (Qa) of the City's preexisting water rights, including Certificate 8105, which does not specify a maximum Qa. Based on this authority, it was lawful for Ecology to include a Qa limit provision, as a condition of the City's new Permit Nos. S4-28812 and G4-29958. This condition set an annual cap on the City's exercise of all its water rights, including Certificate 8105, which the City must comply with in order to be able to utilize its two new permits. While Ecology cannot limit or reduce preexisting water rights when it performs tentative determinations and crafts annual cap conditions while processing and deciding on water right applications, it did not reduce Certificate 8105 because it does not specify a Qa and no determination, either judicial or administrative, had ever been made to ascertain a Qa for the certificate. [1]

The City also wrongly contends that Declaratory Rulings Nos. 1 and 2 "are inconsistent in their guidance to the parties concerning Ecology's authority to impact the quantity of the City's preexisting water rights," based on inclusion of the language stating "this authority does not include the authority to reduce preexisting water rights" in both rulings. City's Motion at 2. This argument is based on the false premise that by ruling in Declaratory Ruling No. 2 that the 1,465 acre-feet per year language in Permit Nos. G4-29958 and S4-28812 is a "condition limiting the total annual quantity usage by the City under the new permits and all preexisting water rights as a condition of approval authorized by RCW 90.03.290," the Court has allowed Ecology to reduce a preexisting water right. This is incorrect because it presupposes a Qa

[1] The City's phrasing of the so-called "principle issue" is inappropriate because it presupposes that Ecology limited or reduced the City's preexisting water rights in a scenario where no Qa figure had ever been established for Certificate 8105. The City wrongly maintains that Certificate 8105 somehow authorizes a fixed Qa that was reduced by Ecology even though the document does not contain any Qa figure.

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figure for Certificate No. 8105 which did not exist.[2] In order to determine that the City's applications met the four criteria for new water permits under RCW 90.03.290, including the "beneficial use" requirement that involves consideration of an applicant's future need for water, Ecology had to tentatively determine a Qa figure.

The revisions to Declaratory Rulings Nos. 2 and 4 requested by the City would conflict with the analysis in the Memorandum Decision and be contrary to law. The City is requesting that Declaratory Order No. 2 be modified so that the City can continue to enjoy the benefits of its new permits while the cap condition would have no effect on its ability to exercise its preexisting water rights. Under the guise of "interpretation," the City is asking the Court to eliminate or re-write the cap condition. This would violate Ecology's water permitting authority, and exceed the Court's declaratory judgment authority.

The City is requesting modification of Declaratory Ruling No. 4 so that this lawsuit will not be interpreted as a belated appeal of Ecology's 1995 permit decisions, and the 1,465 Qa limit condition in the permits would be construed as having no effect on the City's exercise of Certificate 8105. This request lacks merit because the City is in fact attempting to avoid the long-expired statute of limitations for appealing Ecology's decisions on the permit applications. This case is entirely centered on the analyses and conditions in those decisions, and whether Ecology acted within its statutory authority to include them. Moreover, the City is asking the Court to eliminate or re-write the conditions in those decisions. Declaratory Ruling No. 4 should not be revised because it follows logically from Declaratory Rulings Nos. 1 through 3 and is correctly based on the applicable administrative law principles.

If the Court denies the City's requests for reconsideration of Declaratory Rulings Nos. 2 and 4, the Court should also deny the City's contingent requests for reconsideration of

[2] As explained later in this brief, the City is mistaken in asserting that declarations and deposition testimony demonstrate that Certificate 8105 "was not merely an undetermined quantity" and was established to have a Qa figure higher than the 275 acre-feet-per year recognized in the 1995 permit decisions. *See* §§ III.D and E, below.

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Declaratory Rulings Nos. 5 and 6. The City is wrong in contending, based on its allegation that it failed to understand the operation and effect of the annual cap condition, that its constitutional right to due process was violated, and that Ecology breached the Stipulation and Agreed Order of Dismissal in the appeal of Ecology's initial permit decisions. The City received decisions from Ecology that clearly stated the condition, along with the underlying analysis that supported them, and the City was provided with the opportunity to appeal those decisions.

The City's Motion continues to attack a long-standing Ecology practice that has been applied in numerous water permit decisions throughout the state, and which has resulted in the inclusion of Qa limit provisions similar to the one in the City's permit approvals in numerous water rights statewide. The Court should reject this renewed attack now, as it did in its thoughtful analysis in the Memorandum Opinion. The City offers nothing new in this motion, and essentially recycles arguments already rejected by the Court. The Order is based on the correct interpretation and application of the law and should not be modified.

II. RESPONSE TO CITY'S "PROCEDURAL HISTORY"

The City wrongly asserts that "procedurally, this case is not an appeal of the 1995 ROEs or permits and the City does not seek to set aside those decisions." City's Motion at 4. The City acknowledges that it failed to timely appeal the 1995 Amended Reports of Examination (ROEs) or permits for applications S4-28812 and G4-29958, and recognizes that it is barred by the statute of limitations from belatedly appealing those 1995 decisions. Yet, the City proceeds to contend that this action only "challenges Ecology's recent determination that the annual quantity of Certificate 8105 was limited by those decisions and Ecology's authority to determine or reduce the quantity of the City's preexisting water rights for purposes other than deciding the City's applications for new water rights. . . ." *Id.* (emphasis in original).

The City's account of the procedural posture of this case is misleading and omits certain facts. While the City contends that it is not seeking to appeal the 1995 Amended ROEs

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and permits, it is actually requesting the Court to either rewrite or delete the annual cap condition for Permit Nos. S4-28812 and G4-29958. The revisions to the Order being sought by the City's Motion would not merely "interpret" this condition, but would revise or eliminate it by allowing the City to escape from having to comply with it.[3]

As explained in Section III.D, below, the City's allegation that its officials were unaware of the nature of the condition when it settled its Pollution Control Hearings Board (PCHB) appeal in 1994 by agreeing to the issuance of the 1995 Amended ROEs and permits is countered by the accounts of Ecology officials. Moreover, if City officials were unaware of the effects of the condition, it was due to their own failure to adequately review the express language in the Amended ROEs, and in the preceding Stipulation and Agreed Order of Dismissal in the PCHB settlement.

The City's contention that, under Declaratory Rulings Nos. 3 and 4, the present case involves a "future water-related dispute" that is not subject to the expired statute of limitations for Ecology's 1995 decisions, is not persuasive. Such a future dispute would arise either when there is a basin adjudication water rights in superior court, or Ecology performs a tentative determination in the context of a water right decision that constitutes an action that can be appealed to the PCHB. There is no such action that has been appealed in this case. The City argues that this dispute relates to Ecology's opposition to the City's 2008 water system plan amendment request to the Department of Health (DOH),[4] but Ecology did not make any tentative determination of the validity and extent of the City's water rights, and issued no appealable administrative decision, in association with that matter. The tentative determination

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[3] The City fails to acknowledge that if it does not want to be bound by the annual cap condition, it has the option to forego and voluntarily relinquish Permits S4-28812 and G4-29958. If these permits are voided, the cap condition will no longer exist.

[4] While the City's procedural history discusses its 2008 water system plan amendment request to DOH, it neglects to mention that its 2002 water system plan acknowledged that it was bound by the annual cap condition for Permit Nos. S4-28812 and G4-29958 and reported the maximum Qa for Certificate 8105 as being 275 acre-feet per year.

that the City is attempting to challenge was made by Ecology as part of its process to evaluate and decide on the City's applications for Permit Nos. S4-28812 and G4-29958 in 1995.

The City's Motion essentially amounts to a second attempt to argue the merits of issues in this case that the Court has already correctly decided in favor of Ecology. The City's Motion should be denied.

III. ARGUMENT

A. Reconsideration Is Not Warranted Because Ecology's Tentative Determination Of The Validity And Extent Of Certificate 8105 And The Associated Annual Cap Condition For The Permits Complied With the Law

The City wrongly contends that Ecology's tentative determination of the Qa for Certificate 8105 that was made in the 1995 Amended ROEs, and the annual cap condition that was based on that determination, violated the law because Ecology acted in an *ultra vires* fashion. They base this argument on the 2003 Municipal Water Law (MWL), which did not even exist in 1995, and the false premise that, notwithstanding Certificate 8105's lack of a Qa figure, the City has the right to divert 1,085.95 acre-feet per year from Icicle Creek based on pumping the specified maximum instantaneous quantity (Qi) of 1.5 cubic feet per second (cfs) on a 365-day per year, 24-hour per day basis.

