

FILED

JAN 15 2013

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

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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.

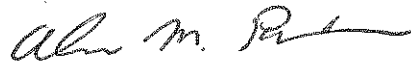
July 19, 2012 Order: Because of the foregoing findings and declarations of law, the Court also finds that it is unnecessary to determine whether Ecology violated the City's constitutional right to due process when Ecology issued its decisions on the City's water right permit applications.

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.

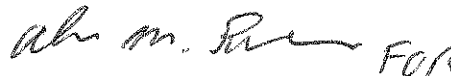
Respectfully submitted this 14th day of January, 2013.

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(per authorization
by e-mail)

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.

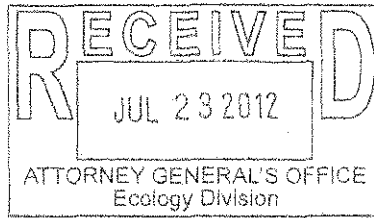
* Leavenworth agrees that during the pendency of this settlement process, and of the litigation in this case should it resume in the future, it will not seek amendment or adjustment of its Water System Plan through the Department of Health to increase the maximum Qa of its water rights in the water rights 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

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FILED
JUL 19 2012
Kim Morrison
Chelan County Clerk

**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

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

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

- 5 1. Department of Ecology's Motion for Summary Judgment, dated June 24, 2011;
- 6 2. Department of Ecology's Memorandum in Support of its Motion for Summary
7 Judgment, dated June 24, 2011;
- 8 3. Plaintiff Leavenworth's Response to Ecology's Motion for Summary Judgment
9 (Re: Phase I Issues), dated July 22, 2011; and
- 10 4. Department of Ecology's Reply Memorandum in Support of Motion for
Summary Judgment, dated August 5, 2011.

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

- 13 1. Plaintiff City of Leavenworth's Motion for Partial Summary Judgment
14 (Re: Phase I Issues), dated June 27, 2011;
- 15 2. Department of Ecology's Memorandum in Response to City of Leavenworth's
Motion for Partial Summary Judgment, dated July 22, 2011; and
- 16 3. Reply of the City of Leavenworth to Defendant Department of Ecology's
17 Response/Opposition to the City's Motion for Partial Summary Judgment,
dated August 5, 2011.

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

- 20 1. Leavenworth's Objection to Ecology's PCHB Legal Authority and Reichman
21 Declaration Exhibits 11 and 12, and Request to Strike, dated July 22, 2011;
- 22 2. Department of Ecology's Memorandum in Opposition to City of Leavenworth's
Request to Strike, dated August 4, 2011;
- 23 3. Leavenworth's Objection to Evidence (07-20-11 Stephen Hirschey Declaration
24 and 07-21-11 Daniel R. Haller Declaration) and Request to Strike, dated
25 August 5, 2011;
- 26

- 1 4. Department of Ecology's Memorandum in Opposition to Leavenworth's
2 Request to Strike Declarations, and, in the Alternative, Request to Strike
3 Portions of Leavenworth's Declarations, dated August 19, 2011;
- 4 5. Leavenworth's Additional Objection to Evidence (07-29-11 Daniel R. Haller
5 Declaration) and Request to Strike, dated September 9, 2011; and
- 6 6. Department of Ecology's Memorandum in Opposition to Leavenworth's
7 Additional Objection to Evidence (07-29-2011 Daniel R. Haller Declaration)
8 and Request to Strike, dated September 21, 2011.

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

- 13 1. Declaration of Melissa Downes in Support of Department of Ecology's Motion
14 for Summary Judgment, dated June 17, 2011;
- 15 2. Declaration of Robert F. Barwin in Support of Department of Ecology's
16 Motion for Summary Judgment, dated June 17, 2011;
- 17 3. Declaration of Alan M. Reichman in Support of Department of Ecology's
18 Motion for Summary Judgment, dated June 20, 2011;
- 19 4. Declaration of Alan M. Reichman in Support of Ecology's Memorandum in
20 Response to City of Leavenworth's Motion for Partial Summary Judgment,
21 dated July 19, 2011;
- 22 5. Declaration of Stephen Hirschey in Support of Ecology's Memorandum in
23 Response to City of Leavenworth's Motion for Partial Summary Judgment,
24 dated July 20, 2011;
- 25 6. Declaration of Daniel R. Haller, dated July 21, 2011; and
- 26 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;

- 1 2. Declaration of Connie Krueger, dated June 23, 2011;
- 2 3. Declaration of Elmer Larsen, dated June 22, 2011;
- 3 4. Declaration of Jill Van Hulle, dated June 21, 2011;
- 4 5. Declaration of Chantell Steiner, dated June 22, 2011;
- 5 6. Declaration of Thomas M. Pors, dated June 26, 2011;
- 6 7. Declaration of Michael J. Cecka, dated June 20, 2011;
- 7 8. Declaration of Stephen Hirschey, dated May 13, 2011;
- 8 9. Declaration of Mark Varela, dated June 22, 2011;
- 9 10. Second Declaration of Michael J. Cecka, dated July 19, 2011;
- 10 11. Second Declaration of Terrence M. McCauley, dated July 19, 2011;
- 11 12. Second Declaration of Jill Van Hulle, dated July 19, 2011;
- 12 13. Second Declaration of Thomas M. Pors, dated July 21, 2011;
- 13 14. Third Declaration of Michael J. Cecka, dated August 3, 2011;
- 14 15. Third Declaration of Thomas M. Pors, dated August 4, 2011; and
- 15 16. Third Declaration of Jill Van Hulle, dated August 3, 2011.

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

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

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

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

11 NOW, THEREFORE, IT IS HEREBY:

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

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

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

22 ORDERED, ADJUDGED, AND DECREED that pursuant to the third cause of action
23 in the City's Second Amended Complaint for Reformation, Declaratory Judgment, and Other
24 Equitable Relief (Second Amended Complaint) the Court hereby finds and makes declarations
25 of law under Chapter 7.24 RCW as to each of the following:
26

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

9 2. That under RCW 90.03.290, Ecology is authorized to approve an application
10 for a new water right permit with a condition that limits the total annual quantity of water that
11 may be used by the applicant under the applicant's entire portfolio of water rights, including
12 the new permit and all preexisting water rights. This authority does not include the authority
13 to reduce preexisting water rights. Therefore, under RCW 90.03.290, Ecology was authorized
14 to include a condition limiting the total annual quantity of water that may be used by the City
15 under all of the City's water rights as a condition in Ecology's 1995 revised approvals of the
16 City's water right Permit Application Nos. G4-29958 and S4-28812. The Court interprets the
17 1,465 acre-feet per year language in Permit Nos. G4-29958 and S4-28812, and the Amended
18 Reports of Examination (ROEs) associated with those permits, as a condition limiting the total
19 annual quantity of water usage by the City under the new permits and all preexisting water
20 rights as a condition of approval authorized by RCW 90.03.290;

21 3. That *res judicata* is not applicable to Ecology's tentative determinations
22 described in Declaratory Order No. 1, above, because final determinations of the extent and
23 validity of water rights can only be made through a general adjudication of water rights in
24 superior court pursuant to RCW 90.03.105-.245. As a result, Ecology's tentative
25 determinations of the extent and validity of Certificate No. 8105 in its decisions on Application
26

