



## Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter and encourage your feedback. Feel free to forward our newsletter to your colleagues, and encourage them to join the Section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

### CONTACT US

**Board Chair  
Dawn Reitan**

[dreitan@insleebest.com](mailto:dreitan@insleebest.com)

**Newsletter Submissions  
Katy Hatfield**

[katyk1@atg.wa.gov](mailto:katyk1@atg.wa.gov)

## Inside This Issue

Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act....	1
First Joint Washington-Oregon Administrative Law Institute.....	1
Public Service Grant – Project Update .....	2
Rebecca Glasgow Receives WSBA Local Hero Award.....	2
Re-Cap of 2013 Annual Meeting	5
2013 Homan Award Recipient ...	5
Legislative Update .....	6
Announcement of 2014 Administrative Law Section Retreat – Taking It to the Next Level .....	7
Case Summary – Ninth Circuit Court of Appeals.....	7
Case Summaries – Washington Supreme Court.....	8
Case Summaries – Washington Court of Appeals ...	9

In anticipation of the Joint Washington-Oregon Administrative Law Institute, which will be held on September 19-20, 2014, in Vancouver, Washington, the Administrative Law Section's newsletter will publish a two-part article comparing the Washington and Oregon administrative procedure acts.

Part I, published below, introduces the two APAs and focuses on contested cases (Oregon term) and adjudicatory proceedings (Washington term).

Part II, which will be published in our next newsletter, will focus on key differences in judicial review between the Washington and Oregon administrative procedure acts.

Both parts of the article focus on principles that the authors believe are helpful for practitioners to understand as paradigmatic differences rather than specific points for limited situations.

## Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act

by John Gray and Jeffrey B. Litwak

### PART I – CONTESTED CASES AND ADJUDICATORY PROCEEDINGS

This article discusses key differences between the Oregon and Washington administrative procedure acts. This first of two articles introduces the two APAs and focuses on contested cases (Oregon term) and adjudicatory proceedings (Washington term). Part II will focus on judicial review. We do not discuss rulemaking because in both states, agency staff, rather than attorneys commonly handle rulemaking tasks. We discuss principles that we believe are helpful for practitioners to understand as paradigmatic differences rather than specific points for limited situations.

#### Introduction to the APAs

The Washington APA is divided into seven parts. The Oregon APA has more "parts," but they exist for similar purposes. Both APAs had origins in the 1961 revisions to the Model State APA<sup>1</sup>; however, Washington significantly

revised its APA following the 1981 revisions to the Model State APA. Oregon did not adopt the 1981 revisions.

*(continued on page 3)*

### Save the Date

## First Joint Washington-Oregon Administrative Law Institute

September 19-20, 2014  
Vancouver, Washington

The Oregon and Washington Administrative Law sections are teaming up to offer a joint CLE focused on highlighting similarities and differences in the practice of administrative law in the two states and discussing state and federal administrative actions affecting both states. Plan to join us for this unique program and the opportunity to expand your network across the border.

## Public Service Grant – Project Update

Congratulations to the recipients of the Administrative Law Section's 2013 Public Service Grant Project! Legal Assistance by Whatcom (LAW) Advocates was granted \$1,500 for its program, which helps disabled homeless adults and veterans obtain disability benefits. The Association of Manufactured Home Owners (AMHO) also received \$1,500 for its outreach to educate homeowners covered by the Manufactured/Mobile Home Landlord-Tenant Act about the Attorney General's Alternative Dispute Resolution Program.

Each year, the Administrative Law Section donates resources to at least one public service project. Applications for our 2014 Public Service Grant Project will be posted online at the Section's website when available. If you have questions, please contact the Public Service Committee Chair, Janelle Stewart.

## Rebecca Glasgow Receives WSBA Local Hero Award

The Administrative Law Section was thrilled to learn that a member of its Board of Trustees, Rebecca Glasgow, was awarded WSBA's Local Hero Award. Read more about Rebecca's phenomenal contributions to the local and statewide legal community on the WSBA website under News & Events>Press Releases [here](#).

## Administrative Law Section Listserv

The Administrative Law Section has a "closed" Listserv, which means only current subscribers of the Listserv can send an email to the Listserv. You can request to receive the listserv messages in a daily digest format by contacting the list administrator below.

**Sending Messages:** To send a message to everyone currently subscribed to this list, address your message to [administrative-law-section@list.wsba.org](mailto:administrative-law-section@list.wsba.org). The Listserv will automatically distribute the email to all subscribers. A subject line is required on all email messages sent to the Listserv.

**Responding to Messages:** Use "Reply" to respond only to the author of the email. Use "Reply All" to send your response to the sender and to all members of the Listserv.

If you have any questions, wish to unsubscribe, or change your email address, contact the WSBA List Administrator at [sections@wsba.org](mailto:sections@wsba.org).

### WSBA Administrative Law Section Executive Committee Officers & Board of Trustees 2013-2014

#### Officers

##### Chair

**Dawn Reitan**

[dreitan@insleebest.com](mailto:dreitan@insleebest.com)

##### Chair-elect

**Katy Hatfield**

[katyk1@atg.wa.gov](mailto:katyk1@atg.wa.gov)

##### Secretary/Treasurer

**Jeff Manson**

[jeffmanson1@gmail.com](mailto:jeffmanson1@gmail.com)

##### Immediate Past Chair

**Heidi Wachter**

[hwachter@cityofjakewood.us](mailto:hwachter@cityofjakewood.us)

#### Trustees

##### Rebecca Glasgow (2014)

[rebeccag@atg.wa.gov](mailto:rebeccag@atg.wa.gov)

##### Jeffrey B. Litwak (2014)

[litwak@gorgecommission.org](mailto:litwak@gorgecommission.org)

##### James Robenalt (2014)

[jrobenalt@williamskastner.com](mailto:jrobenalt@williamskastner.com)

##### Suzanne Mager (2015)

[suzanne.mager@doh.wa.gov](mailto:suzanne.mager@doh.wa.gov)