The City's reliance on RCW 90.03.330(3), a provision enacted as part of the MWL, is misplaced for two reasons. First, the City is mistaken that Ecology somehow acted outside its authority in 1995 by allegedly violating a statute that did not even exist until 2003. RCW 90.03.330(3) applies to municipal water rights which were issued prior to 2003 based on system capacity rather than the actual beneficial use of water (so-called "pumps and pipes" certificates). Thus, the statute has retroactive effect with respect to such water right certificates and Ecology was required *after* the effective date of the statute on September 9, 2003, to apply this new law when it takes any administrative actions relating to such certificates. But the statute cannot operate back in time to re-open and alter decisions that were made by Ecology before the effective date of the statute and were subject to appeal requirements, such as the

Amended ROEs. The City erroneously contends that the present dispute relates to the City's 2008 proposal to amend its water system plan, five years after the effective date of RCW 90.03.330(3). But this dispute relates to the validity and effect of the tentative determination and cap conditions in the Amended ROEs, which were reported in the City's water system planning documents in 2002 and 2008. This case does not involve any appealable administrative action taken by Ecology in regard to the City's 2008 water system plan amendment proposal because Ecology had no decision-making role in that process. DOH, and not Ecology, is the agency which issues decisions to approve or deny proposed water system plans. RCW 70.119A; WAC 246-290-100.

Second, even *arguendo* if the provisions of RCW 90.03.330 could be applied retroactively to re-open and alter earlier application decisions, RCW 90.03.330(2) provides that Ecology cannot take administrative actions that "*revoke or diminish* a certificate for a surface or ground water right for municipal supply purposes" except under certain circumstances. RCW 90.03.330(2) (emphasis added). Ecology could not "revoke or diminish" a municipal water right that lacked a maximum Qa figure. Again, the City's argument is based on the false premise that Certificate 8105 somehow states a Qa figure of 1,085 acre-feet per year (or some other figure higher than the 275 acre-feet per year ascertained in the Amended ROEs) when the certificate is silent as to the water right's maximum Qa. Ecology does not revoke or diminish a water right that has no specified annual quantity. Rather, it ascertains the Qa to fill in the gap in the earlier water right document.[5]

[5] The scenario discussed in the City's motion involving a water right held by Grand Coulee City is immaterial to this case, and does not lend support to the City's position. The permitting decision involving Grand Coulee City supports Ecology's position and reflects a tentative determination based on reasonable beneficial use consistent with the intent of the application. Declaration of Daniel R. Haller (Haller Decl.), ¶¶ 16-17. Just as in the case of the City of Leavenworth, Ecology gave weight to the applicant's (Grand Coulee City's) reasonable statement of population growth and per capita water duty in tentatively determining the extent and validity of the water right. *Id.*, ¶¶ 16-19.

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The City is wrong in contending that Ecology "reduced" the Qa authorized under Certificate 8105 because the City had a right to use up to 1,085 acre-feet per year based on the specified Qi of 1.5 cfs. The quoted passage from one of Stephen Hirschey's declarations states that "*[t]heoretically*, the City could have used the Certificate 8105 water right to divert 1.5 cfs from Icicle Creek continuously, *so long as the diverted water was put to beneficial use*." Declaration of Stephen Hirschey in Support of City's Motion, ¶ 6 (emphasis added). In actuality, continuous diversion under Certificate 8105 to supply the needs of the City at the time it applied for its new permits would have been extremely wasteful, and would not have constituted the beneficial use of water.[6] Declaration of Daniel R. Haller (Haller Decl.), ¶¶ 17, 22, 23; Declaration of Alan M. Reichman in Support of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment (Second Reichman Decl.), Ex. 3 at 170, ll. 4-14 (Dep. of Douglas Clausing); Ex. 4 at 155, l. 18 through 156, l. 2 and 162, l. 8 through 163, l. 1 (Dep. of Daniel R. Haller).

In asserting that "[t]he application demonstrates an intention to use 1.5 cfs year-round for growth, up to the full potential [Qa] of 1,085 acre-feet," the City omits an important fact. *See* City's Motion at 6. The application for Certificate 8105 also states that the City intended to serve a population of 2,500 through exercise of the requested water right at a water duty of 490 gallons per capita per day. Declaration of Thomas M. Pors, Ex. E. That would require much less water than 1,085.5 acre-feet per year, especially in light of the fact that the City already held two other water rights at that time. *See* Haller Decl., ¶ 17. The population figure

[6] Even if the City could demonstrate that they used more than 275 acre-feet per year of water under Certificate 8105 prior to Ecology's performance of its determination of the extent and validity of the water right when it evaluated the City's permit applications, merely pumping a quantity of water would not necessarily demonstrate that water was actually put to beneficial use. *Department of Ecology v. Grimes*, 121 Wn.2d 459, 471-72, 852 P.2d 1044 (1993) (a particular use of water must not only be of benefit to the appropriator, but it must also be a reasonable and economical use of the water in view of other present and future demands upon the source of supply). Before the time that City filed its applications for Permit Nos. S4-28122 and G4-29958, Ecology issued a Notice of Violation to the City as a result of its excessive use of water. Department of Ecology's Memorandum in Support of Motion for Summary Judgment at 5.

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stated in the application is as much an indicator of the City's intent for the water right as the annual quantity figure, and it is this more reasonable expression of intent that Ecology recognized. *See* Haller Decl., ¶ 23; Second Reichman Decl., Ex. 2 at 73, l. 8 through 74, l. 4 (Dep. of Douglas Clausing).

The essential fact here is undisputed: Certificate 8105 includes no figure for maximum Qa and, thus, does not specify what the Qa limit is for the water right. And, in the absence of a Qa figure, there is no "default" that causes the Qa to be determined based on pumping the maximum Qi on an around-the-clock, year-round basis.[7]

The City also wrongly contends that, without the language they are requesting the Court to add to Declaratory Ruling No. 2, Ecology could use "the tentative determinations and cap conditions to circumvent the general adjudication process by conducting piecemeal adjudications of municipal pumps and pipes certificates . . . ." City's Motion at 8. To the contrary, by performing tentative determinations when it processes water right applications, Ecology does not evade the superior court general adjudication process. After all, *final* determinations of the extent and validity can only be made through that judicial process. By performing tentative determinations, Ecology can process individual applications for new permits or changes of existing water rights without waiting for a general adjudication of all the water rights in a basin to be commenced and completed. Without such a tentative determination function, water rights permitting in this state will come to a standstill. Indeed, the revision requested by the City would cast a cloud of uncertainty over numerous water right permits that have been approved by Ecology through tentative determinations, and will

[7] Ecology has considered the maximum Qi to be a "peaking rate," where the full Qi is pumped only during periods when there is a high demand for water, such as during the summer when citizens are irrigating their lawns and gardens, or to flush or charge a water system, but not on a year-round continuous basis. Department of Ecology's Memorandum in Support of Motion for Summary Judgment at 5; Declaration of Alan M. Reichman in Support of Department of Ecology's Motion for Summary Judgment (First Reichman Decl.), Ex. 7 at 29, l. 3 through 30, l. 4 (Dep. of Daniel R. Haller); *see also* First Reichman Decl., Ex. 9 at 7, ll. 6-18 (Dep. of Robert F. Barwin).

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preclude Ecology from being able to process numerous pending permit applications until such time as general adjudications are initiated and completed.

B. Reconsideration Is Not Warranted Because Ecology Did Not Reduce the City's Preexisting Water Rights; Certificate 8105 Specified No Annual Quantity Figure And A Specific Figure Had Not Been Confirmed For The Water Right

The City requests revision of Declaratory Order No. 2 by erroneously arguing that the language in that paragraph of the Order conflicts with language contained in Declaratory Order No. 1. This request should be rejected because Ecology acted within its authority when it issued the Amended ROEs, and the Court's language in both Declaratory Judgments Nos. 1 and 2 is correct and should not be altered.