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

3 4. That under RCW 43.21B.230(1) and 43.21B.310(4), Ecology's decisions on
4 permit applications must be appealed to the Pollution Control Hearings Board (PCHB) within
5 30 days of receipt. Because the City received the Amended ROEs and permits in 1995 and
6 failed to timely appeal those decisions to the PCHB, the City cannot seek judicial review of the
7 Amended ROEs and permits or any of their provisions at this time. Therefore, the City is
8 generally bound by the conditions in Permit Nos. G4-29958 and S4-28812 including, but not
9 necessarily limited to, the amount of additional water granted (up to an additional 90 acre-feet
10 per year), the total quantity of water the City can use each year under its collective water rights
11 (1,465 acre-feet per year), reporting requirements, and well construction requirements.
12 Although Ecology's tentative determination of the annual quantity of Certificate No. 8105 does
13 not have any *res judicata* effect, the Court interprets the City's declaratory judgment claim as a
14 belated appeal of the condition limiting the annual quantity of the City's water rights described
15 in Declaratory Order No. 2, above, that is barred by the 30-day statute of limitations of
16 RCW 43.21B.230(1) and 43.21B.310(4). However, in the event of a future water-related
17 dispute, litigation, or adjudication, Ecology cannot necessarily rely on its tentative
18 determination of the annual quantity of Certificate No. 8105 as being binding;

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


23 6. That statements, figures, and representations in Washington Department of
24 Health-approved water system plans on the status of water rights do not, in themselves, limit
25 the scope and validity of the water rights that are reported in the plans; and
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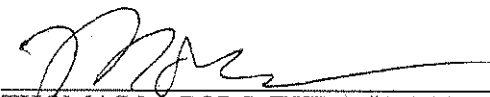
Assistant Attorney General
Attorney for Defendant Department of Ecology

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

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


MICHAEL C. WALTER, WSBA #15044
Attorney for Plaintiff City of Leavenworth

LAW OFFICE OF THOMAS M. PORS


THOMAS M. PORS, WSBA #17718
Attorney for Plaintiff City of Leavenworth

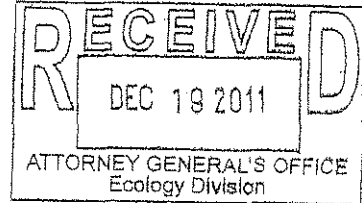
Superior Court of the State of Washington
For Chelan County

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



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

401 Washington Street
P.O. Box 880
Wenatchee, Washington 98807-0880
Phone: (509) 667-6210 Fax (509) 667-6588



December 15, 2011

Mr. Thomas M. Pors
Law Office of Thomas M. Pors
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Mr. Alan M. Reichman
Assistant Attorney General
Attorney General of Washington—Ecology Division
P.O. Box 40117
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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.

December 15, 2011

• Page 2

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.

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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

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)

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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 *Rettkowski* 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 *Rettkowski* Court that PCHB is likewise without authority to conduct adjudicative hearings regarding such rights. 122 Wn.2d at 228-29.

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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 *Rettowski, 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 it 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.

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.

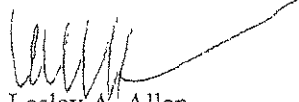
December 15, 2011

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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,

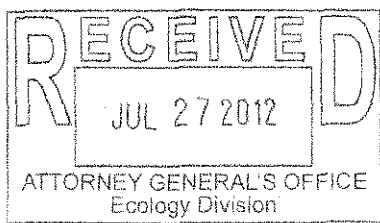
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Lesley A. Allan
Superior Court Judge

C: Superior Court file

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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."

PLAINTIFF CITY OF LEAVENWORTH'S
MOTION FOR RECONSIDERATION

Law Office of Thomas M. Pors
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Tel: (206) 357-8570
Fax: (866) 342-9646

1 quantity of Leavenworth's preexisting inchoate and perfected water rights? The Court's July 19,
2 2012 Order on Parties' Cross-Motions for Summary Judgment and On Motions to Strike ("July
3 19 Order") does not clearly decide this crucial issue at the heart of this dispute. In addition, two
4 of the Court's declaratory rulings contradict each other regarding the Principal Issue. This
5 Motion for Reconsideration seeks resolution of the Principal Issue at the trial court level to
6 provide the parties with necessary and clear guidance regarding the City's assessment and future
7 use of its water rights, or to properly frame and ripen the legal issues for an appeal by either
8 party.

9 Declarations and deposition testimony establish that Leavenworth's Certificate 8105 was
10 not merely an undetermined quantity – it was intended as a water right to meet future growth
11 requirements and had been beneficially used and/or was inchoate and in good standing to levels
12 beyond the 275 acre-foot numerical limit assigned to it by Ecology's tentative determinations in
13 1995.² If the ultimate effect of the 1995 decisions was to limit Certificate 8105 to only 275 acre-
14 feet per year (AFY), then this water right was not only "tentatively determined" it was
15 adjudicated and reduced by Ecology's actions. This has several consequences that require
16 reconsideration of the July 19 Order.

17 The Principal Issue described above was only partially resolved by the Court's December
18 15, 2011 letter opinion and the July 19 Order,³ raising the distinct possibility of a remand to this
19 Court for further proceedings if reconsideration is denied and the City appeals. First, Declaratory
20 Ruling Nos.1 and 2 are inconsistent in their guidance to the parties concerning Ecology's
21 authority to impact the quantity of the City's preexisting water rights. Second, Declaratory
22
23

24 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.

25 ³ A copy of the July 19, 2012 Order is attached as **Appendix A**. The December 15, 2011 letter opinion is attached to
26 this Order.
27

1 Ruling No. 4 mistakenly construes the City's declaratory judgment claim concerning the
2 Principal Issue as a belated appeal of the 1995 decisions⁴.

3 If the Court denies this motion for reconsideration and continues to construe the City's
4 declaratory judgment claim as a belated appeal, the July 19 Order effectively establishes that the
5 City is bound by the total annual quantity conditions in the 1995 Permits. By necessity, this has
6 the effect of reducing the City's preexisting water rights, making it necessary for the Court to
7 decide whether Ecology violated the City's constitutional right to due process, because the City
8 was not notified of the resulting reduction of preexisting water rights or given a meaningful
9 opportunity to challenge that reduction. Finally, if the Court does not reconsider its Declaratory
10 Ruling No. 2, then it also becomes necessary for the Court to interpret the 1994 Stipulation as to
11 the parties' intent regarding the City's preexisting water rights concurrent with the 1995
12 decisions. This intent is material to the question of whether the Department of Ecology was
13 authorized by the City to determine or reduce its preexisting water rights as a consequence of the
14 1995 ROEs and Permits.

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

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

22 II. PROCEDURAL HISTORY

23
24 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
25 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.

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

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

17 The City’s declaratory judgment case doesn’t challenge or seek to modify or set aside the
18 1995 decisions; rather, it challenges Ecology’s recent determination that the annual quantity of
19 Certificate 8105 was limited by those decisions and Ecology’s authority to determine or reduce
20 the quantity of the City’s preexisting water rights for purposes other than deciding the City’s
21 applications for new water rights, especially its authority to reduce the City’s preexisting “pumps
22 and pipes” water right certificate. Put another way, the Principal Issue in this case under the
23 Declaratory Judgments Act is whether Ecology’s tentative determinations and cap conditions in

24 ⁶ Cecka Decl. ¶¶ 5-7; McCauley Decl. ¶¶ 16-18; Varella Decl. ¶¶ 3-5.

25 ⁷ Cecka Decl. ¶ 14; McCauley Decl. ¶ 34.

26 ⁸ The Department of Ecology, acting through its legal counsel, agreed to this declaratory judgment procedure as the
27 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.