##### Stephen Manning (2015)

[smanning@bgwp.net](mailto:smanning@bgwp.net)

##### Gabe Verdugo (2015)

[gabeverdugo@gmail.com](mailto:gabeverdugo@gmail.com)

##### Paul Brachvogel (2016)

[pbrachvogel@cowlitzpud.org](mailto:pbrachvogel@cowlitzpud.org)

##### Margie Gray (2016)

[graymr2@dshs.wa.gov](mailto:graymr2@dshs.wa.gov)

##### Janell Stewart (2016)

[janell.stewart@hcawa.gov](mailto:janell.stewart@hcawa.gov)

#### Committee Chairs

##### CLE Committee

Vacant

##### Diversity and Outreach Committee

**Gabe Verdugo**

[gabeverdugo@gmail.com](mailto:gabeverdugo@gmail.com)

##### Newsletter Committee

**Katy Hatfield**

[katyk1@atg.wa.gov](mailto:katyk1@atg.wa.gov)

##### Publications Committee & Practice Manual

**Jeffrey B. Litwak**

[litwak@gorgecommission.org](mailto:litwak@gorgecommission.org)

##### Legislative Committee

**Richard Potter**

[potterre@frontier.com](mailto:potterre@frontier.com)

##### Editors of Public Records Act

**Deskbook**

**Eric Stahl**

**Ramsey Ramerman**

##### Editor of WA Administrative Law

**Practice Manual**

**Jeffrey B. Litwak**

##### Young Lawyer Liaison

**Elizabeth De Bagara**

[liz@washingtonbusinessadvocates.com](mailto:liz@washingtonbusinessadvocates.com)

##### BOG Liaison

**Bill Viall**

The Administrative Law Section welcomes articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Katy Hatfield ([katyk1@atg.wa.gov](mailto:katyk1@atg.wa.gov)).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

Desktop Publisher • Ken Yu/Quicksilver • [k.yu@earthlink.net](mailto:k.yu@earthlink.net)

**Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act** *continued*

OREGON	PART TITLE	WASHINGTON	PART TITLE
Sections		Sections	
183.310-.315	General Provisions	34.05.010-.120	General Provisions
		34.05.210-.270	Public Access to Agency Rules
183.325-.410	Adoption of Rules	34.05.310-.395	Rule-Making Procedures
183.411-.470	Contested Cases	34.05.410-.494	Adjudicative Proceedings
183.480-.497	Judicial Review	34.05.510-.598	Judicial Review and Civil Enforcement
183.500	Appeals from Circuit Courts		
183.502	Alternative Dispute Resolution		
183.520-.538	Housing Cost Impact Statement		
183.540	Effect of Rules on Small Business		
183.605-.690	Office of Administrative Hearings	Ch. 34.12 RCW: NB, a different chapter within the RCW	Office of Administrative Hearings
183.700-.705	Permits and Licenses		
183.710-.745	Legislative Review of Rules	34.05.610-.681	Legislative Review
183.745	Civil Penalties		
183.750	Readability of Public Writings		
		34.05.900-.903	Technical Provisions

The format of the Oregon and Washington State APAs is similar. Each state's act controls governmental functions in the areas of rules adoption by administrative agencies, the conduct of hearings that contest the actions taken by at least some administrative agencies, the judicial review of orders issued after the administrative hearings, and legislative review of rules adopted by administrative agencies. The states differ on which agencies must conduct hearings as adjudications, but both states require their administrative agencies to comply with the APA when it comes to the adoption of administrative rules.

Washington's APA contains a legislative intent section, RCW 34.05.001. As with most legislative intent sections, it sets the tone for the administration of and interpretation of the APA itself. Significantly, this legislative intent statement states that courts should interpret provisions of the APA consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts. The Washington Court of Appeals has cited to the 1981 version of the Model State APA only once. *Muckleshoot Indian Tribe v. Dep't of Ecology*, 112 Wn. App. 712, 720-21, 50 P3d 668, (2002), but Washington appellate courts have cited to federal administrative law principles several times. See, e.g., *Wells Fargo Bank, NA v. Dep't of Revenue*, 166 Wn. App. 342; 271 P3d 268 (2012) (federal requirement for finality).

Oregon does not have such an express policy and its appellate courts often eschew comparisons to the federal and other states' APAs. For example, in *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 215 Or. App. 557, 171 P3d 942 (2007), the court rejected following a "remarkably similar case," concerning justiciability because it was a federal decision that arose under the federal constitution and analysis under the federal justiciability doctrine is "foreign to Oregon's approach to justiciability." *Id.* at 573-74. Washington court decisions do not typically provide a similar detailed analysis of how the comparative provisions are or are not similar.

#### Central Panel

Both states use a combination of "central panel ALJs" and ALJs who are "in-house" with some other state agencies. Oregon's Office of Administrative Hearings ("OAH") is found within its APA, while Washington's OAH is contained in a separate chapter of the RCW (Ch. 34.12 RCW). In Oregon, the agencies required to use the OAH are identified at ORS 183.635, followed by a list of agencies that "need not" use ALJs from the OAH. Washington works the same way. In "definitions," RCW 34.12.020(4) defines "state agency" to mean "any state board, commission, department, or officer authorized by law to make rules or to conduct adjudicative proceedings," followed by a list of exclusions from the scope of "state agency." *(continued on next page)*

## Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act *continued*

### Brief Adjudicative Proceedings and Emergency Adjudicative Proceedings

Washington differs from Oregon in its use of “brief adjudicative proceedings” (“BAPs”), found at RCW 34.05.482-.494, and “emergency adjudicative proceedings” (“EAPs”), found at RCW 34.05.479 and .4791. The Oregon APA does not authorize such brief hearings. Perhaps the reason for this difference is Washington’s adoption of the 1981 Model State APA, which does allow brief hearings. 1981 MSAPA §§ 4.501, 4-502. The catch phrase for these two types of hearings is “quick and dirty”; in other words, these administrative procedures are done fast and without the panoply of procedural details that apply to adjudicative proceedings. See RCW 34.05.482.