Contrary to the City's argument, there is no conflict between Declaratory Orders Nos. 1 and 2 based on the inclusion of the phrase "[t]his authority does not include the authority to reduce preexisting water rights," in both paragraphs. The language in Declaratory Order No. 2 stating "[t]he Court interprets the 1,465 acre-feet per year language in Permit Nos. G4-29958 and S4-28812, and the Amended Reports of Examination (ROEs) associated with those permits, as a condition limiting the total annual quantity of water usage by the City under the new permits and all preexisting water rights as a condition of approval authorized by RCW 90.03.290" does not cause any such conflict because the cap condition did not cause any "reduction" in Certificate 8105. This argument wrongly presupposes that Certificate 8105 authorizes a maximum Qa of 1,085.95 acre-feet per year (or some other figure greater than 275 acre-feet per year) when the certificate actually does not specify any Qa figure. Nothing is reduced in a situation where a Qa figure has to be ascertained in the first place.

The City maintains that "the July 19 Order violates the proscription against determining and reducing existing rights by interpreting the 1,465 acre-feet language in Permits G4-29958 and S4-28812 as a condition limiting the total annual quantity of water usage by the City under the new permits 'and all preexisting water rights.'" City's Motion at 9 (emphasis in original). This point is not well taken for three reasons. First, Ecology is authorized to tentatively

determine the extent and validity of existing rights when it processes water right applications, as ruled in Declaratory Judgment No. 1, which the City is not challenging. Second, there was no reduction of Certificate 8105 because it does not specify a Qa figure. *See* § III.A, above.

Third, Declaratory Judgment No. 2 simply recognizes what the Amended ROEs actually say, which, for Permit S4-28122, is as follows:

> I recommend that a permit be issued to the City of Leavenworth permitting the withdrawal and beneficial use of up to 3.18 cfs (additional primary instantaneous), 636 acre-feet (assuming operation at full capacity for up to 100 days, with up to 546 acre-feet per year of this 636 acre-feet per year to be supplemental to existing City rights, and up to 90 acre-feet per year of this 636 acre-feet per year to be a primary right but not in addition to the 90 acre-feet of primary duty allocated under application G4-29958) for continuous municipal supply within the service area of the City of Leavenworth . . .; subject to the following provisions.
>
> The primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess of 1,375 acre-feet per year allocated under pre-existing water rights. . . .

Declaration of Melissa Downes in Support of Department of Ecology's Motion for Summary Judgment (Downes Decl.), Ex. 17 (emphasis in original); *see also* Downes Decl., Ex. 18 (parallel language relating to Permit No. G4-29958).

The City is asking the Court to interpret this cap provision to make it mean something which it does not actually state. This provision does not state that the City can only exercise the new permits until such time as it uses 1,465 acre-feet per year, but that the City can then exercise any of its other (preexisting) water rights to pump water in excess of that figure. The City was granted a right to 90 acre-feet in addition to the 1,375 that was determined for the preexisting water rights, for a total of 1,464 acre-feet under *all* its water rights.

Declaratory Judgment No. 2 should not be revised as requested by the City because it is based on the correct application of the law: Ecology was authorized to include the annual cap condition in the City's permits under RCW 90.03.290, which requires Ecology to affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare when the agency evaluates

applications for water permits. Ecology acted within its authority in determining that the condition was necessary in order for the City's permit application to meet this four-part test. The inclusion of the cap condition was necessary to ensure that the City's prospective water use under the applications could meet the "beneficial use" test, and would not allow for wasteful or speculative water use to serve its projected population. *See* Ecology's Summary Judgment Memorandum at 26-30.

The "rules" suggested by the City as a "simple solution" are not supported by the law. *See* City's Motion at 9-10. Their first rule is incorrect because, under *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 227-28, 858 P.2d 232 (1993), Ecology *can* tentatively determine the validity and quantity of a preexisting right when it evaluates an application from a new water permit. This is captured in Declaratory Judgment No. 1, which the City is not challenging. The City is essentially requesting the Court to reverse the following correct legal conclusion in its memorandum decision:

> In *Rettkowski*, the Court held that the department has no authority to tentatively determine the relative priority of water rights in a dispute between competing users in a regulatory action. However, the *Rettkowski* Court noted that the concept of tentative determinations has been developed in the context of permitting cases. The discussion of tentative determinations in *Rettkowski* implicitly approves of the department's authority to engage in this type of analysis in the permitting context.

Memorandum Decision at 4 (footnote and citations omitted). This request should be rejected.

The City's second rule is incorrect because it proposes a type of cap provision that could only affect the new water rights, but would have no effect on the permit applicant's exercise of its preexisting water rights. If the limitation cannot apply to the preexisting water rights, then there was no way for Ecology to ensure that the applications for new permits met the "beneficial use," "impairment," and "public interest" prongs of the four-part test under RCW 90.03.290. This would have required Ecology to deny the permit applications. And, on a statewide basis, taking away Ecology's authority to impose cap conditions would cause Ecology to have to deny permit applications, or put application processing at a standstill, in

instances where applicants have portfolios of preexisting water rights. *See* Department of Ecology's Memorandum in Support of Motion for Summary Judgment at 2, 25-26; Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 27-28.

The City's illustration of how its two suggested rules would operate with respect to the City's water rights shows how its approach is legally flawed, and, thus, why its motion for reconsideration fails. The City asks for the annual cap condition to be interpreted to mean that up to 1,465 acre-feet per year could be used under the new permits and their preexisting rights, including Certificate 8105. This would operate so that when the City reaches 1,465 acre-feet per year, they could then continue to exercise the preexisting rights to surpass the 1,465 acre-feet annual total. In effect, there would be no annual quantity limit at all. The City effectively would be able to use up to 2,275 acre-feet of water per year, based on being able to use 1,085 acre-feet per year under Certificate No. 8105 by pumping 1.5 cfs from Icicle Creek on a 365-day per year, twenty-four hour per day basis. This would allow the City to divert an additional 810 acre-feet per year of water from Icicle Creek by taking the lid off the annual cap condition and interpreting it to mean something it does not actually say.[8]

The City's suggested revisions to Declaratory Judgment No. 2 would conflict with the correct legal analysis in the Memorandum Decision with respect to Ecology's tentative determination authority under RCW 90.03.290. *See* Memorandum Decision at 3-4. Further, as

[8] The City recognizes that the annual quantity figure tentatively determined in the Amended ROEs was based on its projected 20-year population growth and the associated future increase in demand for water. The City had the opportunity to appeal the decisions that were based on that permitting approach, but did not appeal, and now wants to revise those decisions to obtain the right to water to serve growth beyond the 20-year period. While this is not a legally viable approach, there are several other ways for the City to obtain additional water rights to serve future growth, including the filing an application for a new permit made available under reservations of water for future uses from the Wenatchee River and Icicle Creek under the Wenatchee River Basin Instream Flow Rule, WAC 173-545, or purchasing an existing water right. *See* Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 12, n.9. Under Declaratory Judgment No. 3 in the Order, the processing of a permit application could implicate another tentative determination of the City's preexisting water rights by Ecology.

explained in Section III.C, below, by changing the meaning of the analysis and cap conditions in the Amended ROEs, the revisions would essentially rewrite the Amended ROEs in a manner which is beyond the Court's authority. Accordingly, the Court should decline the City's request to reconsider and revise Declaratory Judgment No. 2.

C. The City's Declaratory Judgment Action *Is* A Belated Appeal Of The 1995 Decisions And The Permit Condition Cannot Be Changed Through This Declaratory Judgment Action

The City requests revision of Declaratory Ruling No. 4, and asserts that "the City is not challenging the 1995 decisions and does not seek to change them in any way; therefore the City's declaratory judgment action should not be characterized as a belated appeal." City's Motion at 12. The City first requests that Declaratory Ruling No. 4 be revised to state that the cap condition in Permit Nos. S4-28122 and G4-29958 only applies to those two water rights; but not to the City's preexisting water rights, including Certificate No. 8105. Then the City proceeds to request deletion of the language in Declaratory Ruling No. 4 stating that the Court interprets the City's declaratory judgment claim as a belated appeal of the cap condition in the Amended ROEs and permits that is barred by the statute of limitations. *See* City's Motion at 13.

