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

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SCOTT CORNELIUS, PALOUSE WATER CONSERVATION  
NETWORK, AND SIERRA CLUB PALOUSE GROUP,

Appellants,

v.

WASHINGTON DEPARTMENT OF ECOLOGY, WASHINGTON  
STATE UNIVERSITY, AND WASHINGTON POLLUTION CONTROL  
HEARINGS BOARD,

Respondents.

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**WASHINGTON WATER UTILITIES COUNCIL'S  
AMICUS CURIAE MEMORANDUM**

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***ORIGINAL***

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## I. INTRODUCTION

*Amicus curiae* Washington Water Utilities Council (“WWUC”) urges the Court to reject Appellants’<sup>1</sup> appeal and flawed interpretation of Washington water law.

## II. IDENTITY AND INTEREST OF AMICUS

The WWUC is the state association of Washington water utilities and includes more than 180 cities, water-sewer districts, public utility districts, mutual and cooperative and investor-owned water utilities that together serve over 80 percent of the state's population. A detailed statement of WWUC’s interest in this matter is included in WWUC’s Motion for Leave to File Amicus Curiae Memorandum filed concurrently with this memorandum and incorporated herein by reference.

The WWUC has a direct interest and a long history of involvement in Washington water law and the Municipal Water Law (“MWL”).<sup>2</sup> WWUC members are “municipal water suppliers” who hold water rights for “municipal water supply purposes” under the MWL. RCW 90.03.015 (3), (4). To defend the constitutionality of the MWL and its members’ municipal water rights regulated by the MWL, the WWUC fully participated as an intervenor in *Lummi Indian Nation v. State of Washington*.<sup>3</sup> As *amicus curiae* in this case, the WWUC defends the MWL from the very same constitutional theories and incorrect statutory

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<sup>1</sup> WWUC refers to Appellants Scott Cornelius, Palouse Water Conservation Network, and Sierra Club Palouse Group collectively as “Cornelius” in the singular.

<sup>2</sup> Laws of 2003, 1<sup>st</sup> Spec. Sess., ch. 5.

<sup>3</sup> *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247, 241 P.3d 1220 (2010).

readings that Cornelius unsuccessfully brought as a plaintiff in *Lummi*.

### III. ISSUES PRESENTED FOR REVIEW

WWUC incorporates by reference Washington State University's ("WSU") restatement of the issues in section II of its Response Brief and Department of Ecology's ("Ecology") restatement of the issues in section II of its Response Brief.

### IV. STATEMENT OF THE CASE

WWUC incorporates by reference WSU's statement of the case in section III of its Response Brief and Ecology's statement of the case in section III of its Response Brief.

### V. ARGUMENT

#### A. **Cornelius Mischaracterizes *Lummi* and Seeks to Re-litigate and Reargue Theories the Supreme Court Rejected in *Lummi*.**

The proper interpretation of the MWL and the Supreme Court's decision in *Lummi* are central to this case. Cornelius misconstrues the MWL and *Lummi* in an effort to re-argue and re-package legal theories that the Court unanimously rejected in *Lummi*. These fundamental mischaracterizations of the MWL and *Lummi* are the underpinnings to Cornelius's flawed legal theories; Cornelius misconstrues *Lummi* to say something it does not and then relies on the misinterpretation to argue that the application of the law in this case is unconstitutional. While Cornelius hopes that the Court will entertain these arguments in the context of this "as-applied" challenge, Cornelius has not advanced his arguments beyond the same generalized assertions of impairment that he raised in *Lummi*.

The mere fact that Cornelius seeks to fashion an as-applied challenge out of a Pollution Control Hearings Board (“PCHB”) appeal does not rescue Cornelius’s failed theories of impairment that the Supreme Court unanimously rejected.

1. The Legislature adopted the MWL to resolve uncertainties and clarify ambiguities regarding issues pertaining to municipal water rights.

Cornelius ignores the fundamental ambiguity in the law that preceded the MWL and prompted the legislature to adopt the MWL. As noted by the Supreme Court in *Lummi*, prior to the MWL, it was ambiguous whether non-city water suppliers could be “municipal” for purposes of the exemption from relinquishment.<sup>4</sup> It was only with the adoption of the MWL that the legislature finally resolved that ambiguity. Similarly, there was uncertainty regarding the status of “pumps and pipes” certificates in the wake of the Court’s decision in *Theodoratus*, even though *Theodoratus* was careful to indicate that it did not address “issues concerning municipal water suppliers.”<sup>5</sup> As recognized by the Court, the legislature responded to these uncertainties by adopting the MWL.<sup>6</sup> Thus

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<sup>4</sup> “At that time, ‘municipal water supply’ was not defined in chapter RCW 90.03 and the State acknowledges that there were no promulgated rules or policy guides defining ‘municipal water supply purposes’ prior to the 2003 amendments. On occasion, private water supply companies were deemed municipal, but the department also took the position that private water associations were not entitled to be treated as municipal water suppliers.” *Lummi*, 170 Wn.2d at 255-56 (internal citations omitted).

<sup>5</sup> *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 594, 957 P.2d 1241 (1998). See also *Lummi*, 170 Wn.2d at 256 (“Our *Theodoratus* decision caused concern among existing water users about the vitality of their existing water rights based on capacity.”).

<sup>6</sup> “The legislature responded to these uncertainties in 2003 by significantly amending the water law act. Among other things, the 2003 amendments defined ‘municipal water

while Cornelius insists here, as he did in *Lummi*, that the law with respect to the definitions was clear prior to the MWL,<sup>7</sup> in fact there was ambiguity and uncertainty that prompted the legislature to adopt the MWL.

2. The MWL's definitions and the "rights in good standing" provision apply to rights issued before 2003.

This long-standing ambiguity over what entity qualifies as a municipal water supplier is not merely academic. It is precisely because of this ambiguity that the legislature passed the MWL's definitions of municipal water supplier and municipal water supply purposes and clearly intended those definitions to apply to water rights issued prior to the adoption of the MWL in 2003. Cornelius argues repeatedly that the definitions in the MWL apply "prospectively."<sup>8</sup> However, the Court clearly acknowledged the curative nature of the definitions and their resulting retroactive effect:

[F]or the first time, the legislature has defined municipal water supplier as anyone who provides water to 15 or more residences (among other things) and made that definition apply regardless of whether the water rights certificate was issued prior to September 2003.<sup>9</sup>

Indeed, other portions of the MWL demonstrate the intent to apply the definitions to previously issued rights. For example, RCW 90.03.560

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supplier' and 'municipal water supply purposes' for the first time... The bill also declared that 'water rights certificate[s] issued prior to September 9, 2003 for municipal water supply purposes as defined in 90.03.015' based on system capacity were rights in good standing." *Lummi*, 170 Wn.2d at 256-57 (internal citations omitted).