Here is one interesting difference between standard adjudicative proceedings and BAPs and EAPs. RCW 34.05.452 describes the application of the rules of evidence in an adjudicative proceeding. RCW 34.05.410(1) identifies which statutes in Part IV of the APA apply to adjudicative proceedings: they are RCW 34.05.413 through .476; that range includes RCW 34.05.452. BAPs are codified beginning at RCW 34.05.482 and EAPs are codified at RCW 34.05.479. Consequently, the statute defining the use of evidence in administrative hearings does not necessarily apply to BAPs and EAPs. If RCW 34.05.452 does not apply to BAPs and EAPs, and the Evidence Rules apply only in Washington state courts (Wash. Evid. R 101, “Scope”), what evidence rules apply in BAPs and EAPs? Must witnesses be sworn? Must witnesses have personal knowledge of the facts to which they testify? Is cross-examination allowed? RCW 34.05.482(2) does require, “(b)efore taking action, the presiding officer shall give each party an opportunity to be informed of the agency’s view of the matter and to explain the party’s view of the matter.” Nevertheless, the procedure may be very informal compared to an adjudicative proceeding. There is also nothing in the APA that would prevent an agency from adopting an administrative rule that provides for the application of the evidence rules, or the provisions of RCW 34.05.452 itself. In the absence of an administrative rule answering the question of the application of rules of evidence, the decision appears to be left to the discretion of the Administrative Law Judge or other decision maker.

### Hearsay Testimony and Findings of Fact

Hearsay in an adjudicative proceeding in Washington is governed by RCW 34.05.452(1): “Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” That means that “(a)n administrative hearing officer may rely on hearsay for her decision if the hearsay is not the sole basis for the decision.” *Pappas v. Emp’t Sec.*

*Dep’t*, 135 Wn. App. 852, 854, 146 P.3d 1208 (2006). Oregon’s APA codifies evidence rules in administrative hearings at ORS 183.450. ORS 183.450(1) contains language similar to Washington’s rule on hearsay evidence: “All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.” Like Washington, Oregon has held that hearsay testimony can generally be considered in an administrative case. *Stacy v. Emp’t Dep’t*, 240 Or. App. 183, 189, 252 P.3d 326 (2010). However, unlike Washington, under certain circumstances, hearsay evidence in Oregon may amount to substantial evidence. *Id.* at 189 (citing *Coffey v. Emp’t Dept.*, 147 Or. App. 649, 653, 938 P.2d 805 (1997)).

### Exclusionary Rule

Oregon and Washington differ on whether a presiding officer in an administrative proceeding or a reviewing court should exclude evidence obtained from an improper administrative search in an administrative proceeding.

The Washington APA requires that a presiding officer of an adjudicatory proceeding, “shall exclude evidence that is excludable on constitutional or statutory grounds.” RCW 34.05.452(1). The Washington Supreme Court has not applied the exclusionary rule to administrative proceedings; however, Divisions I and II of the Court of Appeals have done so. *Seymour v. Wash. State Dep’t of Health*, 152 Wn. App. 156, 216 P.3d 1039 (2009) (Division I concluding that the presiding officer should have excluded evidence gathered pursuant to a warrantless inspection and seizure); *Dodge City Saloon v. Wash. State Liquor Control Comm’n*, 168 Wn. App. 388, 288 P.3d 343 (2012) (Division II citing *Seymour* with approval). Division III has not yet considered applying the exclusionary rule to administrative proceedings.

Oregon courts have not excluded evidence from administrative proceedings when that evidence was obtained in violation of the Oregon Constitution. *TMM v. Lake Oswego School Dist.*, 198 Or. App. 572, 108 P.3d 1211 (2005).

There are cases in both Oregon and Washington in which a court has suppressed evidence in a civil or criminal proceeding when that evidence was obtained through an administrative search in violation of the state constitution.

### Representation in Administrative Hearings

#### *Representation of Agencies*

In Washington, the Attorney General represents state agencies in administrative hearings. RCW 43.10.040. Notwithstanding the statutory language, lawyers employed by some agencies sometimes represent those agencies in administrative hearings: e.g., child support hearings before the Office of Administrative Hearings, and Department of Revenue lawyers in “informal appeals” (RCW 82.03.140) before the Board of Tax Appeals.

*(continued on next page)*

## Ten Key Differences Between the Oregon Administrative Procedure Act and the Washington Administrative Procedure Act *continued*

In Oregon, agencies *may* be represented by the Attorney General in contested case hearings. ORS 183.452(1). Agencies may be represented by an officer or employee of the agency if (1) the Attorney General agrees to the representation and (2) the agency rule authorizes agency personnel to appear and represent the agency in the particular type of hearing.

### *Representation of Other Parties*

In Washington, a party other than the agency may appear and represent himself or herself or, if a corporation, by an "authorized representative." Any party may be advised and represented by counsel, at the party's expense, or by another representative if authorized by law. RCW 34.05.428.

In Oregon, a party other than the agency may appear and be represented by counsel or another representative, but the non-lawyer representative may do so only in compliance with ORS 183.457(2). The Oregon statute also limits the agencies before which non-lawyer representatives may practice by describing those agencies in ORS 183.457(1).

### Licensing Issues Regarding Expiration of Licenses and Jurisdiction in Administrative Hearings

The issue sometimes arises whether an agency has jurisdiction to suspend or revoke a license if the license expires before the issue comes on for hearing. In Washington, RCW 34.05.422(3) addresses this issue:

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, an existing full, temporary, or provisional license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

Similarly, in Oregon, ORS 183.430(1) addresses the same question and provides, in pertinent part:

In the case of any license which must be periodically renewed, where the licensee has made timely application for renewal in accordance with the rules of the agency, such license shall not be deemed to expire, despite any stated expiration date thereon, until the agency concerned has issued a formal order of grant or denial of such renewal.

<sup>1</sup> See Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 299 n.16 (1986).