The City's request for reconsideration here should be rejected for two reasons. First, Declaratory Ruling No. 4 follows logically and correctly from Declaratory Rulings Nos. 1 through 3 relating to Ecology's tentative determination authority and the doctrine of *res judicata*, and is based on sound legal reasoning with respect to administrative decision-making and appeals processes. Second, in asking the Court to revise its ruling to state that the annual cap condition only relates to Permit Nos. G4-29958 and S4-28812, the City is asking the Court to take an action which is beyond its authority in this declaratory judgment action. If the Court determines on reconsideration that the City is not bound by the cap condition because it was illegal for Ecology to include it in the Amended ROEs and permits (which it should not), then

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the Court can invalidate the permits. But the Court cannot interpret the condition in a manner that eliminates or rewrites it and leaves the rest of Ecology's permit decisions intact.

The City wrongly contends that its action is not a belated appeal of the Amended ROEs and permits that is barred under the statutes of limitations which require that Ecology's decisions be appealed within 30 days of receipt, RCW 43.21B.230(1) and 43.21B.310(4). However, this case is entirely centered on the analyses and conditions in those decisions, and whether Ecology acted within its statutory authority to include them. The City recognizes that it is "generally bound" by those decisions, but then attempts to change the entire meaning of those decisions by saying that the following condition only applies to the two new permits and not to Certificate 8105 and the City's other preexisting water rights:

> The primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess of 1,375 acre-feet per year allocated under pre-existing water rights. . . .

Downes Decl., Ex. 17 (emphasis in original); Downes Decl., Ex. 18.

This condition cannot just apply to the two new permits when it expressly states that the City was awarded a new primary water allocation of 90 acre-feet per year that is additive to the 1,375 acre-feet that Ecology determined was allocated to the City under its preexisting water rights. The City claims that it simply is asking for the Court to interpret the effect of this language, but it is really asking the Court to drastically modify the 1995 decisions by changing the effect of the cap condition in a manner that eliminates or rewrites it.

The City's reliance on the language in the Order stating that "in the event of a future water-related dispute, litigation, or adjudication, Ecology cannot rely on its tentative determination of the annual quantity of Certificate 8105" is misplaced. This declaratory judgment action is *not* such a "future water-related dispute." Such a dispute will arise when there is a general adjudication of water rights in the Wenatchee River Basin, or when Ecology makes an administrative decision that involves a future tentative determination of the validity and extent of Certificate 8105, such as in the event that the agency processes a water right

application which necessitates such a determination.[9] But the City opted not to appeal the decisions in 1995 which involved the tentative determination and resulting condition that is the focus of the dispute in this case, and cannot elude the statute of limitations to challenge it through this action.[10]

As explained above with respect to the City's request to revise Declaratory Ruling No. 2, as the Court correctly concluded in both the Memorandum Decision and the Order, Ecology lawfully acted within its statutory authority to perform its tentative determination and include the cap condition.[11] And if the Court reconsiders that ruling to find that Ecology lacked such authority, the remedy being sought by the City through its suggested revision to Declaratory Ruling No. 4 would be beyond the Court's authority. The Court cannot grant the relief sought here by the City because a declaratory judgment can only interpret the meaning of an existing legal instrument, but cannot rewrite it. *See Denaxas v. Sandstone Ct. of Bellevue, L.L.C.*, 148 Wn.2d 654, 670, 63 P.3d 125 (2003) (a court cannot rewrite a contract to force a bargain that the parties never made). Through a declaratory judgment, the Court cannot effectively erase or rewrite the provision in the Amended ROEs and permits stating that "[t]he primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in

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[9] While Ecology has chosen not to file a motion for reconsideration of the Order, Ecology reserves the right to appeal any portion of the Order, or the Court's decision on the City's Motion, after the Court issues its final ruling in this case.

[10] If the City does not want to comply with the condition, it has the option to not exercise the two new water rights approved through the Amended ROEs and associated permits. Declaration of Stephen Hirschey in Support of Department of Ecology's Motion for Summary Judgment, ¶¶ 5-6. If the City does not want to be subject to this condition, it can choose to voluntarily forego, cancel, or relinquish the two new permits. However, if the City chooses to retain and exercise the two permits, the City must comply with the aggregate cap condition until there is a future action involving a judicial determination through a basin general adjudication in superior court, or a tentative determination by Ecology in the course of an administrative decision, of its water rights which erases or modifies the condition.

[11] In order to ensure that the City's applications would meet the "beneficial use" requirement, Ecology lawfully included the 1,465 acre-feet per year cap condition in the Amended ROEs. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 597-98, 957 P.2d 1241 (1998) (Ecology is authorized to include conditions in water permits to ensure that the proposed water use will meet the criteria of RCW 90.03.290). If Ecology had lacked authority to ascertain the maximum Qa for Certificate 8105 and include the "aggregate cap" condition, it would have had to deny the City's applications because Ecology could not have affirmatively found that the City's applications met the criteria under RCW 90.03.290.

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excess of 1,375 acre-feet per year allocated under pre-existing water rights. . ." while maintaining the rest of the Amended ROEs and permits intact. If Ecology lacked authority to include the condition because it reduced preexisting water rights in a manner the Court deems was unlawful, then the permits must be vacated or voided because they cannot be rewritten or interpreted in a manner which conflicts with the actual language of the condition.

D. If the Court Does Not Reconsider Ruling Nos. 2 And 4, It Should Not Reconsider Declaratory Ruling No. 5 Because There Is No Reason For The Court To Reach The Due Process Issue

If the Court does not reconsider and revise Declaratory Rulings Nos. 2 and 4, then the City requests the Court to reconsider Declaratory Ruling No. 5, and to revise it to rule either that Ecology violated the City's constitutional right to due process when it issued the 1995 Amended ROEs and permits, or that a trial be held on the due process issue. This request for reconsideration should be denied. If the Court does not reconsider Declaratory Rulings Nos. 2 and 4, then the Court should not alter its ruling, based on Declaratory Rulings Nos. 1 through 4, that "it is unnecessary to determine whether Ecology violated the City's constitutional right to due process when Ecology issued its decisions on the City's water right permit applications." And if the Court determines that it should reach the due process issue, summary judgment should be granted to Ecology because the language contained in Ecology's decisions clearly provided the City with notice and the opportunity to be heard through an appeal to an independent quasi-judicial tribunal, the PCHB.

In light of the following language in Declaratory Ruling No. 4, there is no reason for the Court to reach the due process issue:

> That under RCW 43.21B.230(1) and 43.21B.310(4), Ecology's decisions on permit application must be appealed to the Pollution Control Hearings Board (PCHB) within 30 days of receipt. Because the City received the Amended ROEs and permits in 1995 and failed to timely appeal those decisions to the PCHB, the City cannot seek judicial review of the Amended ROEs and permits or any of their provisions at this time. . . . Although Ecology's tentative determination of the annual quantity of Certificate 8105 does not have any *res judicata* effect, the Court interprets the City's declaratory judgment claim as a belated appeal of the condition limiting the annual of the City's water rights

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described by Declaratory Order No. 2, above, that is barred by the 30-day statute of limitations of RCW 43.21B.230(1) and 43.21B.310(4).

The Amended ROEs and permits govern, and the City received them from Ecology but decided not to appeal them. Any due process claim would have had to have been brought under an appeal at that time, either in the initial appeal to the PCHB, or on judicial review in court from the PCHB's decision. RCW 43.21B.110(1)(d); RCW 43.21B.180; RCW 43.21B.230; RCW 43.21B.310(4); RCW 34.05.514(1); RCW 34.05.570(3). The Amended ROEs cannot be attacked on due process grounds over 14 years after they were issued by Ecology and received by the City.

If, notwithstanding the applicable statute of limitations, the Court decides to reach the City's due process claim, it should be rejected, and Declaratory Judgment No. 5 should be revised accordingly. On April 12, 1995, Ecology sent letters to the City which provided the Amended ROEs, and included the following language stating they were subject to appeal:

> This letter and Amended Report of Examination constitute our determination and order. You have the right to obtain review of this order. Request for review must be made, within thirty (30) days of receipt of this order to the Washington Pollution Control Hearings Board. . . These procedures are consistent with the provisions of Chapter 43.21B RCW and the rules and regulations adopted thereunder.