<sup>7</sup> See Cornelius Reply Brief at 3.

<sup>8</sup> Cornelius Opening Brief at 19.

<sup>9</sup> *Lummi*, 170 Wn.2d at 265-66.

directs Ecology to amend the purpose of use of previously issued water rights that were not expressly designated as “municipal,” but nevertheless meet the MWL’s definition of municipal water supply purposes. The provision is designed to correct documentation of water rights that meet the definition of municipal water supply purposes but are not already identified as municipal rights. This provision directly contradicts Cornelius’s argument that the prior designation of the rights as “community” or “community domestic” is controlling; rather, the controlling concern is whether the purpose for which the right is used meets the definition of municipal water supply purposes, regardless of when the right was issued.

Despite the clear legislative intent and the Court’s straightforward statement that the definitions were meant to apply to previously issued water rights, Cornelius nevertheless insists that the Court held that the definitions can only have prospective effect because the retroactive application would necessarily be unconstitutional.<sup>10</sup> This is a gross mischaracterization of *Lummi*. As noted, *Lummi* held that the definitions apply to previously issued water rights and that they are constitutional on their face. While the Court left open the door for a potential as-applied challenge, the Court concluded that the mere retroactive application of the definitions does not violate the constitution.

Cornelius has not advanced his argument in this “as-applied”

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<sup>10</sup> Cornelius Reply Brief at 5.

context beyond the generic assertions Cornelius and other junior water right holders argued in *Lummi*. As in *Lummi*, Cornelius argues he is harmed by operation of law. Specifically, Cornelius argues that as a junior water right holder, he is impaired by any improvement in position by senior water right holders as a matter of law.<sup>11</sup> This generalized assertion of harm by operation of law is not specific to Cornelius or his water rights – it is the same alleged harm as to any junior water rights. These generalized arguments are the same as Cornelius’s argument in his facial constitutional challenge that the Supreme Court already rejected in *Lummi*:

Nothing in the amendments changes the legal status of the group the challengers attempt to represent: junior water right holders who take water subject to the rights of the senior rights holders whose status may be improved by these changes. Instead, these amendments confirm what the department has already declared (that certain rights are rights in good standing) and statutorily define something that had previously been statutorily undefined (the meaning of municipal water supplier).<sup>12</sup>

*Lummi* confirmed that the mere retroactive application of the definitions does not violate the constitution. This Court should reject Cornelius’s invitation to revisit the already-decided question of the constitutionality of the retroactive application of the definitions.

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<sup>11</sup> See Cornelius Reply Brief at 6.

<sup>12</sup> *Lummi*, 170 Wn.2d at 266-67.

3. Inchoate quantities in municipal pumps and pipes certificates were not relinquished or revoked by operation of law prior to the adoption of the MWL.

Cornelius repeatedly asserts that pumps and pipes municipal water right certificates were lost and then revived by the adoption of the MWL, even though *Lummi* specifically rejected that argument.<sup>13</sup> The Court found that *Theodoratus* created uncertainty for the status of existing pumps and pipes water right certificates and that the legislature resolved that uncertainty for those certificates. Specifically, *Lummi* held that the “rights in good standing” provision applies retroactively to certificates issued before *Theodoratus* and before the MWL.<sup>14</sup> In fact the Court noted that the legislature’s policy decision “simply confirmed” that those rights “continued to be a ‘right in good standing.’”<sup>15</sup> The Court did not hold or even assume that water rights had not been in good standing prior to the adoption of the provision. Rather, the Court acknowledged that the status of those rights was uncertain and that the legislature appropriately resolved that uncertainty for those existing rights. In the Court’s words, the provision “removes the shadow from water certificates that *might* have been challenged under *Theodoratus*...”<sup>16</sup>

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<sup>13</sup> See, e.g., Cornelius Reply at 8-12.

<sup>14</sup> See *Lummi*, 170 Wn.2d at 264 (“Rather, the relevant 2003 amendments simply confirmed that the right represented by a water right certificate issued before *Theodoratus* continued to be ‘a right in good standing.’”); *Id.* at 257 (“The legislation essentially put the imprimatur on our holding in *Theodoratus* prospectively [in RCW 90.03.330(4)] while confirming the good standing of water certificates issued under the former system [in RCW 90.03.330(3)]”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 265.

4. The “rights in good standing” provision is not an adjudication of facts.

Similarly, Cornelius’s separation of powers argument recycles generalized arguments the Court rejected in *Lummi*. Namely, Cornelius asserts that the pronouncement that certificates previously issued on the basis of system capacity were “rights in good standing” amounts to an adjudication of facts.<sup>17</sup> The Supreme Court held in *Lummi* that the “good standing” provision did not result in an adjudication of facts:

But the legislature did not engage in any adjudication of facts. Rather, the relevant 2003 amendments simply confirmed that the right represented by a water right certificate issued before *Theodoratus* continued to be a “right in good standing.” Confirming existing rights was a legislative policy decision not a factual adjudication.<sup>18</sup>

The Court further observed that the separation of powers analysis might be different in an as-applied challenge if a party could show the MWL validated specific water rights that had been previously adjudicated and invalidated:

But while RCW 90.03.330(3) removes the shadow from water certificates that *might* have been challenged under *Theodoratus*, this is a facial challenge to an exercise of general legislative authority. If any of those water rights were litigated and adjudicative facts developed, they are not in this case. Further, while it may be possible to construe ‘rights in good standing’ to mean that the legislature validated water rights that

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<sup>17</sup> Notably, Cornelius is not alleging that the law violates separation of powers because it disturbed a past judgment. *See, e.g., Lummi* 170 Wn.2d at 261 (“Retroactive amendments to the law may violate separation of powers by disturbing judgments, interfering with judicial functions, or cause manifest injustice.”) Instead, Cornelius solely argues that separation of powers is violated because the implementation of the law results in an adjudication of facts. As noted above, that argument fails.

<sup>18</sup> *Lummi*, 170 Wn.2d at 264 (internal citations omitted) (emphasis added).

had been held invalid, the statute can also be construed to mean that such water rights will be treated like any other vested right represented by a water right certificate. We will give statutes constitutional constructions when possible.<sup>19</sup>

In this case, WSU's water rights have not been adjudicated or determined to have been relinquished. Contrary to Cornelius' assertion that this is "immaterial" to their separation of powers arguments, it is, in fact, determinative. The Court in *Lummi* concluded that an as-applied challenge must raise facts showing that the law disturbed a past judgment invalidating a specific water right. Beyond that scenario, however, the Court in *Lummi* dispensed with the general notion that the "rights in good standing" provision amounted to an adjudication of facts.