*Part II of this article will be published in our next newsletter.*

## Re-Cap of 2013 Annual Meeting

In September 2013, we combined a mini-CLE on HIPAA, our annual meeting, and a social hour. The CLE, which was free for Section members, received uniformly favorable reviews for the presentations by all three of our excellent speakers: Timothy Crandell, Dina Yunker Frank, and Howard Stone. At our meeting, outgoing Board Chair Heidi Wachter passed the baton to incoming Board Chair Dawn Reitan. In addition, the 2013 Homan Award was presented to Alan Copsey.



## 2013 Homan Award Recipient

The Administrative Law Section awarded the 2013 Frank Homan Award to Alan Copsey, Deputy Solicitor General, Office of the Attorney General. John Gray, chair of the 2013 Frank Homan Award Committee, presented the award to those gathered at the annual meeting of the Administrative Law Section on September 25, 2013, in Olympia.



Alan Copsey has been with the Office of the Attorney General since 1995. He was appointed to the Solicitor General's Division in 2009, and focuses on appellate practice in state and federal court. He previously was assigned to the Agriculture and Health Division, where he represented a variety of state agencies, including the Department of Agriculture, Department of Archaeology and Historic Preservation, and what is now the Department of Commerce, among others. He has written and given presentations on a variety of topics related to administrative law, appellate practice, growth management and land use, Indian law, and public disclosure.

Before joining the Office of the Attorney General, he externed in the United States Court of Appeals for the Ninth Circuit and clerked in the United States District Court for the Western District of Washington and in the Washington Supreme Court. He received his law degree with honors from the University of Puget Sound (now Seattle University) Law School, where he was a University Scholar. He also earned a Ph.D. in Biology (Ecology) from the University of Oregon,

*(continued on next page)*

---

**2013 Homan Award Recipient** *continued*


---

and was a college professor, teaching courses in biology, ecology, botany, and biostatistics and research design.

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing law in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974, and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent of the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (Ch.34.12 RCW). Frank was generous with his time and expertise, and is well-remembered for his sense of humor, his command of the English language, and his writing style – including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name. This award is usually, but not always, given yearly.

**Prior Recipients**

2011 – Larry A. Weiser  
 2010 – Jeffrey Goltz  
 2008 – Kristal Wiitala  
 2007 – C. Dean Little  
 2006 – William R. Andersen  
 2005 – Bob Wallis

Mr. Copey, congratulations on receiving the 2013 Frank Homan Award! It is well deserved!

## Legislative Update

*by Richard Potter*

The Administrative Law Section's Legislative Committee reviews bills affecting statutes that are of particular interest to the Section, including the Administrative Procedure Act (34.05 RCW), the Open Public Meetings Act (42.30 RCW), the Public Records Act (42.56 RCW) and provisions in other RCW chapters that pertain to administrative law and public records. The Committee finds some of the bills on its own, but most of them are spotted by WSBA's lobbyist and referred to the Committee. The Committee advises WSBA of any concerns, comments, or suggestions, and the Association's lobbyist passes those on to bill authors and sponsors and to pertinent legislative committee members and staff. If the Committee has a concern it feels might warrant a formal Section position (e.g., by testifying at a legislative committee hearing), it forwards that concern to the Section's Board for consideration. Note that Section members may follow bills and provide comments on bills to legislators in their individual capacities (<http://www.leg.wa.gov/pages/home.aspx>).

The 2014 session of the state legislature began on January 13. As of the date of writing this report, the Committee had reviewed over 20 bills. While a handful had already passed out of the first committee, most were still pending in that process.

Five of the bills reviewed involve amendments to the Administrative Procedure Act or other changes affecting the practice of administrative law. A couple would require specific agencies to post certain material on their websites. One would add documents from the Office of Regulatory Assistance to the official record in adjudicative cases. One bill would allow agencies to accept electronic signatures. Two bills concern the Tax Appeals Board. The first would provide for direct review by the Court of Appeals. The other would replace the existing Tax Appeals Board law with a new RCW chapter based on the ABA's model Tax Tribunal Act.

Most of the rest of the bills reviewed concern public records – mainly establishing new disclosure exemptions. Some such bills confine the statement of new exemptions to RCW chapters other than the Public Records Act, making them difficult for practitioners and the general public to find and become aware of. The Committee has for some time been working with the WSBA lobbyist to make sure that such provisions are reflected in the PRA itself, at least by a cross-reference to the other RCW chapter. Of late, we have been seeing more public records bills following that advice.

In our next newsletter, we will report on the final results of the legislature's session.

## Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Katy Hatfield at [katyk1@atg.wa.gov](mailto:katyk1@atg.wa.gov).

## Case Summary – Ninth Circuit Court of Appeals

***Wild Fish Conservancy and Harriet S. Bullitt v. Sally Jewell; U.S. Department of the Interior; Sam D. Hamilton; U.S. Fish and Wildlife Service; Dave Irving; Michael L. Connor; United States Bureau of Reclamation, 730 F.3d 791 (9th Cir. 2013).***

The Ninth Circuit Court of Appeals dismissed a conservation organization’s Administrative Procedure Act claim that sought to enforce the Washington state water code through the Federal Reclamation Act of 1902 because the organization lacked prudential standing. Wild Fish Conservancy and Harriet S. Bullitt (collectively the “Conservancy”) argued that United States officials, agencies, and a federal hatchery manager improperly diverted water at Leavenworth National Fish Hatchery (“the Hatchery”) in violation of the Washington water code. The claim stated that the federal operations violated Section 8 of the Reclamation Act, which requires that federal reclamation projects operate in compliance with state water law concerning “the control, appropriation, use or distribution of water used in irrigation ...” 43 U.S.C. § 383. The alleged Section 8 violation included failing to obtain a permit as required by Washington water code, RCW 90.03.250, and failing to provide adequate fish ladders as required by Washington’s fishway law, RCW 77.57.030. Because the Reclamation Act does not create a private right of action, the Conservancy

brought suit under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-708.