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

13 III. GROUNDS FOR RECONSIDERATION

14 A. Reconsideration Standards

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

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

24 1. Declaratory Ruling No. 2 is inconsistent with Ruling No. 1 and erroneous to
25 the extent that it permits Ecology to do what it has no authority to do -- determine,
26
27

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

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

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

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

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

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

21 **IV. DISCUSSION**

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

25 It is uncontested that Certificate 8105 was issued based on the former "pipes and pumps"
26 administrative policy of certifying water rights once works for diverting and distributing water
27 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

1 declaration: "Theoretically, the City could have used the Certificate 8105 water right to divert 1.5
2 cfs from Icicle Creek continuously, so long as the diverted water was put to beneficial use."¹⁰

3 Ecology's expert witness Robert Barwin agreed with this premise and also admitted that
4 Certificate 8105 was a "pumps and pipes" certificate.¹¹ Another former Ecology employee, Jill
5 Van Hulle, reviewed Ecology's files concerning Certificate 8105 and agrees that it authorizes a
6 continuous diversion of 1.5 cfs so long as the diverted water is put to beneficial use. She also
7 declared that the application and application supporting documents in Ecology's files
8 demonstrate that, at the time this water right was issued, it was intended to supply the City's
9 future growth demands up to the full potential instantaneous quantity (Qi) (1085.95 AFY).¹²
10 Over the years, the City perfected most of the 1085.95 acre-feet attributable to Certificate 8105,
11 including a total quantity of 1748 AFY in 1987.¹³ The City continued to plan for the growth of
12 its water system to serve new customers, and demonstrated future demand projections for the full
13 annual quantity of this water right.¹⁴

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

21 ⁹ Pors Decl., ¶ 9 and Exh. E; Van Hulle Decl., ¶ 12.

22 ¹⁰ Hirshey Decl., ¶ 6. Another former Ecology employee, Jill Van Hulle, reviewed Ecology's files concerning
23 Certificate 8105 and agrees that it authorizes a continuous diversion of 1.5 cfs so long as the diverted water is put to
24 beneficial use. She also declared that the application and application supporting documents in Ecology's files
25 demonstrate that, at the time this water right was issued, it was intended to supply the City's future growth demands
26 up to the full potential instantaneous quantity (Qi) (1085.95 AFY). Van Hulle Decl., ¶¶ 10 and 12.

27 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.

1 imposed on Grand Coulee City when it approved a change to that city's water right certificate in
2 2004. Citing RCW 90.03.330, Ecology revoked its previous limitation on annual quantity and
3 determined that the city's water right certificate 3397, originally issued without an annual
4 quantity limit like Leavenworth's Certificate 8105, had an annual quantity equal to its continuous
5 diversion, precisely what Leavenworth is seeking in this case.¹⁶ It is perplexing to the City that
6 Ecology has steadfastly refused to take the same action with Leavenworth that it took with Grand
7 Coulee City – *i.e.*, to agree that it had no authority to impose an annual quantity limitation on
8 Certificate 8105.

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

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

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

¹⁶ Van Hulle Decl., ¶ 9.

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

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

- 17 1. Ecology cannot determine the validity or quantity of a city’s preexisting water
18 rights, or diminish them, absent an adjudication or an application to change the
19 water right in question. *Rettkowski v. Ecology*, 122 Wn.2d at 227; RCW
20 90.03.330(2).
- 21 2. When a new water right is applied for by a city with a portfolio of existing water
22 rights, the new water right can be conditioned as to instantaneous and annual
23 quantity so long as it does not violate the preceding rule. Ecology can determine,
24 at the time of the new water right decision, the total amount of water that can be
25 used from the new water right and all preexisting water rights, but that limitation

26 ¹⁷ See Plaintiff’s Motion for Partial Summary Judgment, at pp. 28-36; Plaintiff’s Response to Ecology’s Motion for
27 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.

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

- 3 3. To illustrate these two rules, Ecology could legitimately determine as a condition
4 of the 1995 ROEs and Permits that Leavenworth's projected 20-year growth
5 demands could be met by a total annual quantity of 1465 AFY, and that limitation
6 applies, along with the respective instantaneous quantity limits, to water right
7 permits S4-28812 and G4-29958. Once the City uses a total of 1465 acre-feet of
8 water in a given year from any combination of sources, permits S4-28812 and G4-
9 29958 can no longer be used to divert water for municipal purposes, until the
10 following year. However, the City's preexisting water rights, including Certificate
11 8105, can continue to be utilized in that year for municipal purposes so long as
12 they are in good standing and have available annual capacity that is either
13 perfected or inchoate. Thus, for example, if the City's accumulated total water
14 usage in a given year from all sources reaches 1465 acre-feet on October 1st, the
15 wells authorized by permit G4-29958 could not be used, and the additional
16 instantaneous quantity of 3.18 cfs from permit S4-28812 could not be diverted
17 from Icicle Creek until the next year. This would restrict the City to a withdrawal
18 from Icicle Creek up to 3.02 cfs for the remainder of the year (a reduction from
19 6.20 cfs) under its preexisting water rights.

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

1 primary water rights (the remainder was supplemental to existing rights) granted to the City in
2 permits S4-28812 and G4-29958 if Ecology's tentative determination and annual quantity
3 limitation was not an enforceable limitation of Certificate 8105. The preceding illustration
4 debunks that myth and demonstrates that there is no scenario in which permits S4-28812 and G4-
5 29958 could be used to exceed the 1465 AFY of water rights that Ecology determined in 1995
6 was needed for the City's 20-year growth forecast. Once the 1465 acre-feet limit is reached,
7 those permits could no longer be used. The 1995 permits are limited by the 1465 AFY annual
8 limitation, and the City is not challenging that limitation for those permits.¹⁹

9 It must be noted that Ecology's practice of limiting municipal quantities of water to a
10 specific future growth forecast or water use efficiency standard (water duty) has changed and
11 evolved over the years, and Ecology no longer possesses exclusive jurisdiction over what usage
12 of water is reasonable.²⁰ Cities also do not arbitrarily stop growing when they reach a certain
13 date or an arbitrary quantity of projected water usage set forth in a decades old water right permit.
14 Prompted by the Growth Management Act and their own economic development goals, cities are
15 constantly planning their next water sources to meet future needs. It is also true that it has
16 become harder and harder to obtain new water supplies via additional water rights because of
17 instream flow regulations and in some cases over-appropriation of water, and due to rapidly
18 developing scientific analyses used to determine impacts or impairment to existing rights. That
19 is why the Legislature protected existing municipal inchoate water rights represented by pumps
20 and pipes certificates in the Municipal Water Law, so that the water rights already allocated to
21 municipal water systems are not arbitrarily diminished by administrative actions of Ecology. The
22 Supreme Court held that RCW 90.03.330 was a constitutional exercise of the Legislature's
23 authority to resolve uncertainties concerning municipal water rights and ambiguities in the Water
24 Code. *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247, 241 P. 3d 1220 (2010). It
25 would be inconsistent with the Municipal Water Law and Supreme Court precedent to find that
26 Ecology had authority to diminish the City's preexisting water rights via the total annual quantity
27

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.

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

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

8 2. That under RCW 90.03.290, Ecology is authorized to approve an
9 application for a new water right permit with a condition that limits the total
10 annual quantity of water that may be used by the applicant under the applicant’s
11 entire portfolio of water rights, including the new permit and all preexisting water
12 rights. This authority does not include the authority to adjudicate or reduce
13 preexisting water rights. Therefore, under RCW 90.03.290, Ecology was
14 authorized to include a condition limiting allowing the use of Permits G4-29958
15 and S4-28812 only until the total annual quantity of water that may be used by the
16 City under all of the City’s water rights reaches 1,465 acre-feet per year as a
17 condition in Ecology’s 1995 revised approvals of the City’s water right Permit
18 Application Nos. G4-29958 and S4-28812. This condition in Ecology’s 1995
19 revised approvals of the City’s water right application nos. G4-29958 and S4-
20 28812 does not and cannot alter the inchoate or perfected quantity of the City’s
21 preexisting water rights. The Court interprets the 1,465 acre-feet per year
22 language in Permit Nos. G4-29958 and S4-28812, and the Amended Reports of
23 Examination (ROEs) associated with those permits, as a condition limiting the use
24 of those permits until the total annual quantity of water usage by the City under
25 the new permits and all preexisting water rights reaches 1,465 acre-feet per year.
26 ~~as a condition of approval authorized by RCW 90.03.290;~~

20 **C. The City’s Declaratory Judgment Action is not a Belated Appeal of the 1995**
21 **Decisions.**

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

26 ²¹ See Appendix B, at pp. 6-7.