Cornelius's only separation of powers argument is premised on a subjective interpretation of the state of the law prior to the MWL, which *Lummi* already concluded is insufficient for supporting an as-applied challenge. The mere fact that prior to the adoption of the MWL Cornelius could have challenged the validity of WSU's rights based on Cornelius's subjective interpretation of the uncertain state of the law cannot be a valid basis for this as-applied separation of powers challenge.

In sum, Cornelius is recycling the same arguments he presented in *Lummi* with the same superficial rigor. The Supreme Court has already rejected these generalized arguments. The only harm alleged by Cornelius would occur by purported operation of law. He assumes that any benefit or improvement to a senior water right holder through clarifying

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<sup>19</sup> *Id.* at 264-65.

legislation amounts to a harm to all junior water right holders, as a generalized class. This is the same harm Cornelius and other plaintiffs asserted in *Lummi* and it is not specific to Cornelius or his water rights. To determine that Cornelius has been harmed, this Court has to first accept Cornelius's subjective interpretation of the state of the law prior to the adoption of the MWL (an interpretation the Supreme Court already rejected) and then conclude that the MWL changed the outcome. As noted, the law prior to the MWL pertaining to municipal water suppliers was ambiguous and the status of municipal pumps and pipes certificates was uncertain. There can be no harm to Cornelius resulting from the MWL because the clarification of ambiguity and resolution of uncertainty does not "revive" or enlarge rights, it merely clarifies them. The mere fact that Cornelius is making the same arguments in the context of an appeal of a PCHB ruling does not change the outcome. So while Cornelius asserts that "Ecology fails to distinguish between this facial decision [in *Lummi*] and the instant as-applied challenge to the law,"<sup>20</sup> in fact it is Cornelius that fails to make a distinction by bringing the same exact arguments that the Supreme Court has already rejected.

**B. Cornelius Mischaracterizes Numerous Other Principles of Washington Water Law.**

In addition to distorting the MWL and *Lummi*, Cornelius also mischaracterizes numerous other Washington water law principles. The Court should reject these misstatements of law.

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<sup>20</sup> Cornelius Reply Brief at 5.

1. Pumps and pipes groundwater certificates may be changed pursuant to RCW 90.44.100.

First, the Court should reject Cornelius's argument that unperfected groundwater certificates issued on the basis of system capacity cannot be changed. Cornelius relies on a tortured statutory interpretation and irrelevant statements from *R.D. Merrill*<sup>21</sup> about permits and certificates, generally, to proclaim that the statutory scheme deliberately precludes change of certificates that were issued on the basis of system capacity that include some inchoate quantities.<sup>22</sup> Cornelius's argument is inconsistent with the plain language of the statute, which generally allows change of point of diversion and the manner or place of use of groundwater rights, whether documented by a permit or certificate.<sup>23</sup> The statute does not expressly exclude certificates that were issued on the basis of system capacity that include inchoate quantities. To the contrary, the MWL indicates that such rights are "rights in good standing," which *Lummi* held should be "treated like any other vested right

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<sup>21</sup> *R.D. Merrill Co. v. Pollution Control Hrgs. Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999).

<sup>22</sup> See Cornelius Reply Brief at 14. It is worth noting that Cornelius is inconsistent in his briefing. In some cases, he states that only perfected groundwater certificates can be amended. See Cornelius Opening Brief at 28 ("A water user must demonstrate perfection of its water right in order to amend it."). In other sections of his briefing he is more circumscribed and acknowledges that groundwater permits are also subject to the statute that authorizes change of certain water right attributes. See Cornelius Reply Brief at 14 ("RCW 90.44.100 does authorize amendments to both unperfected permits and perfected certificates.").

<sup>23</sup> RCW 90.044.100(1) ("After an application to, and upon the issuance by the department of an amendment to the appropriate permit or certificate of groundwater right, the holder of a valid right to withdraw public groundwaters may, without losing the holder's priority of right, construct wells or other means of withdrawal at a new location in substitution for or in addition to those at the original location, or the holder may change the manner or the place of use of the water.") (emphasis added).

represented by a water right certificate.”<sup>24</sup>

*R.D. Merrill* does not support Cornelius’s strained arguments. *R.D. Merrill* involved change applications for unperfected groundwater permits and did not involve pumps and pipes certificates with inchoate quantities. Cornelius inappropriately seizes on sentences from the Court’s discussion of the permits at issue in that case to invent a purported intent to deliberately prevent changes to municipal pumps and pipes certificates. There were no pumps and pipes certificates with inchoate quantities in *R.D. Merrill*. Moreover, the Court’s general discussion of RCW 90.44.100 does not support Cornelius’s theory. To the contrary, it indicates that inchoate quantities, generally, can be changed pursuant to RCW 90.44.100:

By expressly allowing amendment of a *permit*, RCW 90.44.100 plainly contemplates that an unperfected water right may be involved. It follows that water may not actually have been beneficially used. Thus, unlike RCW 90.03.380, which requires beneficial use of water before a change may be approved, RCW 90.44.100 expressly allows for amendment where water has not actually been applied to beneficial use.<sup>25</sup>

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<sup>24</sup> *Lummi*, 170 Wn.2d at 265. RCW 90.03.570 also supports this interpretation. As noted above, the general rule is that unperfected groundwater rights can be changed, while unperfected surface water rights cannot. However, RCW 90.03.570 provides flexibility to municipal water suppliers by expressly allowing changes to inchoate quantities reflected in municipal surface water rights. The legislature did not adopt a similar measure for groundwater certificates with inchoate quantities precisely because they are already addressed in RCW 90.44.100. It defies logic to presume that the legislature provided more flexibility for surface water rights with inchoate quantities while choosing (through silence on the subject) to impose a more restrictive regime for groundwater certificates with inchoate quantities.

<sup>25</sup> *R.D. Merrill*, 137 Wn.2d at 130 (emphasis added). Indeed, in describing the unperfected groundwater permits that can be changed by RCW 90.44.100, the Court uses the same description of inchoate water rights that the legislature used to describe pumps and pipes certificates with unperfected quantities. *Compare R.D. Merrill*, 137 Wn.2d at

Thus, contrary to Cornelius's arguments, the statute authorizes change of groundwater certificates, even municipal pumps and pipes certificates.

2. Ecology is not required to revoke or diminish inchoate quantities when processing a change application.

The Court should also reject Cornelius's argument that Ecology is required to revoke or diminish inchoate quantities when processing change applications.<sup>26</sup> Cornelius's interpretation is inconsistent with the plain language of the statute, which prohibits the department from revoking or diminishing a certificate for a surface or ground water right for municipal water supply purposes "[e]xcept as provided... for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or RCW 90.44.100."<sup>27</sup> An exception from a general prohibition on revocation or diminishment does not mandate Ecology to revoke or diminish in those circumstances; rather, it creates permissive authority that can be exercised under certain circumstances.