In addition to constitutional standing, the APA requires plaintiffs to demonstrate prudential standing, or a showing of an interested party within the zone of interests protected or regulated by the statute. The Conservancy could not establish prudential standing because it did not have a perfected water right for the waterbody at issue and lacked the ability to enforce the state water code. The State of Washington delegated authority to enforce its water code to the Department of Ecology and has not recognized a public right to independently enforce the code. The court noted that although a lack of state law enforcement rights generally is immaterial to establish APA standing, it is highly relevant when standing is asserted by virtue of a federal statute predicated on cooperative federalism and respect for state sovereignty.

In addition to dismissal based on a lack of standing, the court held that it lacked jurisdiction to consider the Conservancy’s claim regarding fish ladders because the claim did not challenge a final agency action and, in the alternative, the claim rested on provisions of Washington law not incorporated into the Reclamation Act.

*Scott Hilgenberg  
(continued on next page)*

## Announcement of 2014 Administrative Law Section Retreat – Taking It to the Next Level

Annually in June our section has held a retreat open to the membership but focused on a Board meeting. We meet somewhere fun and spend time socializing when we are not on agenda. Most recently we have met at Alderbrook Resort: close enough for a day trip but nice enough to justify an overnight stay. After discussing ways to expand this event so that more of our membership can enjoy it, we have decided to add some new components – one work and one fun. Underway are plans for a CLE on Friday afternoon and a Saturday golf tournament. We are hoping that this

will help expand our retreat to a section-wide event and a way for us all to spend some casual time together. If you are interested in serving on our Board, the retreat is a great way to meet Board members and help plan our Section’s agenda and priorities for the coming year.

Mark your calendar now for Friday, June 6 (CLE and social time) and/or Saturday, June 7 (Golf Tournament, Board meeting, social time) and stay tuned for details. Be there when the Administrative Law Section takes it to the next level!

## Case Summaries – Washington Supreme Court

### ***Lemire v. Dep't of Ecology and Pollution Control Hearings Board*, 178 Wn.2d 227, 309 P.3d 395 (2013)**

The Department of Ecology is vested with the authority to issue orders for violations of the Water Pollution Control Act (WPCA). Ecology issued an administrative order to Joseph Lemire, a cattle rancher, directing him to take steps to curb pollution of a creek that runs through his property. Lemire challenged the order to the Pollution Control Hearings Board on both constitutional and statutory grounds. The Board upheld the order on summary judgment. Lemire then sought judicial review, which reversed the summary judgment determination, reasoning that summary judgment was not appropriate because substantial evidence did not support the agency's underlying order. Ecology appealed directly to the Supreme Court, which reversed the trial court and reinstated the summary judgment determination and underlying agency order. Lemire argued that Ecology's Order was invalid because it was not supported by substantial evidence and because Ecology lacked the authority to regulate nonpoint source pollution. As to the substantial evidence argument, the court noted that Lemire never actually disputed facts related to Ecology's order and that the trial court had mischaracterized Ecology's burden under the WPCA. Although the dissent argued that more weight should be given to the superior court determination, the Supreme Court held that it sits in the same position as the superior court and does not afford its decision any special weight. Lemire further challenged Ecology's authority to issue the administrative order under the WPCA, but the court held that nonpoint source pollution could be regulated by Ecology. The court further dismissed Lemire's argument that the Order amounted to an unconstitutional taking of his property.

*Stephen Manning*

### ***Friends of Columbia Gorge v. State Energy Facility Site Evaluation Control*, 178 Wn.2d 320, 310 P.3d 780 (2013)**

In this case, the Washington Supreme Court affirmed the siting of Whistling Ridge Energy Project under chapter 80.50 RCW. The Energy Facility Site Evaluation Council recommended to Governor Gregoire that she approve the project with certain reductions in scope. The Governor executed a site certification agreement with the Project, specifying the conditions and requirements of her approval. Opponents sought judicial review, and the superior court certified the issue directly to the Washington Supreme Court.

When a project seeks approval under RCW 80.50, the Site Evaluation Council is charged with conducting informational public hearings, a hearing to determine whether a proposed project is consistent with relevant land use regulations, and an adjudicative hearing allowing parties to

challenge the Council's initial determinations. The Council then submits a recommendation to the Governor, along with a proposed site certification agreement containing any conditions required for the project to move forward. In this case, the court emphasized the unique statutory framework granting much discretion to the Council and the Governor in siting projects. Combining this with the deferential nature of review under the APA, the court viewed its review as "necessarily limited."

From an administrative law perspective, this case is interesting in its approach to this unusual administrative scheme and for the significant deference given to the Council and Governor. While the opinion marches through a long list of issues raised, most are specific to this particular statutory and regulatory scheme and need not be recited here.

*Rebecca Glasgow*

### ***King County Public Hospital District v. Dep't of Health*, 178 Wn.2d 363, 309 P.3d 416 (2013).**

Providers may open certain healthcare facilities only after receiving a certificate of need from the Department of Health. When reviewing a certificate of need application, the department must provide notice to interested parties (providers offering similar services), take public comment, and if requested, hold a public hearing. If the application is denied, the applicant, along with other interested parties, has a right to an adjudicative proceeding under the APA, presided over by a health law judge. The department denied Odyssey Healthcare Inc.'s certificate of need application to provide hospice care in King, Pierce and Snohomish counties, finding there was no need for additional providers. Odyssey challenged the department's denial, arguing that it had failed to correctly apply certain methodology establishing whether or not there was a need. During the pendency of the Odyssey appeal, other entities applied for certificates of need to provide hospice care in a different county. Pursuant to another department need analysis based on the new certificate of need application, need was shown for one additional hospice provider in King County in 2009 and two additional by 2013.