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

10 Declaratory Ruling No. 4 also provides "in the event of a future water-related dispute,
11 litigation, or adjudication, Ecology cannot necessarily rely on its tentative determination of the
12 annual quantity of Certificate 8105." This declaratory judgment action is such a future water-
13 related dispute. It relates to the Principal Issue, not the conditions of the 1995 decisions. In
14 Declaratory Ruling No. 3 of the July 19 Order, the Court ruled correctly that res judicata is not
15 applicable to Ecology's tentative determinations in those decisions because final determinations
16 of the extent and validity of water rights can only be made through a general adjudication. If
17 Ecology's tentative determinations are not binding in a future water-related dispute or litigation,
18 then the Court can and should rule that Ecology's tentative determinations and cap conditions are
19 enforceable limits on the quantity of permits S4-28812 and G4-29958, but not on Certificate
20 8105 or the City's other preexisting water rights.

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

23 4. That under RCW 43.21B.230(1) and 43.21B.310(4), Ecology's decisions
24 on permit applications must be appealed to the Pollution Control Hearings Board
25 (PCHB) within 30 days of receipt. Because the City received the Amended ROEs
26 and permits in 1995 and failed to timely appeal those decisions to the PCHB, the
27 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

1 City can use each year under its collective water rights (to 1,465 acre-feet per
2 year), reporting requirements, and well construction requirements are interpreted
3 as prohibiting the use of the additional water sources approved in Permit Nos. G4-
4 29958 and S4-28812 after the City's total annual water usage reaches 1,465 acre-
5 feet, until the next calendar year. Because Ecology had no authority to reduce the
6 City's preexisting water rights in the ROEs and Permits for G4-29958 and S4-
7 28812, the City may use its other water rights, including Certificate 8105,
8 notwithstanding the conditions in the 1995 ROEs and Permits. The Court does
9 not make any decision in Phase I of this case regarding the annual quantity of
10 perfected and inchoate water rights under Certificate 8105, but does rule that the
11 275 acre-feet per year tentative determination and 1465 acre-feet per year annual
12 limitation in Permits G4-29958 and S4-28812 is not a limitation on the City's use
13 of Certificate 8105.²² Although Ecology's tentative determination of the annual
14 quantity of Certificate No. 8105 does not have any res judicata effect, the Court
15 interprets the City's declaratory judgment claim as a belated appeal of the
16 condition limiting the annual quantity of the City's water rights described in
17 Declaratory Order No. 2, above, that is barred by the 30-day statute of limitations
18 of RCW 43.21B.230(1) and 43.21B.310(4). However, in the event of a future
19 water-related dispute, litigation, or adjudication, Ecology cannot necessarily rely
20 on its tentative determination of the annual quantity of Certificate No. 8105 as
21 being binding;

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

25 The City conditionally requests reconsideration of Declaratory Ruling No. 5 if the Court
26 does not reconsider and revise Declaratory Ruling Nos. 2 and 4 as requested above. As
27 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.

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

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

25 ²³ Pors Decl., Exh. J, p. 123:15 to p. 125:1 (dep. of Daniel J. Haller, P.E.).

26 ²⁴ Cecka Decl., ¶ 6; McCauley Decl., ¶ 17; Varela Decl., ¶ 5.

27 ²⁵ See Footnote 7, above.

28 ²⁶ Cecka Decl., ¶¶ 6-7; McCauley Decl., ¶¶ 18-19; Larsen Decl., ¶ 15.

29 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.

1 quantity of Certificate 8105.³⁰ Thus, Ecology provided notice of a decision and appeal rights
2 relating to the two new applications, but not relating to the City's existing water rights. This was
3 a valuable property right of Leavenworth citizens, taken without notice or an opportunity to be
4 heard or to appeal. This lack of notice is one of the bases for the City's due process claims. See,
5 Second Amended Complaint, ¶¶ 4.21 – 4.22, 6.9 – 6.10, 6.12, and relief ¶¶ 3, 7.

6 The legal basis for the City's due process claims is set forth in its Second Amended
7 Complaint (see above sections) and at pp. 46-49 of Plaintiff's Motion for Partial Summary
8 Judgment, and is not repeated here. To summarize, water rights are important property rights
9 protected by the U.S. Constitution, Fourteenth Amendment and the Washington Constitution,
10 Article 1, section 16, and a city cannot be deprived of its water rights without due process of law.
11 *Bach v. Sarich*, 74 Wn. 2d 575, 445 P.2d 648 (1968). Due process requires a notice of
12 government action and an opportunity to be heard prior to any final agency action. In this regard,
13 basic notions of due process and fundamental fairness required Ecology to provide the City with
14 notice that it was diminishing its water rights and give the City the opportunity to challenge that
15 determination. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (“[t]he
16 opportunity to present reasons, either in person or in writing, why a proposed action should not
17 be taken is a fundamental due process requirement.”). Without notice that its preexisting water
18 rights were being limited or reduced, the City was unaware of this potential consequence of the
19 1995 decisions and was precluded from preparing any defense to such action or seeking review.

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

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

³⁰ Pors Decl., Exh. W.

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

11 "D. Leavenworth has existing water rights *which are not the subject of, nor affected*
12 *by, this appeal*, to wit:

13 3) *Surface Water Certificate No. 8105* (Certificate Record No. 17, page no.
14 8105) authorizes diversion of 1.50 cfs from Icicle Creek and seepage waters from
15 an infiltration gallery adjacent to the creek channel for the purposes of municipal
16 supply. The priority date is June 20, 1960.³¹ (Emphasis added)

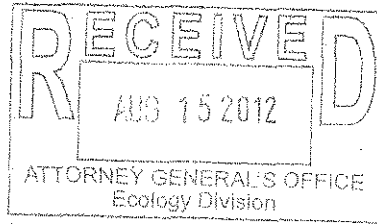
17 At a minimum, the Court should incorporate into the final order its interpretation of the
18 1994 Stipulation and Order as evidence of the parties' unambiguous intent that the City's
19 existing water rights, including Certificate 8105, would not be affected by the appeal and
20 subsequent issuance of the ROEs and permits for applications G4-29958 and S4-28812. This
21 would be consistent with a plain meaning interpretation of the 1994 Stipulation and Order. See
22 Plaintiff's Motion for Partial Summary Judgment, at pp. 50-52.³²

23 V. CONCLUSION AND RELIEF REQUESTED

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

25 ³¹ Pors Decl., Exhibit M.

26 ³² If the Court does interpret the 1994 Stipulation but finds that the City agreed to a reduction of its existing water
27 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.



FILED
AUG 13 2012
Kim Morrison
Chelan County Clerk

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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

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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.

1 Contrary to the City's arguments, the City's "principle issue" was squarely and
2 correctly resolved by the Court in the Memorandum Opinion and its rulings on the scope of
3 Ecology's authority are accurately spelled out in Declaratory Rulings Nos. 1 and 2 in the
4 Order. In evaluating the City's water permit applications, Ecology had authority under RCW
5 90.03.290 to tentatively determine the maximum annual quantity (Qa) of the City's preexisting
6 water rights, including Certificate 8105, which does not specify a maximum Qa. Based on this
7 authority, it was lawful for Ecology to include a Qa limit provision, as a condition of the City's
8 new Permit Nos. S4-28812 and G4-29958. This condition set an annual cap on the City's
9 exercise of all its water rights, including Certificate 8105, which the City must comply with in
10 order to be able to utilize its two new permits. While Ecology cannot limit or reduce
11 preexisting water rights when it performs tentative determinations and crafts annual cap
12 conditions while processing and deciding on water right applications, it did not reduce
13 Certificate 8105 because it does not specify a Qa and no determination, either judicial or
14 administrative, had ever been made to ascertain a Qa for the certificate.¹

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

24 ¹ The City's phrasing of the so-called "principle issue" is inappropriate because it presupposes that
25 Ecology limited or reduced the City's preexisting water rights in a scenario where no Qa figure had ever been
26 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.