More importantly, Cornelius's argument that Ecology must revoke or diminish unperfected quantities in the change process is inconsistent with the legislative intent of RCW 90.03.330. The intent is manifested in

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130 ("A holder's right under a permit to appropriate water is an inchoate right, which is 'an incomplete appropriative right in good standing' which 'remains in good standing so long as the requirements of law are being fulfilled'") (quoting *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 596, 957 P.2d 1241 (1998)) with RCW 90.03.330(3) (a water right certificate for municipal water supply purposes that was issued on the basis of system capacity "is a right in good standing").

<sup>26</sup> See Cornelius Opening Brief at 21.

<sup>27</sup> RCW 90.33.330(2). The same statute also authorizes Ecology to revoke or diminish when a certificate was issued with ministerial errors or was obtained through misrepresentation. *Id.*

key provisions of the MWL that provide clarity for municipal water rights – provisions that Cornelius ignores. Cornelius infers that revocation or diminishment is mandatory by reading RCW 90.03.330(2) together with .330(1), which requires Ecology to issue a certificate upon demonstration that the right has been perfected. RCW 90.03.330(1) is a general statement applicable to all water rights that predates the MWL. Nevertheless, according to Cornelius, the two provisions, together, create a mandatory requirement for Ecology to revoke or diminish water rights “that do not meet perfection criteria.” Cornelius Opening Brief at 21.

Cornelius completely ignores RCW 90.03.330(3) which specifically addresses municipal certificates issued on the basis of system capacity and indicates they are rights “in good standing.”<sup>28</sup> Cornelius also ignores RCW 90.03.330(4) which requires all future certificates to be issued based on actual beneficial use. These two sections resolved uncertainty regarding the status of municipal water rights with inchoate quantities and “essentially put the legislature’s imprimatur on [the Supreme Court’s] holding in *Theodoratus* prospectively while confirming the good standing of water certificates issued under the former system.”<sup>29</sup>

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<sup>28</sup> The general standard for perfection of water rights articulated in the provision upon which Cornelius relies was unclear for decades, especially as it pertained to municipal water rights. *Lummi*, 170 Wn.2d at 254 (“Until recently, it was not entirely clear what it took to perfect a water right.”). The legislature adopted RCW 90.03.330(3) to resolve uncertainty regarding those pumps and pipes certificates by indicating that water rights issued on the basis of system capacity that include inchoate quantities were not invalid in the wake of *Theodoratus*; as “rights in good standing,” any inchoate quantities are subject to the requirements of reasonable diligence.

<sup>29</sup> *Lummi*, 170 Wn.2d at 257.

If there is a principle Ecology should apply in the context of a change application for a municipal pumps and pipes certificate, it is derived from these more specific provisions in RCW 90.03.330(3) and (4) which articulate the Legislature's specific intent with respect to municipal rights, and not the more general statement on which Cornelius relies.<sup>30</sup> By requiring revocation or diminishment of inchoate quantities in the change process, Cornelius's interpretation would completely vitiate the "good standing" language in RCW 90.03.330(3). It would also render meaningless the statute, RCW 90.03.570, that expressly authorizes change of unperfected quantities in municipal surface water rights. Under Cornelius's absurd interpretation, inchoate quantities could never be changed and would always need to be revoked. The proper interpretation of RCW 90.03.330(2) permits but does not require, revocation or diminishment of inchoate quantities if, for example, an inchoate right was not being developed with reasonable diligence.

3. Washington recognizes the "de facto change" principle.

The Court should reject Cornelius's assertion that the use of a water right from an unauthorized point of withdrawal results in relinquishment.<sup>31</sup> An "unauthorized" point of withdrawal or diversion refers to withdrawals or diversions taken from a different location than the

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<sup>30</sup>See, e.g., *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 309-10, 197 P.3d 1153 (2008) (citing *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)) (under rules of statutory construction specific statutory language will prevail over general language).

<sup>31</sup> See, e.g., Cornelius Reply Brief at 10.

one expressly identified in a water right certificate. By asserting that withdrawals from an unauthorized point of withdrawal results in relinquishment, Cornelius is erroneously equating beneficial use of water from an unauthorized well to non-use.

Contrary to Cornelius's assertion, Washington water law considers the continued use of a right from an unauthorized point of withdrawal to be a beneficial use that is not subject to relinquishment. This protection from relinquishment of unauthorized withdrawals is sometimes referred to as the "de facto change" doctrine. It is a general principle of western water law.<sup>32</sup> Ecology has incorporated it into a policy document.<sup>33</sup> Additionally, the Washington superior court presiding over the Yakima River basin general adjudication has applied the de facto change doctrine and held that a water user "does not forfeit a water right by changing the POD [point of diversion] to a source within the same general watershed without authorization so long as water has been beneficially used in the amount authorized."<sup>34</sup> In other words, the continued withdrawal from an

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<sup>32</sup> See *Russell-Smith v. Water Resources Dept.*, 952 P.2d 104 (Or. App. 1998); *Lengel v. Davis*, 141 Colo. 94, 347 P.2d 142 (1959).

<sup>33</sup> See Department of Ecology, Water Resources Program Policy, POL-1120 "Policy For Conducting Tentative Determinations Of Water Rights," August 30, 2004 ("POL 1120") at 5. ("Use of water in a manner inconsistent with one's water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful."). AR 23, Ex. 2 at 5-6.

<sup>34</sup> *Ecology v. Acquavella, et al.*, Yakima Superior Court No. 77-2-01484-5, Memorandum Opinion and Order Re: Exceptions to Second Supplemental Report of Referee Subbasin 4 (Oct. 8, 2002), ("Lavinal Order") at 9 (emphasis in original). The Court can take judicial notice of the Lavinal Order as a decision of a Washington court. Although the Lavinal Order is not binding precedent, it is persuasive authority from the only general water rights adjudication currently ongoing in Washington. The Lavinal Order is set forth in Appendix A hereto.

unauthorized point in the same basin is not subject to relinquishment because water has been beneficially used.<sup>35</sup>

Contrary to Cornelius's assertions, Washington courts have not rejected this "*de facto* change" principle. The cases to which Cornelius cites simply held that the principle does not apply to the facts that were before the court in those specific cases. For example In *R.D. Merrill*, the water right holder argued that a pre-code claim to divert water from a ditch was valid and perfected even though the diversion was never constructed. The water right holder relied on the historical diversion of water from another nearby ditch. The Court rejected the notion that the pre-code claim had been perfected and maintained based on diversions from the nearby ditch because the water that was actually diverted from the ditch was pursuant to another water right. In other words, it was not the use of the water from another point of diversion that was fatal in that case; rather it was the conclusion that historical water diversions were pursuant to an entirely different water right, such that there was no diversion, authorized or otherwise, under the water right claim.<sup>36</sup>

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<sup>35</sup> It is important to note that this acknowledgment of unauthorized withdrawals only "prevents the user from forfeiting a right to the lawful diversion point." Lavinal Order at 9. The act of diverting water from a new location does not establish a right to the new diversion location, and the owner must apply to change the water right to confirm the new location, as WSU did in this case.