Based on this data, Odyssey asked the department to grant its certificate of need. The department refused, stating that it looks at the facts as they existed during its review. Odyssey then filed a federal lawsuit, prompting Odyssey and the department to settle both the adjudicative proceeding and federal lawsuit. With its settlement, the department would consider stipulating to Odyssey's certificate of need application for King County in light of the recent findings of need, but only after interested parties were provided with notice and an opportunity to comment. Evergreen, Providence Hospice, Home Care of Snohomish County, and Hospice of Seattle ("Providence") objected to the settlement terms and the Health Law Judge allowed these parties to intervene for the purposes of providing comment

*(continued on next page)*

---

**Case Summaries – Washington Supreme Court** *continued*


---

on the settlement. The Health Law Judge approved the settlement and issued a certificate of need for Odyssey. Providence filed a petition for judicial review.

Providence argued that the 2008 need calculation should not have been considered by the department because it occurred after the application was made. The court found that the Health Law Judge has considerable discretion to admit or not admit evidence that came into existence after the application and public comment period. Providence next argued that the Health Law Judge violated their due process rights by refusing to allow them to provide oral argument or written testimony in a hearing on the merits as provided for by RCW 70.38.115 and long-standing policy. However, the court held that due process requires only notice and an opportunity to be heard. Further, although a competing provider has standing to obtain judicial review of a certificate of need the department grants another provider, it does not follow that a competitor has the right to demand an adjudicative proceeding.

*Stephen Manning*

***In re Disciplinary Proceeding Against Joe Wickersham, 178 Wn.2d 653, 310 P.3d 1237 (2013).***

This case involves an attorney discipline matter regarding abandonment of a law practice when mental health issues are involved. The Supreme Court of Washington held that Joe Wickersham failed to appear on behalf of at least two clients and failed to ensure protection of his clients' interests by abandoning his law practice, violating the Rules of Professional Conduct, RPC 8.4(d) and RPC 1.16(d). The court upheld the disciplinary board (the "Board") determination that the appropriate sanction was a three-year suspension, with readmission dependent on a mental health examination.

During the summer of 2010, Wickersham demonstrated signs of mental health issues. Wickersham displayed extremely odd behavior in court while representing one client, and failed to appear on behalf of at least two clients. Wickersham abruptly left Washington in August 2010, and represented to the public that his practice was permanently closed. Wickersham claimed there was a conspiracy against him, involving federal, state, and local officials and that he was in extreme danger. Wickersham did not resume practicing until December 2010.

After a grievance was filed against Wickersham, a hearing officer determined that disbarment was the proper recourse. The hearing officer applied standard 4.4 of the ABA standards "Lack of Diligence." The presumptive sanction where a lawyer abandons his practice and causes serious or potentially serious injury to his client is disbarment. ABA Standards std. 4.41(a).

Upon review, the Board reduced the sanction to a three-year suspension. Wickersham appealed, and the court reviewed the appropriateness of the sanction. A sanction discussion requires consideration of the ethical duty violated, the lawyer's mental state, the injury caused and related aggravating or mitigating factors. *In re Disciplinary Proceeding of Marshall, 160 Wn.2d 317, 342, 157 P.3d 859 (2007)*. Aggravating and mitigating circumstances are considered to determine whether a departure from the presumptive sanction is warranted. *In re Disciplinary Proceeding Against Conteh, 175 Wn.2d 134, 284 P.3d 724 (2012)*.

The court found no clear error in the finding that Wickersham abandoned his practice. Further the court clarified that because no mental state component exists in standard 4.41(a), Wickersham's lack of knowledge of his own actions is irrelevant. In addition, evidence of possible injury to his clients' interests was sufficient to demonstrate substantial evidence of injury.

The court agreed with the Board that the mitigating factors of remorse and personal or emotional problems applied. Yet the hearing officer, Board, and court all refused to apply the mitigating factor of mental disability. As applied, a mental disability may only be considered as a mitigator if there is medical evidence that the respondent is affected by a mental disability, the disability caused the conduct, the respondent's recovery from the disability is demonstrated by a sustained period of rehabilitation, and the recovery arrested the misconduct. The court determined Wickersham had not recovered to the point of demonstrating successful rehabilitation; therefore the sanction was appropriate. Importantly, the court noted the sensitive nature of mental health issues, the resolution of disciplinary action involving them, and the need to protect the public.

*Scott Hilgenberg*

---

## Case Summaries – Washington Court of Appeals

***Nelson v. Dep't of Labor & Industries, 175 Wn. App. 718, 308 P.3d 686 (published Aug. 9, 2013)***

At the time of her death due to a drug overdose in 2006 (unrelated to her work injury), Lois Nelson was receiving time-loss benefits for a 2003 work injury. After her death, the Department of Labor & Industries (L&I) issued an order finding her permanently totally disabled (PTD). Finding no beneficiaries, L&I closed Nelson's case without making an award for PTD. Nelson's estate sought reconsideration, claiming that Nelson was entitled to an award of permanent partial disability (PPD), which would have benefitted Nelson's estate. L&I's determination was affirmed by the Board of Industrial Insurance Appeals and the Superior Court. The Estate did not challenge the finding that "Nelson was permanently precluded from

*(continued on next page)*

---

---

**Case Summaries – Washington Court of Appeals** *continued*


---

obtaining or performing reasonably continuous gainful employment in the competitive labor market,” as a result of her work injury. Thus the court affirmed the finding that Nelson was PTD. The court pointed out that as a matter of law, a worker who is PTD is not entitled to PPD benefits. The Board had also explained that Nelson was deemed PTD posthumously purely as a technicality. In order to comply with the state’s second injury fund statute, it was necessary to calculate Nelson’s pre-existing disability in order to address the employer’s experience rating for purposes of determining the employer’s industrial insurance premiums. The Court of Appeals affirmed the earlier rulings.

*Merrilee Harrell*

***City of Lakewood v. Koenig*, 176 Wn. App. 397, 309 P.3d 610 (Sept. 4, 2013)**

David Koenig appealed from the trial court’s order denying his request for costs and attorney fees under former RCW 42.56.550(4) (2005). Koenig originally filed a request for records under the Public Records Act (PRA) with the City of Lakewood (City). The City’s response to the request included some documents with driver’s license numbers redacted. After Koenig refused to confirm that the City had complied with his request, the City sued for declaratory judgment. The trial court granted summary judgment in favor of the City and denied Koenig’s request for costs and attorney fees.