Downes Decl., Exs. 17, 18.[12]

The City's contention that "Ecology provided notice of a decision and appeal rights relating to the two new applications, but not relating to the City's existing water rights" is contradicted by the specific language in the ROEs and permits stating: *"The primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess of 1,375 acre-feet per year allocated under pre-existing water rights. . . ."* Downes Decl., Exs. 17-20. This provision is underlined in the document to emphasize its significance. This

[12] Subsequently, permits associated with the ROEs were issued on August 11, 1995. The Permits stated this condition setting the Qa cap for the City's water rights, including the newly permitted rights, at 1,465 acre-feet per year. Downes Decl., Exs. 19, 20.

provision unequivocally communicated to the City that an annual cap on *all* its water rights was included as a condition in Ecology's approvals of Application Nos. G4-29958 and S4-28812. Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 22-24; Haller Decl. ¶ 9. This was in addition to the language in the Amended ROEs finding that the Qa authorized under Certificate 8105 is 275 acre-feet per year and that 1,375 acre-feet per year is authorized by all the City's rights that preexisted the two new permits.[13] Downes Decl., Exs. 17-18.

To comport with the constitutional right to due process, an agency must provide notice and the opportunity for a hearing appropriate to the nature of the case. *State v. Nelson*, 158 Wn.2d 699, 703, 147 P.3d 553 (2006) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 79, 110 P.3d 812 (2005) (citing *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003)). For appeals of water right decisions issued by Ecology, the PCHB provides the opportunity for a full evidentiary hearing that includes the testimony of witnesses and presentation of evidence. WAC 371-08-475; *Motley-Motley*, 127 Wn. App. at 79; *see also* Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 30-31.

The City received the decision documents, and based on the content of the Amended ROEs, and the letter stating that the City had the right to appeal the decisions to the PCHB, the City plainly was provided "notice" of its right to appeal and seek an opportunity to be heard before the PCHB. Further, it is also abundantly clear that the City was provided an

[13] Moreover, after the Agreement was entered in the PCHB and before the Amended ROEs were issued, Ecology provided draft versions of the Amended ROEs to the City for its review, to ensure that the City was satisfied that they were written properly to carry out the Agreement. Downes Decl., Ex. 15 ("The enclosed draft reports are for [the City's] review."). Subsequently, the City sent a letter to Ecology stating its satisfaction with the contents of the draft Amended ROEs. Downes Decl., Ex. 16 ("These reports appear to be in general conformance with the terms of the agreements negotiated between the Department of Ecology and the City of Leavenworth.").

"opportunity to be heard" since the PCHB appeal process provides a de novo hearing before an independent quasi-judicial tribunal, and the right to seek judicial review of the PCHB's decision. RCW 43.21B.180; *see also* Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 32-34.

The actual facts in this case contradict the City's assertion that Ecology provided no notice to City officials that the annual cap provision in the Amended ROEs and permits would be a binding condition that the City would have to comply with in order to be able to exercise its two new permits, G4-29958 and S4-28818. *See* City's Motion at 14-16. The City's contention that there was inadequate notice to the City and that "the City understandably believed that Ecology was merely stating a fact with regard to the annual quantity of Certificate 8105, not making an appealable determination . . ." is not factually supported. *See* Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 5-8.[14]

In sum, the City's request for reconsideration of Declaratory Ruling No. 4 should be denied, and its language should not be revised. And if the Court decides to reach the due process issue, the Court should reject the City's request for a trial and grant summary judgment in Ecology's favor.

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[14] The City's contention that "City officials trusted Ecology to know these things and report them accurately," also does not support the City's position. As Douglas Clausing, the former Section Manager for Water Resources in Ecology's Central Regional Office, explained during his deposition, it is the responsibility of a water right permit applicant to analyze and understand the meaning and effect of Ecology's application decisions. Second Reichman Decl., Ex. 2 at 23 ll. 8-11 ("I think it's incumbent upon the applicant to scrutinize what all the verbiage in that ROE is actually and take issue with anything that compromises their position."); Ex. 3 at 121, ll. 15-25 ("Q. Was there any other reason that you had to think that the City shouldn't trust what the Department of Ecology was telling them about their existing water rights? A. I don't think that any applicant for water rights should blindly trust an administrative agency. They should be accountable for submitting their application, following it through, paying attention to details, and especially looking at the Report of Findings."); *see also* Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 6-7.

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E. If The Court Does Not Reconsider Declaratory Rulings Nos. 2 And 4, It Should Not Reconsider Its Ruling On Declaratory Ruling No. 6 Because There Is No Reason To Reach The Issue Over Interpretation Of The 1994 Agreement

If the Court does not reconsider and revise Declaratory Rulings Nos. 2 and 4, then the City requests the Court to reconsider Declaratory Ruling No. 6, which states that "because of the foregoing findings and declarations, that portion of the third cause of action in the City's Second Amended Complaint seeking an interpretation of the 1994 agreement between the parties does not need to be determined." The City is requesting the Court to interpret the 1994 Stipulation and Agreed Order (Agreement) between the City and Ecology (that was entered into in settlement of the City's appeal to the PCHB of the initial permit decisions), and rule that the "diminishment of Certificate 8105 is contrary to the express written agreement of the parties." City's Motion at 17.

This request for reconsideration should be denied. If the Court does not reconsider Declaratory Rulings Nos. 2 and 4, the Court should not alter its ruling, based on Declaratory Rulings Nos. 1 through 4, that it is unnecessary to reach the City's claim for interpretation of the Agreement. And if the Court determines that it should reach the contract interpretation issue, summary judgment should be granted to Ecology because the express language in the Agreement shows that the City agreed to accept the annual cap provision that was included in the unappealed Amended ROEs.

In light of the language in Declaratory Ruling No. 4 quoted in the immediately preceding section of this brief relating to the due process issue, there is no reason for the Court to reach the contract interpretation issue. Like with the City's due process claim, the Amended ROEs govern, and the City failed to timely appeal them. In effect, the content of the Agreement is irrelevant because even if the Court were to find that the Amended ROEs and their annual cap provision are contrary to the Agreement, the Amended ROEs and permits would still be effective and binding. Further, any remedy related to a breach of the Agreement, based on the Court finding that Ecology's issuance of the Amended ROEs caused a breach,

would be to rescind the Amended ROEs and permits and put the parties back into the positions they were in before they entered into the Agreement. *See* Department of Ecology's Memorandum in Support of Motion for Summary Judgment at 35-36; Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 43. If the City believed that the annual cap condition was contrary to the parties' Agreement, then the City should have appealed the Amended ROEs. They did not.

If, notwithstanding the statute of limitations applicable here, the Court decides to reach the contract interpretation claim, it should be rejected, and the Order should be revised accordingly to include a ruling in favor of Ecology. Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 36-39; *see, e.g.*, Second Reichman Decl., Ex. 7 at 69, l. 23 through 70, l. 14 (Dep. of Jo Messex Casey).[15] Significantly, the City's decision not to appeal the Amended ROEs to the PCHB demonstrates the parties' mutual intent to agree on an aggregate Qa limit for the City's collective water rights. Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for Partial Summary Judgment at 40-41.

VI. CONCLUSION

Based on the foregoing, Ecology respectfully requests the Court to deny the City's Motion for Reconsideration. The Order on Parties' Cross-Motions for Summary Judgment accurately effectuates the Court's Memorandum Decision, which is well-reasoned and soundly based on the applicable law. Accordingly, the Court should not grant the City's requests for revision to the Order.

[15] "The stipulation and the amended report of exam that resulted -- exams, plural, that resulted from it were a consensus. They were a joint effort and agreement so that the city could get the additional water that it wanted. The city, I believe, well understood that that required us to assess the old water rights, including the certificate 8105, and to make a tentative determination about the quantity of that water right. I think that was discussed at length between Mr. Clausing, Mr. Cecka, Mr. McCauley, and I, because otherwise we could not have gone forward."

DATED this 10th day of August, 2012.

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SUPERIOR COURT OF STATE OF WASHINGTON
FOR CHELAN COUNTY

CITY OF LEAVENWORTH, Plaintiff, vs. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Defendant.	NO. 09-2-00748-3 PLAINTIFF'S REPLY MEMORANDUM Re: MOTION FOR RECONSIDERATION Oral Argument Noted for: September 21, 2012, 11:00 a.m.