<sup>36</sup> *R.D. Merrill*, 137 Wn.2d at 137 (in response to the argument that the exact point of diversion was immaterial, the Court holds that "the evidence does not adequately support the proposition that water under the 1915 notice was ever diverted and applied to beneficial use, *regardless of the means of diversion*") (emphasis added). Also the Court in that case was addressing a pre-code claim, which requires "strict compliance" with the requirements for establishing a water right claim, including the actual diversion.

Importantly, the Court in *R.D. Merrill* was deciding whether the water right claim was established and perfected pursuant to the specific claim requirements, while the *de facto* change principle offers certificates protection from relinquishment. By relying on *R.D. Merrill*, Cornelius obfuscates the distinction between perfection and relinquishment. By contrast, in this case, there is no question that WSU's wells were constructed and water withdrawn before WSU began withdrawing from other unauthorized points of withdrawal.

Similarly, *Twisp*<sup>37</sup> does not reject the *de facto* change doctrine. In *Twisp*, Ecology argued that the town had not abandoned its water right claim to divert water from a river because it had continued to withdraw water under the claim from two new wells it had dug.<sup>38</sup> However, the Court held that the town had not used the wells as unauthorized points of withdrawal for the claim, as Ecology contended, because the facts did not support the claim. The town had previously applied for and obtained two new groundwater rights after it constructed the wells indicating the town's intent to create separate, new water rights, rather than new points of withdrawal associated with the claim.<sup>39</sup> Thus, contrary to Cornelius's arguments, these Washington decisions do not hold that unauthorized withdrawals constitute non-use nor do they reject the *de facto* change principle.

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<sup>37</sup> *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997). (“*Twisp*”).

<sup>38</sup> See *Twisp*, 137 Wn.2d at 785-86.

<sup>39</sup> *Id.* at 786.

**C. Cornelius Attacks WSU for Achieving Effective Water Conservation and Efficiency.**

The MWL has two objectives that work together. First, as described above, the MWL provides certainty to municipal water suppliers by resolving uncertainties and clarifying ambiguities. Second, the MWL imposes conservation requirements on municipal water suppliers.<sup>40</sup> The MWL objective regarding water conservation and efficiency works together with the water rights certainty objective. The legislature confirmed both the municipal exception from relinquishment and the validity of pumps and pipes certificates as water appropriations for meeting future population and economic growth and, at the same time, required municipal water suppliers to take steps to reduce overall water diversions relative to customer demand. *See also* RCW 90.03.320 (development schedules should allow for “delays that may result from planned and existing conservation and water use efficiency. . .”). This legislative approach advances water resources stewardship while securing municipal water rights needed for long-term planning and growth. By affirming that municipal rights are in good standing and not subject to relinquishment, the legislature removed a negative consequence from successful conservation efforts that result in diminished water use.

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<sup>40</sup> In the MWL, the legislature declared its intent to “establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability.” RCW 70.119A.180 (Laws of 2003, 1<sup>st</sup> Spec. Sess., ch. 5, § 7). Pursuant to this statutory authority, the Department of Health promulgated water use efficiency rules that establish conservation planning requirements, water distribution system leakage standards, and minimum requirements for water conservation performance reporting. Ch. 246-290 WAC.

Notwithstanding this legislative policy, Cornelius seeks advantage from WSU's successful efforts to reduce groundwater withdrawals. Cornelius maligns the fact that WSU's "water use has declined over time" and alleges a "failure to put water to use."<sup>41</sup> Cornelius seeks to accomplish what the legislature sought to prevent: penalizing municipal water rights for water conservation. WSU explains the regional water conservation program that has led to reduction of annual groundwater pumping.<sup>42</sup> The evidence shows that WSU reduced overall groundwater use in 2004-2005 by more than 10% compared to 1992-1993 (using two-year averages to be conservative).<sup>43</sup> This Court should apply the MWL as the legislature intended by rejecting Cornelius's arguments about the legal consequences of WSU's reduced groundwater pumping.

## VI. CONCLUSION

In sum, the Washington Water Utilities Council urges the Court to uphold the PCHB decision and reject Cornelius's arguments.

DATED this 24<sup>th</sup> day of September, 2012.

VAN NESS FELDMAN GORDON DERR

By



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Utilities Council

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<sup>41</sup> Cornelius Opening Brief at 10, 39.

<sup>42</sup> WSU Response Brief at 5-6.

<sup>43</sup> CP 474 (PBAC 2002-2005 Report).

# APPENDIX A

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF YAKIMA

3 IN THE MATTER OF THE DETERMINATION )  
4 OF THE RIGHTS TO THE USE OF THE )  
5 SURFACE WATERS OF THE YAKIMA ) No. 77-2-01484-5  
6 RIVER DRAINAGE BASIN, IN )  
7 ACCORDANCE WITH THE PROVISIONS OF )  
8 CHAPTER 90.03, REVISED CODE OF )  
9 WASHINGTON, )  
10 STATE OF WASHINGTON, ) MEMORANDUM OPINION AND ORDER  
11 DEPARTMENT OF ECOLOGY, ) RE: EXCEPTIONS TO SECOND  
Plaintiff, ) SUPPLEMENTAL REPORT OF REFEREE  
vs. ) SUBBASIN 4  
JAMES J. ACQUAVELLA, ET AL., ) (SWAUK CREEK)  
Defendants )

12 I. INTRODUCTION

13 This Court held a hearing August 8, 2002 to consider exceptions to the Second  
14 Supplemental Report of Referee for Subbasin 4 dated March 20, 2002 (Second Supplemental  
15 Report). Trendwest Investments, Inc. (Claim No. 01685), Pat & Mary Burke (Claim No. 01475),  
16 Lavalin Corporation (Claim No. 06626), Bernard P. Knoll (Claim Nos. 12061, 12062), First Creek  
17 Water Users Association (Claim No. 00648) and Liberty Mountain Ownership Association, Inc.  
18 (Claim No. 01095) filed exceptions. All parties, along with the Department of Ecology appeared  
19 and participated in the hearing. The Court ruled on some of the exceptions during the hearing and  
20 those rulings are summarized below. The Court reserved ruling on other matters until it could  
21 properly review the record. The Court, having been fully advised by the parties through written  
22 exceptions and oral argument, makes the following rulings in regard to the above named parties.

22 II. ANALYSIS

23 a. Trendwest Investments, Inc. (Claim No. 01685)

24 Trendwest requested that it be recognized as the sole entity holding water rights under Claim  
25 No. 01685. The Court GRANTED that exception at the time of hearing. The water rights set forth  
in the Schedule of Rights at pages 100 and 116 shall be amended to identify Trendwest Investments,  
Inc. as the sole owner of those water rights.