In this appeal, Koenig argued that because the City’s response was deficient, he was entitled to costs and attorney fees regardless of whether the driver’s license numbers were exempt. The appeals court held that Koenig was entitled to costs and attorney fees because the City failed to provide Koenig with a brief explanation of the basis for not providing the records requested and thereby violated RCW 42.56.210(3) (the “brief explanation” requirement). Koenig argued that because the City failed to provide an adequate explanation for the redaction of driver’s license numbers in its original response, the City committed a violation of the PRA entitling him to costs and attorney fees regardless of whether the driver’s license numbers are exempt. Koenig relied on *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), for the proposition that failure to provide an explanation for refusing to produce documents is a free-standing PRA violation that entitles him to costs and attorney fees. The City argued that under *Sanders*, a “brief explanation” violation was not a separate violation and that lack of a brief explanation can only aggravate penalties for improperly withheld records.

The appeals court held that under the Washington Supreme Court’s interpretation of the plain language in former RCW 42.56.550(4), a requester is entitled to costs and attorney fees when the responder fails to provide a

brief explanation of the exemption authorizing it to redact driver’s license numbers. They also held that the City violated RCW 42.56.210(3) by failing to provide a brief explanation for the redactions contained in the response to Koenig’s public records request. The PRA’s brief explanation requirement provides that an agency response to a PRA request “include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” RCW 42.56.210(3). According to the court, a statement that identified the information that was withheld and merely cited a statutory exemption violated the brief explanation requirement. *Sanders*, 169 Wn.2d at 845-46. In this case the City’s response to Koenig’s PRA request as it related to the driver’s license numbers stated that the driver’s license numbers had been redacted pursuant to RCW 46.52.120 and RCW 46.52.130. Because the City violated the brief explanation requirement, the appeals court held that Koenig was entitled to costs and attorney fees.

*Melanie deLeon*

***Wright v. Dep’t of Social and Health Services*, 176 Wn. App. 585, 309 P.3d 662 (2013)**

DSHS appealed a trial court order that held: (1) that DSHS had failed to provide certain documents in response to Amber Wright’s PRA request; and (2) that DSHS owed penalties, litigation costs, and attorney fees to Wright. In March 2007, Wright made a public records request to DSHS asking for “her entire DSHS file.” DSHS replied stating that Wright would have to sign a release under Chapter 13.50 RCW, which governs the release and maintenance of dependency records. After the release was signed by Wright, DSHS provided a five-volume file containing her juvenile administrative records. One year later, Wright made a second request for her entire file, but this time indicated the request was being made pursuant to the PRA, Chapter 42.56 RCW. DSHS notified Wright that her Children’s Administrative records were confidential under the PRA, but that the release earlier signed by Wright would make her juvenile administrative records available under Chapter 13.50 RCW. In November 2008, DSHS informed Wright that it was done compiling records for her second PRA request. In December 2009, DSHS provided a transcribed copy of a 2005 CD-recorded interview with Wright, stating that it had recently been located. Wright contended that DSHS had failed to provide the PRIDE manual and general investigative protocols and that she was entitled to fees for the failure to originally produce the interview and transcription on time.

Although the superior court had held that DSHS had failed to provide the PRIDE manual and the investigation protocols in response to Wright’s PRA request, the Supreme Court held that Wright had failed to request these documents in her PRA request. Wright’s request for document production neither expressly mentioned nor identified with

*(continued on next page)*

---

**Case Summaries – Washington Court of Appeals** *continued*


---

reasonable clarity either the PRIDE manual or the investigation protocols. The court next held that the PRA did not apply to the interview and transcription because Chapter 13.50 RCW was the sole method for obtaining juvenile records maintained under that chapter. Because the PRA did not apply to the interview or transcription, DSHS did not violate the PRA when it failed to disclose these items until it later found them and Wright was not entitled to any PRA awards.

*Stephen Manning*

***Kadlec Regional Medical Center v. Dept. of Health*, 177 Wn. App. 171, 310 P.3d 876 (2013)**

A health law judge dismissed a medical center's challenge to a partial approval of its certificate of need request. Division II of the Court of Appeals concluded that the State Department of Health had denied the medical center's primary request and held that the medical center was entitled to an adjudicatory proceeding.

Kadlec Regional Medical Center applied to the Department to increase its bed capacity by up to 114 beds. Kadlec submitted alternative proposals for 75 and 55 new beds, indicating that those options were "not preferred" and "inferior." The Department issued a certificate of need to Kadlec for 55 additional beds.

Kadlec challenged the Department's decision to approve only 55 new beds. At the adjudicative proceeding, the health law judge dismissed Kadlec's challenge in part because the Department had granted one of Kadlec's requested options. Thus, the health law judge concluded that Kadlec lacked the right to appeal. See RCW 70.38.115(10)(a) ("Any applicant denied a certificate of need or whose certificate of need has been suspended or revoked has the right to an adjudicative proceeding.").

On review, Division II considered Chapter 70.38 RCW's focus "on providing sufficient, quality health services and facilities, while controlling increases in costs." The court found that Kadlec's flexible approach was more consistent with this focus than was the "all or nothing" possibility that risked inadequate services if a single large request were denied. The court also concluded that Kadlec did not waive its right to appeal the Department's decision by implementing the certificate of need to the extent that it was granted.

*Gabe Verduga*

***Dep't of Labor and Industries v. Slaugh*, 312 P.3d 676 (2013)**

An injured worker persuaded the Board of Industrial Insurance Appeals that RCW 51.36.010 provides the supervisor of industrial insurance with discretion to consider extending life-sustaining medical and surgical treatment to workers in all cases that the Department of Labor and Industries has accepted and then closed. Division III of the Court of Appeals disagreed, holding that the supervisor has

discretion to consider extending such treatment to workers only in cases of permanent total disability.