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

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

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

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

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

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

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

15 II. RESPONSE TO CITY'S "PROCEDURAL HISTORY"

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

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

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

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

12 The City's contention that, under Declaratory Rulings Nos. 3 and 4, the present case
13 involves a "future water-related dispute" that is not subject to the expired statute of limitations
14 for Ecology's 1995 decisions, is not persuasive. Such a future dispute would arise either when
15 there is a basin adjudication water rights in superior court, or Ecology performs a tentative
16 determination in the context of a water right decision that constitutes an action that can be
17 appealed to the PCHB. There is no such action that has been appealed in this case. The City
18 argues that this dispute relates to Ecology's opposition to the City's 2008 water system plan
19 amendment request to the Department of Health (DOH),⁴ but Ecology did not make any
20 tentative determination of the validity and extent of the City's water rights, and issued no
21 appealable administrative decision, in association with that matter. The tentative determination
22

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

26 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.

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

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

6 III. ARGUMENT

7 A. Reconsideration Is Not Warranted Because Ecology's Tentative Determination Of 8 The Validity And Extent Of Certificate 8105 And The Associated Annual Cap 9 Condition For The Permits Complied With the Law

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

18 The City's reliance on RCW 90.03.330(3), a provision enacted as part of the MWL, is
19 misplaced for two reasons. First, the City is mistaken that Ecology somehow acted outside its
20 authority in 1995 by allegedly violating a statute that did not even exist until 2003.
21 RCW 90.03.330(3) applies to municipal water rights which were issued prior to 2003 based on
22 system capacity rather than the actual beneficial use of water (so-called "pumps and pipes"
23 certificates). Thus, the statute has retroactive effect with respect to such water right certificates
24 and Ecology was required *after* the effective date of the statute on September 9, 2003, to apply
25 this new law when it takes any administrative actions relating to such certificates. But the
26 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

1 Amended ROEs. The City erroneously contends that the present dispute relates to the City's
2 2008 proposal to amend its water system plan, five years after the effective date of
3 RCW 90.03.330(3). But this dispute relates to the validity and effect of the tentative
4 determination and cap conditions in the Amended ROEs, which were reported in the City's
5 water system planning documents in 2002 and 2008. This case does not involve any
6 appealable administrative action taken by Ecology in regard to the City's 2008 water system
7 plan amendment proposal because Ecology had no decision-making role in that process. DOH,
8 and not Ecology, is the agency which issues decisions to approve or deny proposed water
9 system plans. RCW 70.119A; WAC 246-290-100.

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

21
22
23 ⁵ The scenario discussed in the City's motion involving a water right held by Grand Coulee City is
24 immaterial to this case, and does not lend support to the City's position. The permitting decision involving Grand
25 Coulee City supports Ecology's position and reflects a tentative determination based on reasonable beneficial use
26 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.

1 The City is wrong in contending that Ecology "reduced" the Qa authorized under
2 Certificate 8105 because the City had a right to use up to 1,085 acre-feet per year based on the
3 specified Qi of 1.5 cfs. The quoted passage from one of Stephen Hirschey's declarations states
4 that "[t]heoretically, the City could have used the Certificate 8105 water right to divert 1.5 cfs
5 from Icicle Creek continuously, so long as the diverted water was put to beneficial use."
6 Declaration of Stephen Hirschey in Support of City's Motion, ¶ 6 (emphasis added). In
7 actuality, continuous diversion under Certificate 8105 to supply the needs of the City at the
8 time it applied for its new permits would have been extremely wasteful, and would not have
9 constituted the beneficial use of water.⁶ Declaration of Daniel R. Haller (Haller Decl.), ¶¶ 17,
10 22, 23; Declaration of Alan M. Reichman in Support of Ecology's Memorandum in Response
11 to City of Leavenworth's Motion for Partial Summary Judgment (Second Reichman Decl.),
12 Ex. 3 at 170, ll. 4-14 (Dep. of Douglas Clausing); Ex. 4 at 155, l. 18 through 156, l. 2 and 162,
13 l. 8 through 163, l. 1 (Dep. of Daniel R. Haller).

14 In asserting that "[t]he application demonstrates an intention to use 1.5 cfs year-round
15 for growth, up to the full potential [Qa] of 1,085 acre-feet," the City omits an important fact.
16 See City's Motion at 6. The application for Certificate 8105 also states that the City intended
17 to serve a population of 2,500 through exercise of the requested water right at a water duty of
18 490 gallons per capita per day. Declaration of Thomas M. Pors, Ex. E. That would require
19 much less water than 1,085.5 acre-feet per year, especially in light of the fact that the City
20 already held two other water rights at that time. See Haller Decl., ¶ 17. The population figure
21

22 ⁶ Even if the City could demonstrate that they used more than 275 acre-feet per year of water under
23 Certificate 8105 prior to Ecology's performance of its determination of the extent and validity of the water right
24 when it evaluated the City's permit applications, merely pumping a quantity of water would not necessarily
25 demonstrate that water was actually put to beneficial use. *Department of Ecology v. Grimes*, 121 Wn.2d 459,
26 471-72, 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.

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

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

9 The City also wrongly contends that, without the language they are requesting the
10 Court to add to Declaratory Ruling No. 2, Ecology could use "the tentative determinations and
11 cap conditions to circumvent the general adjudication process by conducting piecemeal
12 adjudications of municipal pumps and pipes certificates" City's Motion at 8. To the
13 contrary, by performing tentative determinations when it processes water right applications,
14 Ecology does not evade the superior court general adjudication process. After all, *final*
15 determinations of the extent and validity can only be made through that judicial process. By
16 performing tentative determinations, Ecology can process individual applications for new
17 permits or changes of existing water rights without waiting for a general adjudication of all the
18 water rights in a basin to be commenced and completed. Without such a tentative
19 determination function, water rights permitting in this state will come to a standstill. Indeed,
20 the revision requested by the City would cast a cloud of uncertainty over numerous water right
21 permits that have been approved by Ecology through tentative determinations, and will
22

23 ⁷ Ecology has considered the maximum Qi to be a "peaking rate," where the full Qi is pumped only
24 during periods when there is a high demand for water, such as during the summer when citizens are irrigating
25 their lawns and gardens, or to flush or charge a water system, but not on a year-round continuous basis.
26 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).

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

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

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

11 Contrary to the City's argument, there is no conflict between Declaratory Orders Nos. 1
12 and 2 based on the inclusion of the phrase "[t]his authority does not include the authority to
13 reduce preexisting water rights," in both paragraphs. The language in Declaratory Order No. 2
14 stating "[t]he Court interprets the 1,465 acre-feet per year language in Permit Nos. G4-29958
15 and S4-28812, and the Amended Reports of Examination (ROEs) associated with those
16 permits, as a condition limiting the total annual quantity of water usage by the City under the
17 new permits and all preexisting water rights as a condition of approval authorized by RCW
18 90.03.290" does not cause any such conflict because the cap condition did not cause any
19 "reduction" in Certificate 8105. This argument wrongly presupposes that Certificate 8105
20 authorizes a maximum Qa of 1,085.95 acre-feet per year (or some other figure greater than
21 275 acre-feet per year) when the certificate actually does not specify any Qa figure. Nothing is
22 reduced in a situation where a Qa figure has to be ascertained in the first place.

23 The City maintains that "the July 19 Order violates the proscription against determining
24 and reducing existing rights by interpreting the 1,465 acre-feet language in Permits G4-29958
25 and S4-28812 as a condition limiting the total annual quantity of water usage by the City under
26 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

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

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

6 I recommend that a permit be issued to the City of Leavenworth permitting the
7 withdrawal and beneficial use of up to 3.18 cfs (additional primary
8 instantaneous), 636 acre-feet (assuming operation at full capacity for up to 100
9 days, with up to 546 acre-feet per year of this 636 acre-feet per year to be
10 supplemental to existing City rights, and up to 90 acre-feet per year of this 636
11 acre-feet per year to be a primary right but not in addition to the 90 acre-feet of
12 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.