1           b.     Pat and Mary Burke (Claim No. 01475)

2           The Burkes filed one exception to the Supplemental Report along with a stipulation between  
3 them and Trendwest Investments. After taking testimony from Mary Burke at the August 8, 2002  
4 hearing, the Court ruled it would accept the stipulation. The stipulation pertains to the  
5 instantaneous component of a right confirmed to the Burkes and Trendwest. Trendwest's  
6 predecessor, Hartman, and the Burkes shared a ditch known as the Burke-Hartman ditch, which  
7 diverts up to 6.0 cfs from Swauk Creek. The Referee recommended confirmation of the entire 6.0  
8 cfs but did so on a proportionate, per acre basis as there was no historical evidence indicating how  
9 much of the diversion applied to each parcel – the Burkes were recommended a right for 39.6 acres  
10 and the Hartmans (now Trendwest) a right for 95 acres.

11           The evidence shows the Burkes/Hartmans have historically shared the ditch and each has used  
12 the entire 6.0 cfs on a rotational basis. Mrs. Burke testified this method was necessary in light of  
13 the physical characteristics of the ditch and would have, in all probability, been the required method  
14 from the time the ditch was constructed and shared by the three original homesteaders. Thus, there  
15 is not now, nor has there been historically, a precise division of the right to the water diverted by the  
16 Burke-Hartman ditch. Lacking anything more definitive, the Court accepts the method for division  
17 of the instantaneous component of the right proposed by the two claimants who use the ditch and  
18 each claimant will be confirmed a right to divert 3.0 cfs. No party filed an exception to the  
19 stipulation and Ecology offered no objection at the time of hearing.

20           Accordingly, the right set forth on page 98 of the Second Supplemental Report of Referee shall  
21 be MODIFIED at line 5.5 to read as follows:

22           “3.0 cfs including conveyance loss; 297 acre-feet for irrigation; 1 acre-foot per year for stock  
23 water.” See Stipulation at p. 2.

24           Similarly, the right set forth at page 100 of the Second Supplemental Report shall be  
25 MODIFIED at line 7 to read as follows:

          “0.63 cfs including conveyance loss; 150 acre feet per year for irrigation.”

          The right set forth at page 116 of the Second Supplemental Report shall be MODIFIED at line  
16.5 as follows:

          “2.37 cfs including conveyance loss; 562.5 acre-feet per year for irrigation.”

          The Burkes also took exception to the Referee's decision not to recommend a right for irrigation  
from McCallum Spring. The Referee determined the flow from McCallum Spring constituted

1 subirrigation and therefore no diversionary water right attached. See Second Supplemental Report  
2 at 13 citing RCW 90.03.120, Ecology v. Grimes, 121 Wn.2d 459, 466, 852 P. 2d 1044 (1993). The  
3 Referee did recommend a diversionary stock water right for McCallum Spring. The Burkes  
4 disagreed, asserting the use of the right constituted a purposeful application of the water. Ecology  
5 deferred to the Court to make a factual determination – if the Court finds the use of water to be  
6 subirrigation then Ecology believes no right is appurtenant whereas if there is a purposeful  
7 diversion and application of the water then a right is appropriate. Ecology does note the water duty  
8 may be too high in light of the irrigation method and to the extent the Court confirms a right, the  
9 agency believes quantities on par with Dunford Spring (another spring on the Burke's property)  
10 would be appropriate. See Verbatim Report of Proceedings dated August 8, 2002 at p. 41-42 (RP).

11 This decision hinges on the structures and use of water from McCallum Spring. It is, by no  
12 means, clear-cut. The facts are as follows. Since the 1940's when Mr. Pat Burke acquired the  
13 property in question, a ring surrounding the spring has channeled the spring water into a pipe and  
14 ultimately into a stock tank. The overflow from the tank then runs down-gradient into the original  
15 homestead and irrigates orchard, garden and pasture. According to descendants of the McCallums  
16 who settled the area, there has always been a ring and diversion to a stock tank and the water was  
17 used for the purposes described above. See RP at 28, 34. Apparently, the flow of the water has  
18 diminished since the construction of a highway between the spring and the area of use. The Burkes  
19 indicate the flow is adequate to irrigate only 10 acres whereas historically, it was capable of  
20 irrigating up to 18 acres. They also ask the Court grant them a right to divert 0.5 cfs on a  
21 continuous flow basis. Ecology's investigator determined the use to be irrigation during the  
22 September 6, 1990 investigation. SE – 11.

23 The Court finds there has been a purposeful diversion and conveyance to the place of actual  
24 beneficial use. The water is diverted at the spring location and conveyed through a pipe into a  
25 holding mechanism from which it is ultimately distributed. Once the water flows from the stock  
26 tank, it appears some channeling of the water has occurred. The Court does not perceive a major  
27 distinction between this method and restricting canals to facilitate overflows for flood irrigation.  
28 Further, the water has historically been utilized for a beneficial use.

29 However, the Court does not interpret the evidence to show the entire 0.5 cfs produced by the  
30 spring is diverted. Rather, the consistent testimony has been that water is diverted into a 2-inch pipe  
31 and then reduced to a 1-inch pipe, which runs into the stock tank. See Testimony of Pat Burke

1 dated March 10, 1997 at page 32. The claimant supplied no precise measurement information.  
2 Further, the non-diversionary stock and wildlife water stipulation set out at the beginning of the  
3 Report of Referee, requires 0.25 cfs be retained in natural watercourses, including springs. Thus,  
4 the Court could confirm, at most, a 0.25 cfs diversionary right in light of that limitation.  
5 Additionally, the two RCW 90.14 water right claims (WRC) that seem to apply are WRC Nos.  
6 000185 and 052591. Although not specifically stated, the Referee may have chosen 000185 as  
7 applying to this right as the instantaneous diversion component of the recommended stock water  
8 right was set by the Referee at 0.045 cfs, which approximates the 20 gpm on the claim form. WRC  
9 No. 000185 also asserts a right to irrigate 5 acres through a diversion of 30 acre-feet per year.  
10 Further, Ecology and the Burkes stated at the hearing that a quantity similar to Dunford Springs  
11 would be acceptable -- the Referee recommended 0.067 cfs, 28.25 acre-feet for irrigation of 5 acres.

12 The Court finds the information in WRC No. 000185 together with the Dunford Spring analysis  
13 to be the most consistent with the evidence supplied in the hearings. Therefore, the Court confirms  
14 a right to divert 0.045 cfs continuously which during the irrigation season calculates to about 21  
15 acre-feet. Therefore, the Court will use those as the parameters of the water right.

16 The findings of fact set forth at page 103 of the Second Supplemental Report beginning at line 1  
17 shall be MODIFIED as follows.