I. INTRODUCTION

Ecology's Response sets up two false premises and repeats them throughout as the basis for all of its arguments opposing reconsideration. These false premises are: (1) that it did not reduce the annual quantity (QA) of Certificate 8105 in the 1995 ROEs simply because there was no QA number on certificate; and (2) that the City's legal quest for declaratory rulings concerning Ecology's lack of statutory authority to reduce pre-existing water rights is only a belated appeal of the 1995 ROEs and permits. Because these premises are wrong, as demonstrated below and in the City's Motion for Reconsideration, all of Ecology's subsequent arguments based on these false premises are also wrong. This reply establishes that Ecology's

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premises are wrong, and that Ecology has no persuasive argument against the City's motion for reconsideration.

The circular logic behind Ecology's arguments proves that the Principal Issue in this case has not been decided, which necessitates reconsideration of the July 19 Order. The Principal Issue in this case is whether Ecology had authority, for purposes other than deciding and conditioning applications S4-28812 and G4-29958, to determine, limit or reduce the quantity of Leavenworth's preexisting inchoate and perfected water rights. Despite Ecology's bare assertions to the contrary, there is no statutory or case authority in support of its position that it has such authority. Ecology simply did not and does not have authority to limit or reduce a water right applicant's pre-existing water rights when deciding an application for new water rights. The July 19 Order correctly provides that Ecology can make "tentative determinations" for purposes of deciding the new applications, and it can impose conditions on the exercise of new water rights in order to meet the four-part test of RCW 90.03.290. However, the July 19 Order should be revised on reconsideration to clearly decide that Ecology's tentative determinations and annual quantity limitations in the 1995 ROEs and permits are not legally binding limits on the annual quantity of Certificate 8105 or upon the aggregate annual quantity of the City's preexisting water rights but only on the City's withdrawals under Permits S4-28812 and G4-29958.

The Court should reconsider its Order on Summary Judgment and grant the relief requested in the City's Motion.

II. LEAVENWORTH'S PREEXISTING RIGHTS WOULD BE REDUCED IF ECOLOGY'S TENTATIVE DETERMINATION AND AGGREGATE QUANTITY CAP AFFECT THOSE RIGHTS IN ADDITION TO PERMITS S4-28812 AND G4-29958.

Ecology blindly insists that it did not reduce Certificate 8105 merely because the certificate did not specify an annual quantity (Qa). This argument ignores testimony from current and former Ecology officials that the absence of a Qa number did not imply a limit on the

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perfected or inchoate quantity of that water right.[1] These officials agree that before Ecology attempted to limit the Qa of Certificate 8105, the City had the right to use 1.5 cfs continuously (up to 1085.95 AFY) so long as that use was beneficial. If a right to use up to 1085.95 AFY is suddenly limited to only 275 AFY it has obviously been reduced. Ecology's argument that "up to 275" is not less than "up to 1085.95" is clearly and indisputably wrong.

Ecology also uses a flawed argument that it did not reduce Leavenworth's existing water rights because Certificate 8105 was limited to serving only 2500 people. That argument is based on a false assumption that a population number in the application document for Certificate 8105 limited that water right to supplying a population of 2500 people, and that the use of more than 275 AFY would be unreasonable given that limitation. That argument is plainly wrong because population numbers in water right documents are <u>not</u> limitations on the exercise of municipal water rights. RCW 90.03.260(5) makes clear that, "the population figures in the application or any subsequent water right document are not an attribute limiting exercise of the water right ...." Ecology ignored this statute in its Response and instead cites to declarations to the contrary. A declaration cannot override a statute and in this case the statute makes Ecology's declarations and argument irrelevant.

Ecology next argues that even if Leavenworth could demonstrate that it used more than 275 AFY under Certificate 8105 before Ecology's tentative determination,[2] that doesn't prove the City's use was beneficial, and Ecology notes the issuance of a 1988 notice of violation to the City relating to excessive use of water. This is very misleading, because Ecology never made any findings that Leavenworth wasted water or exceeded a reasonable usage of water, Ecology did not specify a quantity of water usage that was reasonable, and the notice of violation was resolved years before Ecology's decisions on applications S4-28812 and G4-29958.[3] In fact, the

[1] Hirschey Decl., ¶ 6; Van Hulle Decl., ¶¶ 10 and 12; testimony of Robert Barwin, Third Pors Decl., Exh. AA, p.130, l. 8 to p. 131, l. 2, and p. 155, l. 5 to p. 156, l. 13.

[2] The Declaration of Mark J. Varela, P.E., at ¶7 and Ex. A, demonstrates that Leavenworth used an average of 1688 acre-feet per year from 1985 to 1987 and 1748 acre-feet in 1987. This is 648 acre-feet more than Leavenworth's other existing water rights, representing far more than Ecology's 275 acre-feet tentative determination.

[3] Third Declaration of Jill Van Hulle, ¶ 11, p. 6.

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notice Ecology referred to pertained to the usage of excessive instantaneous quantity (Qi) and had nothing whatever to do with the annual quantity or annual usage – Qa – of Leavenworth's water rights. The issues in this case, especially the Principle Issue, concern only Qa – the annual quantity of water rights. This case does not concern Qi – instantaneous quantity measurements of water. The Court should not be misled by these red herring waste issues, which are only an attempt by Ecology to obscure the fact that its tentative determination and cap condition would definitely reduce the City's existing water rights if they were applied to those rights.

Ecology treated other municipal water rights that lacked a Qa number in the certificate (e.g., Grand Coulee City's Certificate 3397) consistently with the City's position in this case, and admitted in official documents that it had no authority to reduce the annual quantity of those rights below the inchoate right reflected by a continuous withdrawal.[4] In its Response at footnote 5, Ecology misleads the Court by contending that the Grand Coulee City example is immaterial, but that argument is also based on the false conclusion that Leavenworth's water rights could only be used to supply a population of 2500 persons. The declaration making that misleading argument was also disputed by the City. Ecology' 2004 decision relating to Grand Coulee City reinstated the full potential Qa of its Certificate 3397 to 1302 AFY, the annual quantity that equals usage of 1.8 cfs continuously throughout the year, and reversed a previous "aggregate cap" of 806.4 AFY on the annual quantity of all the city's water rights that was included in a 1974 ROE. Ecology's rationale in its 2004 decision was that the Municipal Water Law, RCW 90.03.330(3), prevented Ecology from revoking or diminishing pumps and pipes certificates.[5] This is exactly analogous to Leavenworth's argument about Certificate 8105. In both cases Ecology imposed an aggregate cap as a condition on a new water right that was less than the full inchoate quantity represented by preexisting water rights, including a certificate that did not specify a Qa number. In both cases this cap condition was imposed prior to the passage of the Municipal Water Law. In Grand Coulee City's case, however, Ecology later admitted that it did

[4] Van Hulle Decl., ¶ 9.
[5] Second Van Hulle Decl., ¶ 14.

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not have authority to impose that aggregate cap and reinstated the full inchoate quantity of the certificate that did not specify a Qa number. Ecology also corrected a previous aggregate cap decision in the case of the City of Buckley, and ceased referring to the aggregate cap in subsequent water right decisions.[6]

In this case, Ecology treats Leavenworth differently by arguing that the Municipal Water Law only applies to decisions made after its effective date of September 9, 2003, but that is inconsistent with its actions relating to Grand Coulee City, Buckley and other cities. For Grand Coulee City, Ecology went back even further than Leavenworth's 1995 ROEs and determined that cap conditions it imposed in 1974, thirty years previously, were invalid. Ecology did not rescind the new water rights issued with those aggregate cap conditions (as it alleges it would be required to do here), it merely reinstated the full inchoate quantity of Grand Coulee City's pumps and pipes certificate. That is no more than what Leavenworth is seeking by declaratory judgment in this case – a determination that the aggregate cap did not apply as a limit of the preexisting pumps and pipes certificate. While Ecology argues that this result "will preclude Ecology from being able to process numerous pending permit applications until such time as general adjudications are intitiated and completed,"[7] the fact is that Ecology has already made identical decisions without the unfounded and dire consequences that it predicts.