The Department awarded Slaugh permanent partial disability due to lung injuries that he incurred while employed with Lockheed Martin. In a lengthy process involving a remand, Slaugh requested that the supervisor exercise its discretion to authorize continued life-sustaining medical treatment for his asthma.

Slaugh relied on a 2003 decision of the Board of Industrial Insurance Appeals, holding that RCW 51.36.010 permits the Department to consider extending life-sustaining treatment in all closed cases. See *In re Reichlin*, No. 00 15943, 2003 WL 22273065 (Wash. Bd. of Indus. Ins. Appeals July 25, 2003). The Board declined to overturn its previous decision, but the Franklin County Superior Court reversed the Board's decision in Slaugh's case after the Department and Lockheed Martin appealed. After an extensive review of RCW 51.36.010's grammar and punctuation, Division III affirmed the superior court, holding that the statute unambiguously limits the supervisor's discretion to cases of permanent total disability.

*Gabe Verduga*

***Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 312 P.3d 766 (2013)**

Washington State Department of Ecology (Ecology) appealed a superior court's order holding that Ecology's denial of the Squaxin Island Tribe (Tribe)'s rulemaking petition was arbitrary and capricious and remanding the matter to Ecology to "engage in rulemaking as requested in the Tribe's 2009 petition."

In December 2009, the Tribe filed a petition requesting Ecology initiate rulemaking to revise a water resource inventory area water management rule. Ecology denied the Tribe's petition due to budget cuts and a need for additional information before a comprehensive rule amendment could be undertaken. As an alternative to granting the petition, Ecology agreed to seek funding for a study and to direct Mason County to limit ground water withdrawals for new residential developments to in-house domestic use of water.

An agency's decision to deny a rulemaking petition is subject to judicial review as other agency action under RCW 34.05.570(4). The court reviews the record to determine whether the agency reached its decision through a process of reason, not whether the result was itself reasonable in the judgment of the court. Accordingly, an agency has wide discretion in deciding to forgo rulemaking.

The court found that before issuing its decision, Ecology held a meeting with representatives from the Tribe and met with Mason County commissioners. Ecology also held a stakeholder and public meeting to discuss the Tribe's petition and concerns and the decision Ecology faced. Ecology devised six options, including closing or withdrawing the basin, limiting new uses, and seeking funding for a

*(continued on next page)*

**Case Summaries –  
Washington Court of Appeals *continued***

study. Ecology’s regional director specifically noted that the agency should closely consider how the basin closure request relates to other water resource issues in the state, particularly in Kittitas County. The court held that Ecology decided not to act on the Tribe’s petition after carefully considering it and weighing the pros and cons of various proposed responses and that Ecology presented valid justifications supported by the record for not taking rulemaking action and the record supported that Ecology came to its decision through a process of reasoning. Therefore, Ecology’s decision to deny the Tribe’s petition was not arbitrary and capricious.

*Melanie deLeon*

***In re Dependency of A.P., 312 P.3d 1013 (2013)***

At issue was whether a dependency action initiated in superior court by DSHS constituted judicial review of an agency action under RCW 4.84.350. DSHS filed a dependency action, which was dismissed due to insufficient facts. The child’s mother subsequently sought an award of reasonable attorney fees and costs under RCW 4.84.350, which provides, in pertinent part, that “a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees...” The court concluded that the term “judicial review” was limited to court review of particular agency actions, and did not include original actions filed by an agency in superior court. The court noted that a dependency action is an original action, upholding the lower court’s denial of attorney fees under RCW 4.84.350.

*Merrilee Harrell*

- ADMINISTRATIVE LAW
- ALTERNATIVE DISPUTE RESOLUTION
- ANIMAL LAW
- ANTITRUST, CONSUMER PROTECTION AND UNFAIR BUSINESS PRACTICES
- BUSINESS LAW
- CIVIL RIGHTS LAW
- CONSTRUCTION LAW
- CORPORATE COUNSEL
- CREDITOR DEBTOR RIGHTS
- CRIMINAL LAW
- ELDER LAW
- ENVIRONMENTAL AND LAND USE LAW
- FAMILY LAW
- HEALTH LAW
- INDIAN LAW
- INTELLECTUAL PROPERTY
- INTERNATIONAL PRACTICE
- JUVENILE LAW
- LABOR AND EMPLOYMENT LAW
- LEGAL ASSISTANCE TO MILITARY PERSONNEL
- LITIGATION
- REAL PROPERTY, PROBATE AND TRUST
- SENIOR LAWYERS
- SEXUAL ORIENTATION AND GENDER IDENTIFICATION LEGAL ISSUES
- SOLO AND SMALL PRACTICE
- TAXATION
- WORLD PEACE THROUGH LAW

# Join a WSBA Section Today!

*Connect with others in your area of the law.*

**Why join a section?**

Membership in one or more of the WSBA’s sections provides a forum for members who wish to explore and strengthen their interest in various areas of the law.

**Who can join?**

Any active WSBA member can join.

**What are the benefits?**

- Professional networking
- Resources and referrals
- Leadership opportunities
- Being “in the know”
- Advancing your career
- Affecting change in your practice area
- Skill development in involvement with programs and the legislative process
- Sense of community among peers

**Is there a section that meets my interest?**

With 27 practice sections, you’ll find at least one that aligns with your practice area and/or interest.

**Membership year begins October 1.**

**Law students can join any section for \$17.75.**

**Newly admitted attorneys can join one section for free during their first year.**

**It’s easy to join online!**

Learn more about any section at [www.wsba.org/legal-community/sections](http://www.wsba.org/legal-community/sections).

**WSBA Sections**

[sections@wsba.org](mailto:sections@wsba.org) • [www.wsba.org/legal-community/sections](http://www.wsba.org/legal-community/sections)



## Disclaimer

The Administrative Law newsletter is published as a service to the members of the Administrative Law Section of the WSBA. The views expressed herein are those of the individual contributing writers only and do not represent the opinions of the writers’ employers, WSBA, or the Administrative Law Section.