18 CLAIMANT NAME:	Pat Burke & Mary Burke	Court Claim No. 01475
19 Source:	McCallum Spring	
20 Use:	Irrigation of 5 acres and stock water.	
21 Period of Use:	April 1 through October 31 for irrigation; continuously for stock water	
22 Quantity:	0.045 cfs; 20 acre-feet per year for irrigation and 1 acre-foot for stock water during irrigation season; 2 acre-feet during the non-irrigation season for stock water	
23 Priority Date:	May 24, 1884	
24 Point of Diversion:	1200 feet south and 1100 feet west of the north quarter corner of Section 3, being within the NE1/4NW1/4 of Section 3, T. 19 N., R. 17 E.W.M.	

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Place of Use:

That portion of the NW1/4 of Section 3, T. 19 N., R. 17 E.W.M. lying westerly of the state highway.

c. Lavinal Corporation (Claim No. 06626)

Lavinal excepted to the Referee's denial of a water right from Swauk Creek for the purpose of mining. That denial was premised on a lack of proof of beneficial use of Swauk Creek water prior to 1932 and a lack of RCW 90.14 compliance. Lavinal now asks the Court to confirm a water right from Williams Creek as WRC No. 136707 does assert a right to 1 cfs from Williams Creek for mining use on what is now Lavinal property (formerly owned by Clifford Burcham).

Lavinal's argument regarding historic beneficial use is factually complicated and somewhat circumstantial. Mr. Frank Kerstetter was the first settler of the property now owned by Lavinal in the SE ¼ of Section 3, T. 20 N., R. 17 E.W.M. He filed both a mining claim and a Notice of Appropriation for 100 inches of Swauk Creek water. Mr. Jacob Kirsch, an area resident and miner since 1928 (and the former owner near where the Williams Creek diversion point is located) indicated the Williams Creek Ditch was used for washing gold dumps in connection with the Swauk Creek mining claims. Testimony of Jacob Kirsch, November 19, 1991, p. 32-33. Mr. J.C. Pike filed a claim for the Williams Creek water June 6, 1886. Mr. Kirsch confirmed that the Pike claim was the basis for his own RCW 90.14 claim with an 1886 priority date, a claim that is very similar to that filed by Clifford Burcham. The Burcham family eventually acquired the property and received a mining patent on May 7, 1918 and owned the property until it was sold to Lavinal in the late 1980's. Mr. Burcham filed his RCW 90.14 claim on June 14, 1974, specifying Williams Creek as the source of surface water for mining operations on his property. Clifford Burcham was still mining at the time of the sale to Lavinal and engaged in an operation requiring water.

Mr. Kirsch also testified that no water had been diverted from the Williams Creek Ditch at any point west of a heliport "for at least 15 years" prior to 1991. The land west of the heliport that was previously used for mining included the Burcham/Lavinal property. Accordingly, Lavinal has concluded that Mr. Burcham used Williams Creek for his mining operating up to about 1976 (including the period the RCW 90.14 claim was filed) and switched to a Swauk Creek diversion when the Williams Creek delivery structure collapsed. The Swauk Creek water use requires a pump, which would have not been available to early users. Lavinal has carried on the mining practice in much the same fashion as Mr. Burcham, including the water use from Swauk Creek.

1 In support of water use, Lavinal also supplied a letter from Clifford W. Burcham stating water  
2 had been used on the property at least dating back to the time of the mining patent on May 7, 1918.  
3 Mary Burke also declared on May 29, 2002 that:

4 "It was commonly known that the miners used water for mining purposes. This includes Mr.  
5 Burcham, who used water from Williams Creek and Swauk Creek. At no time I am aware of  
6 Mr. Burcham failing to use water for any consecutive five-year period from 1967 to the  
7 purchase by the Sweeneys."

8 Lavinal submitted additional evidence in support of water use including the following:

- 9 1) A Notice of Water Right by Frank Kerstetter for 100 inches from Swauk Creek for the  
10 "Pawnee" Placer Mine;
- 11 2) A Warranty Deed from Frank Kerstetter and William Burcham to Eva Kerstetter and Anna  
12 Burcham dated September 1, 1915 showing a conveyance of, inter alia, the Pawnee placer  
13 claim.
- 14 3) The mining patent from the U.S. to Burchams and Kerstetters date May 7, 1918.
- 15 4) Portions of an appraisal by Lamb Hanson Lamb, dated September 23, 1990, for the Burcham  
16 claim property. This includes various materials regarding the history of mining, including  
17 the use of water through ditches where possible in the Swauk/Liberty area.
- 18 5) Photographs and a newspaper article dated November 13, 1974 that includes quotes from  
19 Cliff Burcham and photographs from his collection on various historical events.

20 The evidence of historic water use is somewhat circumstantial. However, when considered in  
21 totality, adequate to convince the Court water was used from Williams Creek for the purpose of  
22 mining from when that activity was commenced on the property to the current use by Lavinal. The  
23 Burcham family was engaged in mining at least from the time of patent in 1918 (and sometime  
24 before as is required under the mining law to receive a patent) through the sale to Lavinal. Mr.  
25 Clifford Burcham confirmed the use of water on the property prior to sale to Lavinal and references  
the 90.14 claim which asserts a right to divert from Williams Creek. The use of Williams Creek  
would have been more likely in the early 1900's as diversions from Swauk Creek would have been  
unlikely without a pump. Mrs. Mary Burke confirmed those uses dating back to childhood visits  
with Mr. Burcham in the 1940's. Use of Williams Creek continued until the mid-1970s when  
flumes failed and diversions past the heliport ceased. The Court finds that Williams Creek water  
was used on the Lavinal property for mining purposes dating back to at least 1915. The use from  
Williams Creek discontinued about 1976 and a use from Swauk Creek commenced, continuing to  
the present day.

1 That brings the Court to the legal issue of whether or not the Williams Creek right for the  
2 Lavinal property has relinquished in light of the nonuse of that source and point of diversion since  
3 at least 1976. RCW 90.14.160 establishes that a right reverts to the state if the owner voluntarily  
4 fails to use any portion of the right for 5 consecutive years. Ecology asserts the Williams Creek  
5 right has not been used for 25 consecutive years and therefore has relinquished and the use from  
6 Swauk Creek is an unauthorized change in point of diversion and use from a different source that  
7 should be terminated. Lavinal counters, stating the right has been exercised continuously during the  
8 25-year period, albeit from another source/point of diversion and this continued use of water  
9 prevents the right from relinquishing. Both parties believe this to be a matter of first impression in  
10 Washington and have supplied citations to decisions from other states to support their arguments.  
11 Considerable discussion transpired at the hearing regarding the meaning of Russell Smith v. Water  
12 Resources Department, 152 Or. App. 88, 952 P.2d 104 (1998).