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

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

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

25 Declaratory Judgment No. 2 should not be revised as requested by the City because it is
26 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

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

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

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

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

22 The City's second rule is incorrect because it proposes a type of cap provision that
23 could only affect the new water rights, but would have no effect on the permit applicant's
24 exercise of its preexisting water rights. If the limitation cannot apply to the preexisting water
25 rights, then there was no way for Ecology to ensure that the applications for new permits met
26 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

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

5 The City's illustration of how its two suggested rules would operate with respect to the
6 City's water rights shows how its approach is legally flawed, and, thus, why its motion for
7 reconsideration fails. The City asks for the annual cap condition to be interpreted to mean that
8 up to 1,465 acre-feet per year could be used under the new permits and their preexisting rights,
9 including Certificate 8105. This would operate so that when the City reaches 1,465 acre-feet
10 per year, they could then continue to exercise the preexisting rights to surpass the 1,465 acre-
11 feet annual total. In effect, there would be no annual quantity limit at all. The City effectively
12 would be able to use up to 2,275 acre-feet of water per year, based on being able to use 1,085
13 acre-feet per year under Certificate No. 8105 by pumping 1.5 cfs from Icicle Creek on a 365-
14 day per year, twenty-four hour per day basis. This would allow the City to divert an additional
15 810 acre-feet per year of water from Icicle Creek by taking the lid off the annual cap condition
16 and interpreting it to mean something it does not actually say.⁸

17 The City's suggested revisions to Declaratory Judgment No. 2 would conflict with the
18 correct legal analysis in the Memorandum Decision with respect to Ecology's tentative
19 determination authority under RCW 90.03.290. See Memorandum Decision at 3-4. Further, as
20

21 ⁸ The City recognizes that the annual quantity figure tentatively determined in the Amended ROEs was
22 based on its projected 20-year population growth and the associated future increase in demand for water. The
23 City had the opportunity to appeal the decisions that were based on that permitting approach, but did not appeal,
24 and now wants to revise those decisions to obtain the right to water to serve growth beyond the 20-year period.
25 While this is not a legally viable approach, there are several other ways for the City to obtain additional water
26 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.

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

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

8 The City requests revision of Declaratory Ruling No. 4, and asserts that "the City is not
9 challenging the 1995 decisions and does not seek to change them in any way; therefore the
10 City's declaratory judgment action should not be characterized as a belated appeal." City's
11 Motion at 12. The City first requests that Declaratory Ruling No. 4 be revised to state that the
12 cap condition in Permit Nos. S4-28122 and G4-29958 only applies to those two water rights,
13 but not to the City's preexisting water rights, including Certificate No. 8105. Then the City
14 proceeds to request deletion of the language in Declaratory Ruling No. 4 stating that the Court
15 interprets the City's declaratory judgment claim as a belated appeal of the cap condition in the
16 Amended ROEs and permits that is barred by the statute of limitations. See City's Motion at
17 13.

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

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

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

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

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

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

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

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

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

17
18 ⁹ While Ecology has chosen not to file a motion for reconsideration of the Order, Ecology reserves the
19 right to appeal any portion of the Order, or the Court's decision on the City's Motion, after the Court issues its
20 final ruling in this case.

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

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

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

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

9 If the Court does not reconsider and revise Declaratory Rulings Nos. 2 and 4, then the
10 City requests the Court to reconsider Declaratory Ruling No. 5, and to revise it to rule either
11 that Ecology violated the City’s constitutional right to due process when it issued the 1995
12 Amended ROEs and permits, or that a trial be held on the due process issue. This request for
13 reconsideration should be denied. If the Court does not reconsider Declaratory Rulings Nos. 2
14 and 4, then the Court should not alter its ruling, based on Declaratory Rulings Nos. 1 through
15 4, that “it is unnecessary to determine whether Ecology violated the City’s constitutional right
16 to due process when Ecology issued its decisions on the City’s water right permit
17 applications.” And if the Court determines that it should reach the due process issue, summary
18 judgment should be granted to Ecology because the language contained in Ecology’s decisions
19 clearly provided the City with notice and the opportunity to be heard through an appeal to an
20 independent quasi-judicial tribunal, the PCHB.

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

23 That under RCW 43.21B.230(1) and 43.21B.310(4), Ecology’s decisions on
24 permit application must be appealed to the Pollution Control Hearings Board
25 (PCHB) within 30 days of receipt. Because the City received the Amended
26 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

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

3 The Amended ROEs and permits govern, and the City received them from Ecology but
4 decided not to appeal them. Any due process claim would have had to have been brought
5 under an appeal at that time, either in the initial appeal to the PCHB, or on judicial review in
6 court from the PCHB's decision. RCW 43.21B.110(1)(d); RCW 43.21B.180; RCW
7 43.21B.230; RCW 43.21B.310(4); RCW 34.05.514(1); RCW 34.05.570(3). The Amended
8 ROEs cannot be attacked on due process grounds over 14 years after they were issued by
9 Ecology and received by the City.

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

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

20 Downes Decl., Exs. 17, 18.¹²

21 The City's contention that "Ecology provided notice of a decision and appeal rights
22 relating to the two new applications, but not relating to the City's existing water rights" is
23 contradicted by the specific language in the ROEs and permits stating: "The primary
24 allocation of up to 90 acre-feet per year shall be perfected to the extent of actual use in excess
25 of 1,375 acre-feet per year allocated under pre-existing water rights. . . ." Downes Decl.,
26 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.

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

8 To comport with the constitutional right to due process, an agency must provide notice
9 and the opportunity for a hearing appropriate to the nature of the case. *Ståte v. Nelson*, 158
10 Wn.2d 699, 703, 147 P.3d 553 (2006) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*,
11 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)); *Motley-Motley, Inc. v. State*, 127 Wn.
12 App. 62, 79, 110 P.3d 812 (2005) (citing *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607,
13 612, 70 P.3d 947 (2003)). For appeals of water right decisions issued by Ecology, the PCHB
14 provides the opportunity for a full evidentiary hearing that includes the testimony of witnesses
15 and presentation of evidence. WAC 371-08-475; *Motley-Motley*, 127 Wn. App. at 79; *see also*
16 Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for
17 Partial Summary Judgment at 30-31.

18 The City received the decision documents, and based on the content of the Amended
19 ROEs, and the letter stating that the City had the right to appeal the decisions to the PCHB, the
20 City plainly was provided "notice" of its right to appeal and seek an opportunity to be heard
21 before the PCHB. Further, it is also abundantly clear that the City was provided an
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23 ¹³ Moreover, after the Agreement was entered in the PCHB and before the Amended ROEs were issued,
24 Ecology provided draft versions of the Amended ROEs to the City for its review, to ensure that the City was
25 satisfied that they were written properly to carry out the Agreement. Downes Decl., Ex. 15 ("The enclosed draft
26 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.").

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

5 The actual facts in this case contradict the City's assertion that Ecology provided no
6 notice to City officials that the annual cap provision in the Amended ROEs and permits would
7 be a binding condition that the City would have to comply with in order to be able to exercise
8 its two new permits, G4-29958 and S4-28818. *See* City's Motion at 14-16. The City's
9 contention that there was inadequate notice to the City and that "the City understandably
10 believed that Ecology was merely stating a fact with regard to the annual quantity of
11 Certificate 8105, not making an appealable determination . . ." is not factually supported. *See*
12 Department of Ecology's Memorandum in Response to City of Leavenworth's Motion for
13 Partial Summary Judgment at 5-8.¹⁴

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

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20 ¹⁴ The City's contention that "City officials trusted Ecology to know these things and report them
21 accurately," also does not support the City's position. As Douglas Clausen, the former Section Manager for
22 Water Resources in Ecology's Central Regional Office, explained during his deposition, it is the responsibility of
23 a water right permit applicant to analyze and understand the meaning and effect of Ecology's application
24 decisions. Second Reichman Decl., Ex. 2 at 23 ll. 8-11 ("I think it's incumbent upon the applicant to scrutinize
25 what all the verbiage in that ROE is actually and take issue with anything that compromises their position.");
26 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.