For purposes of deciding applications S4-28812 and G4-29958 in 1993 and 1995, Ecology had to make a tentative determination of the quantity of the City's existing water rights. That is how Ecology determined that Leavenworth needed, at most, 90 additional acre-feet of Qa to meet what was then its 20-year growth projection for serving a population of 3,823 persons. What Ecology is trying to do now by opposing the City's Motion for Reconsideration, is to use that 275 AFY tentative determination and 1465 AFY cap condition as the means of reducing the

[6] Leavenworth's Response to Ecology's Motion for Summary Judgment, pp. 22; Second Van Hulle Declaration, ¶ 13 and Exhibit E.
[7] Ecology Response, pp. 9-10.

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City's preexisting water rights. This exceeds Ecology's legal authority and exceeds what was needed for Ecology to decide the City's new applications under RCW 90.03.290.

III. ECOLOGY'S PERMITTING PROGRAM WOULD NOT BE DISRUPTED BY THE RELIEF REQUESTED IN THE CITY'S MOTION.

Ecology initially contended in their summary judgment motion that they had legal authority to reduce the City's preexisting water rights with a tentative determination or aggregated cap condition. Now that the Court has ruled that Ecology cannot use tentative determinations or cap conditions to reduce preexisting rights, Ecology denies that the City's existing water rights were ever reduced. It also asserts that if the Court grants the relief requested by the City, then its permitting program will be disrupted. The "cloud of uncertainty" and inability to process pending applications that Ecology alleges as a consequence have not been proven and were refuted by the City, which provided numerous examples of Ecology issuing new water rights to cities despite uncertainty about the quantity of existing rights.[8]

The City's expert witness, a former Ecology official familiar with permitting decisions involving uncertainty, disproved Ecology's argument and testified:

> I cannot point to a single example of Ecology denying a new application based on staff's inability to settle on an official system-wide annual quantity (Qa) of preexisting water rights. Further, Mr. Haller does not identify any instance where Ecology denied a new water right application based on staff's inability to settle on the Qa of preexisting water rights. Instead, there is example after example of creative solutions when Ecology cannot determine precisely the Qa of existing perfected and inchoate water rights. The most common solution is the issuance of non-additive (supplemental) water rights, which allows for system flexibility such as allowing for new water sources without increasing the Qa of an applicant's total portfolio.[9]
>
> ...
>
> Despite the legal conclusions made in Paragraph 8 of the Haller Declaration, I maintain my previous testimony that it is not necessary for Ecology to make binding determinations of the extent and validity of previously issued water rights in order to act on new ones. This is not a legal opinion, it is a fact based on my observations and

[8] Leavenworth's Response to Ecology's Motion for Summary Judgment, pp. 16-19; Second Van Hulle Decl., ¶¶ 6-7, 9-11 and Exhibits C and D

[9] Third Declaration of Jill Van Hulle, ¶ 6, p.3.

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experience with such decisions as an Ecology employee. Ecology has approved new municipal water right applications without making binding determinations that limit or reduce previously issued water rights. Most of the examples I gave to support this testimony in my previous declarations were not mentioned by or contested by Mr. Haller. There are numerous reasons why Ecology may be unable to make a definitive finding regarding the interpretation or quantity of previously issued water rights, but this has not prevented Ecology from making decisions approving new water rights.[10]

IV. THE CITY'S DECLARATORY JUDGMENT CLAIMS ARE NOT A BELATED APPEAL AND WOULD NOT ALTER THE TERMS OF THE 1995 DECISIONS.

Ecology's arguments that the City's declaratory judgment claims must be interpreted as a belated appeal of the 1995 decisions falsely presumes that those decisions would be altered by the relief requested by the City. In order to make this argument, however, Ecology is starting from an incorrect interpretation of the 1995 decisions that exceeds its authority. Instead, the Court should interpret (not alter) the 1995 decisions consistent with the limits of Ecology's authority. That authority does not include reducing the City's preexisting water rights. A reasonable interpretation of the 1995 decisions has been proposed by the City in its Motion for Reconsideration and Appendix B.[11] The City's interpretation is also consistent with the 1994 Stipulation, the agreement between Ecology and the City that the City's preexisting water rights "are not the subject of, nor affected by, this appeal."[12] Ecology has not put forward an alternative interpretation that is consistent with its lack of authority to reduce existing water rights and with the 1994 Stipulation. All of Ecology's interpretations would reduce the City's preexisting water rights in violation of law and the parties' agreement.

An agency may only do that which it is authorized to do by the Legislature. *Rettkowski v. Ecology*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993); *In re Puget Sound Pilots Ass'n*, 63 Wn.2d 142, 146 n.3, 385 P.2d 711 (1963); *Neah Bay Chamber of Commerce v. Department of Fisheries*, 119 Wn.2d 464, 469, 832 P.2d 1310. (1992). Thus, if Ecology lacked authority to reduce the

[10] Third Declaration of Jill Van Hulle, ¶ 10, p.5.
[11] City of Leavenworth's Motion for Reconsideration, pp. 9-10; Appendix B, pp. 6-18 (proposed revisions to Declaratory Rulings 2 and 4).
[12] Pors Decl., Exh. M, ¶ I.D., p.2.

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City's preexisting rights, the 1995 decisions never had that effect, despite how Ecology may have interpreted them.

This is akin to the res judicata argument raised by Ecology and rejected by the Court. Any determination by an administrative body (such as Ecology) which is outside its powers and duties as authorized by the statutes is not binding on a court hearing the issue. Karl B. Tegland, 14A Washington Practice Series § 35:51 (2010); *Nichols v. Snohomish County*, 47 Wn. App. 550, 736 P.2d 670 (1987). "Before any preclusive effects arise, the administrative agency must, of course, have the authority to make the determination in question. The requirement is analogous to the requirement of jurisdiction to support a judgment." Tegland, at § 35:51, pp. 582-583. Because Ecology lacked authority to reduce the City's preexisting rights, the 1995 decisions did not have that effect; therefore, a declaratory judgment as requested by the City would not alter the 1995 decisions.[13]

The City's declaratory judgment action and Motion for Reconsideration do not seek to modify or set aside the 1995 decisions. The City proposes no change in the terms and conditions of those decisions. Rather, the City challenges Ecology's interpretation that the City's preexisting rights were limited by those decisions, as it recently expressed in opposition to the City's water system plan amendment. If the Court grants the City's motion for reconsideration and requested changes to the July 19 Order, the terms of the 1995 decisions do not change because they still operate to the extent of Ecology's legal authority as enforceable limitations of water right permits S4-28812 and G4-29958. As illustrated in the City's Motion for Reconsideration, the City's requested changes to the July 19 Order give effect to all the language of the 1995 decisions without exceeding Ecology's legal authority. This refutes Ecology's claim that the relief requested by the City would rewrite the decisions. For these reasons, the City's declaratory judgment action is not, and should not be interpreted as, a belated appeal of the 1995 decisions.

[13] The City's failure to appeal the 1995 decisions did not create new legal authority for Ecology out of thin air. Neither did the City accept new limitations on its existing water rights, because it relied on the Stipulation as Ecology's agreement that existing water rights were not affected.

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Ecology disputes the City's reliance on language in the res judicata ruling in the July 19 Order that Ecology cannot rely on its tentative determination in a "future water-related dispute, litigation or adjudication," but Ecology only contradicts the City with an unsupported statement that this is not such a future water-related dispute. Ecology misreads Declaratory Ruling No. 4 by assuming that the Court intended to allow Ecology to enforce its tentative determinations as binding against preexisting water rights until there is a general stream adjudication. The July 19 Order neither states nor implies such an enormous temporary grant of authority to Ecology. Ecology can hardly claim that this lawsuit and all the discovery, motions and presentation hearings held in this matter are not a dispute concerning the City's water rights. By doing so, Ecology exposes its desire to have "tentative adjudication" authority rather than acknowledging its own limited powers relating to existing water rights.

Ecology also wrongly claims that the Court has no jurisdiction to interpret the 1995 decisions. The determination whether the City's preexisting water rights are limited or reduced by the 1995 decisions is "an actual, present and existing dispute" "between parties having genuine and opposing interests" that are "direct and substantial," and a judicial determination "will be final and conclusive." Thus, the Court has jurisdiction to interpret the decisions under the Uniform Declaratory Judgment Act. RCW ch. 7.24; *Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005).