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

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

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

20 In light of the language in Declaratory Ruling No. 4 quoted in the immediately
21 preceding section of this brief relating to the due process issue, there is no reason for the Court
22 to reach the contract interpretation issue. Like with the City's due process claim, the Amended
23 ROEs govern, and the City failed to timely appeal them. In effect, the content of the
24 Agreement is irrelevant because even if the Court were to find that the Amended ROEs and
25 their annual cap provision are contrary to the Agreement, the Amended ROEs and permits
26 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,

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

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

16 VI. CONCLUSION

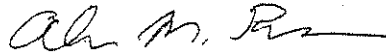
17 Based on the foregoing, Ecology respectfully requests the Court to deny the City's
18 Motion for Reconsideration. The Order on Parties' Cross-Motions for Summary Judgment
19 accurately effectuates the Court's Memorandum Decision, which is well-reasoned and soundly
20 based on the applicable law. Accordingly,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

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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."

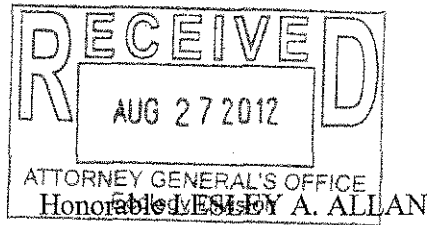
1 DATED this 10th day of August, 2012.

2 ROBERT M. MCKENNA
3 Attorney General

4 

5 ALAN M. REICHMAN, WSBA #23874
6 Assistant Attorney General

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8 State of Washington
9 Department of Ecology
10 (360) 586-6748



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

3 The circular logic behind Ecology's arguments proves that the Principal Issue in this case
4 has not been decided, which necessitates reconsideration of the July 19 Order. The Principal
5 Issue in this case is whether Ecology had authority, for purposes other than deciding and
6 conditioning applications S4-28812 and G4-29958, to determine, limit or reduce the quantity of
7 Leavenworth's preexisting inchoate and perfected water rights. Despite Ecology's bare
8 assertions to the contrary, there is no statutory or case authority in support of its position that it
9 has such authority. Ecology simply did not and does not have authority to limit or reduce a water
10 right applicant's pre-existing water rights when deciding an application for new water rights.
11 The July 19 Order correctly provides that Ecology can make "tentative determinations" for
12 purposes of deciding the new applications, and it can impose conditions on the exercise of new
13 water rights in order to meet the four-part test of RCW 90.03.290. However, the July 19 Order
14 should be revised on reconsideration to clearly decide that Ecology's tentative determinations
15 and annual quantity limitations in the 1995 ROEs and permits are not legally binding limits on
16 the annual quantity of Certificate 8105 or upon the aggregate annual quantity of the City's
17 preexisting water rights but only on the City's withdrawals under Permits S4-28812 and G4-
18 29958.

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

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

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

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

6 Ecology also uses a flawed argument that it did not reduce Leavenworth's existing water
7 rights because Certificate 8105 was limited to serving only 2500 people. That argument is based
8 on a false assumption that a population number in the application document for Certificate 8105
9 limited that water right to supplying a population of 2500 people, and that the use of more than
10 275 AFY would be unreasonable given that limitation. That argument is plainly wrong because
11 population numbers in water right documents are not limitations on the exercise of municipal
12 water rights. RCW 90.03.260(5) makes clear that, "the population figures in the application or
13 any subsequent water right document are not an attribute limiting exercise of the water right"
14 Ecology ignored this statute in its Response and instead cites to declarations to the contrary. A
15 declaration cannot override a statute and in this case the statute makes Ecology's declarations and
16 argument irrelevant.

17 Ecology next argues that even if Leavenworth could demonstrate that it used more than
18 275 AFY under Certificate 8105 before Ecology's tentative determination,² that doesn't prove
19 the City's use was beneficial, and Ecology notes the issuance of a 1988 notice of violation to the
20 City relating to excessive use of water. This is very misleading, because Ecology never made
21 any findings that Leavenworth wasted water or exceeded a reasonable usage of water, Ecology
22 did not specify a quantity of water usage that was reasonable, and the notice of violation was
23 resolved years before Ecology's decisions on applications S4-28812 and G4-29958.³ In fact, the

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

26 ² The Declaration of Mark J. Varela, P.E., at ¶7 and Ex. A, demonstrates that Leavenworth used an average of 1688
27 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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1 notice Ecology referred to pertained to the usage of excessive instantaneous quantity (Qi) and
2 had nothing whatever to do with the annual quantity or annual usage – Qa – of Leavenworth’s
3 water rights. The issues in this case, especially the Principle Issue, concern only Qa – the annual
4 quantity of water rights. This case does not concern Qi – instantaneous quantity measurements
5 of water. The Court should not be misled by these red herring waste issues, which are only an
6 attempt by Ecology to obscure the fact that its tentative determination and cap condition would
7 definitely reduce the City’s existing water rights if they were applied to those rights.

8 Ecology treated other municipal water rights that lacked a Qa number in the certificate
9 (e.g., Grand Coulee City’s Certificate 3397) consistently with the City’s position in this case, and
10 admitted in official documents that it had no authority to reduce the annual quantity of those
11 rights below the inchoate right reflected by a continuous withdrawal.⁴ In its Response at footnote
12 5, Ecology misleads the Court by contending that the Grand Coulee City example is immaterial,
13 but that argument is also based on the false conclusion that Leavenworth’s water rights could
14 only be used to supply a population of 2500 persons. The declaration making that misleading
15 argument was also disputed by the City. Ecology’s 2004 decision relating to Grand Coulee City
16 reinstated the full potential Qa of its Certificate 3397 to 1302 AFY, the annual quantity that
17 equals usage of 1.8 cfs continuously throughout the year, and reversed a previous “aggregate
18 cap” of 806.4 AFY on the annual quantity of all the city’s water rights that was included in a
19 1974 ROE. Ecology’s rationale in its 2004 decision was that the Municipal Water Law, RCW
20 90.03.330(3), prevented Ecology from revoking or diminishing pumps and pipes certificates.⁵
21 This is exactly analogous to Leavenworth’s argument about Certificate 8105. In both cases
22 Ecology imposed an aggregate cap as a condition on a new water right that was less than the full
23 inchoate quantity represented by preexisting water rights, including a certificate that did not
24 specify a Qa number. In both cases this cap condition was imposed prior to the passage of the
25 Municipal Water Law. In Grand Coulee City’s case, however, Ecology later admitted that it did

26 ⁴ Van Hulle Decl., ¶ 9.

27 ⁵ Second Van Hulle Decl., ¶ 14.

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

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

18 For purposes of deciding applications S4-28812 and G4-29958 in 1993 and 1995,
19 Ecology had to make a tentative determination of the quantity of the City's existing water rights.
20 That is how Ecology determined that Leavenworth needed, at most, 90 additional acre-feet of Qa
21 to meet what was then its 20-year growth projection for serving a population of 3,823 persons.
22 What Ecology is trying to do now by opposing the City's Motion for Reconsideration, is to use
23 that 275 AFY tentative determination and 1465 AFY cap condition as the means of reducing the
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26 ⁶ Leavenworth's Response to Ecology's Motion for Summary Judgment, pp. 22; Second Van Hulle Declaration, ¶ 13
and Exhibit E.

27 ⁷ Ecology Response, pp. 9-10.