V. ECOLOGY MISINTERPRETS THE CITY'S REQUESTED REVISIONS TO DECLARATORY RULINGS 2 AND 4.

Ecology incorrectly asserts that the City's requested changes to Declaratory Ruling No. 2 are inconsistent with the following language in the 1995 decisions:

> "The primary allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess of 1,375 acre-feet per year allocated under pre-existing rights. ..."

The 1995 decisions do not need to state that after the City uses 1,465 acre-feet per year, "the City can then exercise any of its other (preexisting) rights to pump water in excess of that figure." It

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is not necessary to provide in the ROEs that the City can use its preexisting rights after the new water rights have been exhausted, because the City already possessed that right. Ecology again relies on the false premise that it had authority to limit the City's existing water rights in order to grant the City an additional 90 acre-feet of water. It certainly had the authority to limit the use of the new water rights, and it did so by imposing a cumulative annual total of 1465 acre-feet on the new water rights, including amounts used under both the City's new and existing rights. This is what is commonly known as a supplemental water right limitation, as explained in the Second Declaration of former Ecology official Jill Van Hulle,[14] and is used whenever Ecology feels an applicant has adequate existing water rights but may need a new water source. The cap language quoted above, just like supplemental conditions included in many municipal water right decisions, prevents the water right holder from using the new water right in excess of the amount Ecology determines to be beneficial for its foreseeable growth.

Ecology implies that the result requested by the City will allow the City to waste water, but this is wrong for at least two reasons. First, it is purely speculative. The Court cannot base a decision on summary judgment based on speculative or conclusory statements or evidence. The party opposing summary judgment must support its response with admissible evidence. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 151 P.3d. 201 (2006). Inadmissible hearsay cannot establish the existence of a genuine issue of material fact. *Id.* The non-moving party cannot defeat summary judgment by relying on speculation, argumentative assertions that unresolved factual issues remain, or consideration of affidavits at face value. *Id.*; *Donohoe v. State*, 135 Wn.App. 824, 142 P.3d 654 (2006). Mere possibilities will not defeat a motion for summary judgment, and the non-moving party cannot establish a question of material fact on the basis of inferences that are remote or unreasonable. *Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 147 P.3d 600 (2006); *Lynn v. Labor Ready, Inc., supra.*

[14] Second Declaration of Jill Van Hulle, ¶¶ 10-11.

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Second, this misleading assertion ignores Ecology's separate and distinct authority to prevent any water right holder, including the City, from wasting water. A fundamental tenet of water law precludes waste of water. RCW 90.03.010 limits the appropriation of water to "beneficial use" and Ecology possesses separate authority to prevent wasteful uses of water. *See, Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993). Ecology is required to reduce wasteful practices in the exercise of water rights "to the maximum extent practicable." RCW 90.03.005. There is no result in this case that could violate this principle, and the City is not asking for the ability to waste water. Ecology's suggestion to the contrary is merely a scare tactic.

VI. ECOLOGY'S ARGUMENT RELATING TO DECLARATORY RULING NO. 5 IGNORES DISPUTED FACTS.

The City's conditional request for reconsideration of Declaratory Ruling No. 5 seeks a trial on the City's due process claims if, but only if, the Court denies the City's request for reconsideration of Declaratory Ruling Nos. 2 and 4. The reason is that these declaratory rulings as currently written reduce the City's valuable property rights without procedural or substantive due process, because the City never had proper notice that its existing rights were being taken away or an opportunity to be heard before its water rights were taken. Ecology's sole argument against reconsideration on this point is that the language inside the 1995 decisions should have been enough to inform the City that its existing rights were being taken away.

Ecology's 1995 notices of decision, which included notice of a right to appeal within 30 days, only referenced that a decision was made regarding the new applications S4-28812 and G4-29958, not a decision regarding the City's existing water rights, including Certificate 8105.[15] No other written notification was provided to the City, and City officials relied on the 1994 Stipulation for their understanding that the City's existing water rights were not affected.

[15] Declaration of Melissa Downes, Exs. 17 and 18.

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Ecology's position boils down to this: "The City should not have trusted our agreement and they should have read between the lines and read our minds that we were, in fact, reducing their existing water rights. Too late to appeal now." Remarkably, Ecology cites in support of their position the deposition testimony of former Ecology official Doug Clausing, which is a textbook example of denial of due process: "I don't think that any applicant for water rights should blindly trust an administrative agency."[16] The City has raised material issues of fact by declaration and deposition testimony that disputes Ecology's claim that adequate notice was provided. If summary judgment is not granted to the City on its due process claims, then a trial on those issues is required. That is the intent of the City's request for reconsideration of Declaratory Ruling No. 5. Ecology merely contradicted the City and its evidence, and has not established the absence of genuine issues of material fact and that Ecology is entitled to judgment as a matter of law.

VII. ECOLOGY'S ARGUMENT RELATING TO DECLARATORY RULING NO. 6 IS BASED ON ERRONEOUS ASSUMPTIONS.

If the Court reconsiders Declaratory Ruling Nos. 2 and 4 as requested by the City, to the effect that Ecology could not limit or reduce the annual quantity of the City's existing water rights, then no change is necessary to Declaratory Ruling No. 6. If the Court does not reconsider Declaratory Ruling Nos. 2 and 4, then it must address the question of the reduction of the City's existing water rights through the tentative determination and annual cap condition in the 1995 decisions in light of the plain meaning of 1994 Stipulation. The City asks the Court to interpret the 1994 Stipulation and the 1995 decisions in light of the parties' agreement. Ecology is trying to avoid its agreement not to affect the City's existing water rights by insisting that the agreement is irrelevant and claiming that the City could only enforce it by appealing the 1995 decisions within 30 days, despite the lack of discovery of a breach of agreement at that time.

Ecology's Response claims that the content of the parties' agreement, the 1994 Stipulation, is "irrelevant" because even if the Amended ROEs and the annual cap provision are

[16] Ecology's Response to City of Leavenworth's Motion for Reconsideration, p. 20, footnote 14.

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contrary to the 1994 Stipulation, they "would still be effective and binding." Thus, Ecology believes that it can breach an agreement relating to a water right decision with impunity, and that a party to an agreement with Ecology cannot rely on the agreement when interpreting a subsequent decision.

Declaratory Ruling No. 2 already acknowledges that Ecology's aggregate cap condition authority did not include the authority to reduce preexisting rights. By interpreting the 1994 Stipulation along with the 1995 decisions, the Court should go further and determine that Ecology could not violate the terms of the parties' agreement that Leavenworth's existing water rights, including Certificate 8105, are not "affected by" the 1995 decisions. This would make the interpretation of the 1995 decisions consistent with a plain meaning interpretation of the 1994 Stipulation and Order. *See* Plaintiff's Motion for Partial Summary Judgment, at pp. 50-52.[17]

VIII. CONCLUSION

Ecology's Response to the City's Motion for Reconsideration is incorrect and does not establish that reconsideration should be denied. It repeatedly relies on the false premise that Ecology's 1995 decisions did not reduce the City's preexisting rights, even though Ecology previously argued the opposite and claimed the authority to do so. The Response also attempts to obscure the very nature of this case, which seeks an interpretation of the 1995 decisions that is harmonious with the limits of Ecology's authority and the parties' intentions as expressed in the 1994 Stipulation. By repeatedly casting the City's declaratory judgment claims for a resolution of this conflict as a belated appeal, a second false premise, Ecology seeks to escape the consequences of breaching an agreement with the City and exceeding its statutory authority. The Court should grant the relief requested by the City (as suggested by Appendix B to the Motion for Reconsideration), which would avoid an unnecessary appeal and lead to a final resolution of this dispute.

//

[17] If the Court does interpret the 1994 Stipulation but finds that the City agreed to a reduction of its existing water rights, the City also conditionally requests reconsideration of the Court's determination that it was unnecessary to decide the City's reformation claims, and believes that they must be considered at trial.

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RESPECTFULLY SUBMITTED this 24th day of August, 2012.

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NO. 31236-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CITY OF LEAVENWORTH, Appellant, v. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondent.	CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 14th day of January 2013, I caused to be served the Joint Position Paper for Settlement Conference in the above-captioned matter upon the parties via mail and email as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of January 2013, in Olympia, Washington.

HOLLY FISHER
Legal Assistant