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

3
4 **III. ECOLOGY'S PERMITTING PROGRAM WOULD NOT BE DISRUPTED BY
5 THE RELIEF REQUESTED IN THE CITY'S MOTION.**

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

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

17 I cannot point to a single example of Ecology denying a new application based on staff's
18 inability to settle on an official system-wide annual quantity (Qa) of preexisting water
19 rights. Further, Mr. Haller does not identify any instance where Ecology denied a new
20 water right application based on staff's inability to settle on the Qa of preexisting water
21 rights. Instead, there is example after example of creative solutions when Ecology cannot
22 determine precisely the Qa of existing perfected and inchoate water rights. The most
23 common solution is the issuance of non-additive (supplemental) water rights, which
24 allows for system flexibility such as allowing for new water sources without increasing
25 the Qa of an applicant's total portfolio.⁹

26 ...
27 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.

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

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

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

23 An agency may only do that which it is authorized to do by the Legislature. *Rettkowski v.*
24 *Ecology*, 122 Wn.2d 219, 226, 858 P.2d 232 (1993); *In re Puget Sound Pilots Ass'n*, 63 Wn.2d
25 142, 146 n.3, 385 P.2d 711 (1963); *Neah Bay Chamber of Commerce v. Department of Fisheries*,
26 119 Wn.2d 464, 469, 832 P.2d 1310. (1992). Thus, if Ecology lacked authority to reduce the

27 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, ¶ 1D., p.2.

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

3 This is akin to the res judicata argument raised by Ecology and rejected by the Court.
4 Any determination by an administrative body (such as Ecology) which is outside its powers and
5 duties as authorized by the statutes is not binding on a court hearing the issue. Karl B. Tegland,
6 14A Washington Practice Series § 35:51 (2010); *Nichols v. Snohomish County*, 47 Wn. App.
7 550, 736 P.2d 670 (1987). "Before any preclusive effects arise, the administrative agency must,
8 of course, have the authority to make the determination in question. The requirement is
9 analogous to the requirement of jurisdiction to support a judgment." Tegland, at § 35:51, pp.
10 582-583. Because Ecology lacked authority to reduce the City's preexisting rights, the 1995
11 decisions did not have that effect; therefore, a declaratory judgment as requested by the City
12 would not alter the 1995 decisions.¹³

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

26 ¹³ The City's failure to appeal the 1995 decisions did not create new legal authority for Ecology out of thin air.
27 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.

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

12 Ecology also wrongly claims that the Court has no jurisdiction to interpret the 1995
13 decisions. The determination whether the City's preexisting water rights are limited or reduced
14 by the 1995 decisions is "an actual, present and existing dispute" "between parties having
15 genuine and opposing interests" that are "direct and substantial," and a judicial determination
16 "will be final and conclusive." Thus, the Court has jurisdiction to interpret the decisions under
17 the Uniform Declaratory Judgment Act. RCW ch. 7.24; *Coppernoll v. Reed*, 155 Wn.2d 290,
18 300, 119 P.3d 318 (2005).

19
20 **V. ECOLOGY MISINTERPRETS THE CITY'S REQUESTED REVISIONS TO
DECLARATORY RULINGS 2 AND 4.**

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

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

25 The 1995 decisions do not need to state that after the City uses 1,465 acre-feet per year, "the City
26 can then exercise any of its other (preexisting) rights to pump water in excess of that figure." It
27

PLAINTIFF'S REPLY MEMORANDUM
Re: MOTION FOR RECONSIDERATION

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

13
14 Ecology implies that the result requested by the City will allow the City to waste water,
15 but this is wrong for at least two reasons. First, it is purely speculative. The Court cannot base a
16 decision on summary judgment based on speculative or conclusory statements or evidence. The
17 party opposing summary judgment must support its response with admissible evidence. *Lynn v.*
18 *Labor Ready, Inc.*, 136 Wn. App. 295, 151 P.3d. 201 (2006). Inadmissible hearsay cannot
19 establish the existence of a genuine issue of material fact. *Id.* The non-moving party cannot
20 defeat summary judgment by relying on speculation, argumentative assertions that unresolved
21 factual issues remain, or consideration of affidavits at face value. *Id.*; *Donohoe v. State*, 135
22 Wn.App. 824, 142 P.3d 654 (2006). Mere possibilities will not defeat a motion for summary
23 judgment, and the non-moving party cannot establish a question of material fact on the basis of
24 inferences that are remote or unreasonable. *Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 147
25 P.3d 600 (2006); *Lynn v. Labor Ready, Inc.*, *supra*.

26
27 ¹⁴ Second Declaration of Jill Van Hulle, ¶¶ 10-11.

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

10
11 **VI. ECOLOGY'S ARGUMENT RELATING TO DECLARATORY RULING NO. 5**
12 **IGNORES DISPUTED FACTS.**

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

21 Ecology's 1995 notices of decision, which included notice of a right to appeal within 30
22 days, only referenced that a decision was made regarding the new applications S4-28812 and G4-
23 29958, not a decision regarding the City's existing water rights, including Certificate 8105.¹⁵ No
24 other written notification was provided to the City, and City officials relied on the 1994
25 Stipulation for their understanding that the City's existing water rights were not affected.

26
27 ¹⁵ Declaration of Melissa Downes, Exs. 17 and 18.

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

13
14 **VII. ECOLOGY'S ARGUMENT RELATING TO DECLARATORY RULING NO. 6**
15 **IS BASED ON ERRONEOUS ASSUMPTIONS.**

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

26 Ecology's Response claims that the content of the parties' agreement, the 1994
27 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.

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

5 Declaratory Ruling No. 2 already acknowledges that Ecology's aggregate cap condition
6 authority did not include the authority to reduce preexisting rights. By interpreting the 1994
7 Stipulation along with the 1995 decisions, the Court should go further and determine that
8 Ecology could not violate the terms of the parties' agreement that Leavenworth's existing water
9 rights, including Certificate 8105, are not "affected by" the 1995 decisions. This would make the
10 interpretation of the 1995 decisions consistent with a plain meaning interpretation of the 1994
11 Stipulation and Order. *See* Plaintiff's Motion for Partial Summary Judgment, at pp. 50-52.¹⁷

12 VIII. CONCLUSION

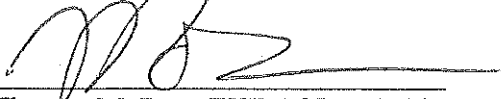
13 Ecology's Response to the City's Motion for Reconsideration is incorrect and does not
14 establish that reconsideration should be denied. It repeatedly relies on the false premise that
15 Ecology's 1995 decisions did not reduce the City's preexisting rights, even though Ecology
16 previously argued the opposite and claimed the authority to do so. The Response also attempts to
17 obscure the very nature of this case, which seeks an interpretation of the 1995 decisions that is
18 harmonious with the limits of Ecology's authority and the parties' intentions as expressed in the
19 1994 Stipulation. By repeatedly casting the City's declaratory judgment claims for a resolution
20 of this conflict as a belated appeal, a second false premise, Ecology seeks to escape the
21 consequences of breaching an agreement with the City and exceeding its statutory authority. The
22 Court should grant the relief requested by the City (as suggested by Appendix B to the Motion
23 for Reconsideration), which would avoid an unnecessary appeal and lead to a final resolution of
24 this dispute.

25 //

26 ¹⁷ If the Court does interpret the 1994 Stipulation but finds that the City agreed to a reduction of its existing water
27 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.

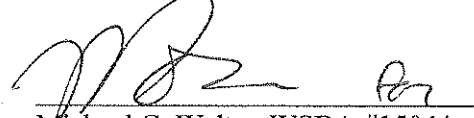
1 RESPECTFULLY SUBMITTED this 24th day of August, 2012.
2

3 LAW OFFICE OF THOMAS M. PORS

4 

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PLAINTIFF'S REPLY MEMORANDUM
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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.

A handwritten signature in cursive script that reads "Holly Fisher". The signature is written in black ink and is positioned above a horizontal line.

HOLLY FISHER
Legal Assistant