13 This Court has heretofore made no decisions on the question of whether a right relinquishes if  
14 water from a different source at a different point of diversion (POD) is utilized in lieu of the source  
15 and POD where the right was established. The Court and Referee have routinely confirmed rights  
16 when the current POD varies slightly from the location of the original POD, but always from the  
17 same source. See e.g. Report of the Court Re: Subbasin No. 23 dated January 31, 2002. The right  
18 is typically confirmed at the original point of diversion. Id. Here, the diversion now used by  
19 Lavinal from Swauk Creek is slightly upstream from where Williams Creek empties into Swauk  
20 Creek. The diversion from Swauk Creek can not, and does not, utilize the same water as would  
21 otherwise have been used at the Williams Creek diversion. However, these two sources of water are  
22 in the same general watershed and Lavinal advises that no party diverts in the section between the  
23 Swauk Creek point of diversion and where Williams Creek empties into Swauk. Whether a  
24 diversion from an altogether different, but closely connected source protects the original right will  
25 require an analysis of the relevant statutes and a review of the decisions of other states.

26 We start with the existing case law. Lavinal and Ecology cited several cases in support but both  
27 seem to agree that Russell-Smith v. Water Resources Dept., 952 P.2d 104 (Or. App. 1988) is most  
28 useful. The Court concurs and notes both parties urge it to follow Russell Smith. The court held:

29 “The resolution is by no means clear-cut. Nevertheless, we conclude that there is no forfeiture  
30 under ORS 540.610 when a water user uses water from the designated source, and for the  
31 designated purposes, but from an unauthorized POD, for the statutory forfeiture period.”

1 The holding is broad enough to support both Lavinal and Ecology. On one hand, the court  
2 found forfeiture did not apply even though water had not been diverted from the original POD. On  
3 the other, the holding is specific to a use from the designated source but from an unauthorized POD.  
4 However, the Russell Smith court based its decision on four factors, which are more helpful. First,  
5 Oregon's water rights laws treat "use," "beneficial use," and "point of diversion" as distinct  
6 concepts. Second, the forfeiture statute focused on "use" and "beneficial use" without any  
7 reference to "point of diversion." Third, although other Oregon statutes address unauthorized  
8 changes in points of diversion, none established forfeiture as the remedy. Finally, under the Oregon  
9 scheme, the lack of forfeiture in such a scenario will not result in water right holders engaging in  
10 unbridled and disruptive changes in points of diversion. Would these considerations be the same: 1)  
11 under Washington law; and 2) if the point of diversion was moved to a different source? It must  
12 also be noted Russell Smith did involve a change from a spring to an intermittent stream.

13 Like Oregon, Washington water law treats "use," "beneficial use" and "point of diversion" as  
14 distinct concepts. RCW 90.03.380 states the "right to the use of water" remains appurtenant to land  
15 and can be changed if doing so will not cause a detriment or injury to existing rights. That section  
16 makes no mention of "source." In the next sentence, the statute specifically permits the change in  
17 point of diversion if such a change can be made without detriment or injury. The third sentence  
18 states "Before any transfer of such right to use water or change of the point of diversion of water . .  
19 .." The same distinction is continued throughout the transfer statute and makes clear the transfer of  
20 the right to use water is different than the change in point of diversion. That analysis is of some  
21 assistance and works in Lavinal's favor.

22 Similar to Oregon, the forfeiture statute concentrates on "use" and "beneficial use" without any  
23 reference to "point of diversion." RCW 90.14.160 does apply to "[a]ny person entitled to divert or  
24 withdraw waters. . ." However, the statute states the right relinquishes because the right holder  
25 fails to "beneficially use all or any part of said right." In the context of the statutory provision, "all  
or any part of said right" refers to the water and not other elements of the water right such as the  
POD. This interpretation is confirmed by other language in the sentence, which states "said right or  
portion thereof shall revert to the state, and the waters affected by said right shall become available  
for appropriation." The Court would be surprised if Ecology has any interest (or authority) over  
abandoned points of diversion. No mention is made of "source." The Court finds RCW 90.14.160  
to be concerned with the beneficial use of water and not the point of diversion or source.

1 There is no clear statement in the water code that forfeiture is the appropriate penalty for  
2 unauthorized changes in point of diversion or source. RCW 90.03.380 makes no such mention.  
3 Conversely, RCW 90.03.600 allows Ecology to assess civil penalties of up to one hundred dollars  
4 per day for violations of RCW 90.03. The unauthorized use of water that deprives another of their  
5 right is a misdemeanor crime. RCW 90.03.400. Those measures would appear to be the  
6 appropriate penalty in the event water is used without Ecology's authorization.

7 Which brings up the last consideration, and a concern expressed by Ecology at the time of  
8 hearing – what prevents water users from changing points of diversion willy-nilly without  
9 consideration of RCW 90.03.380. The answer seems to be the penalty statutes set forth above. See  
10 RCW 90.03.400 and .600. The Court recognizes this may place a considerable burden on Ecology  
11 to monitor and enforce existing decrees and permits. However, an interpretation of the statutes  
12 leads to the conclusion such enforcement is the way and the means to curtail unauthorized uses and  
13 changes of water – not a relinquishment proceeding pursuant to RCW 90.14. The legislature could  
14 have made forfeiture a penalty along with the other statutory provisions if it wanted a water right to  
15 be forfeited when a user changes the point of diversion without compliance with RCW 90.03.380.

16 The Court, after considering the relevant Washington statutes, holds that a water user, under  
17 these facts, does not forfeit a water right by changing the POD to a source within the same general  
18 watershed without authorization so long as water has been beneficially used in the amount  
19 authorized. Clearly, a user cannot establish a right to the new diversion – it only prevents the user  
20 from forfeiting a right to the lawful diversion point. That is particularly true under these facts where  
21 a water user proves historic beneficial use and provides an RCW 90.14 claim reflecting that historic  
22 use. For example, had Mr. Burcham and his predecessors used water from Swauk Creek  
23 historically, then switched the point of diversion to Williams Creek after 1917, then filed an RCW  
24 90.14 claim indicating the source as Williams Creek, and then switched the POD to Swauk Creek,  
25 the Court's decision may have been different. Further, a water user who does choose to take the  
law in their hands in such a fashion may be subject to civil penalties and possible criminal  
prosecution for the "unauthorized use of water to which another person is entitled or the willful or  
negligent waste of water to the detriment of another."

The Court finds that a right to Williams Creek was perfected by Lavinal's predecessor and was  
not relinquished when an unauthorized change in point of diversion was initiated. Russell Smith;  
Van Tassell Real Estate & Livestock Co. v. City of Cheyenne, 54 P.2d 906 (Wyo., 1936). Although

1 the decision in State v. Fanning, 361 P.2d 721 (N.M. 1961) is contrary, its resolution appears to be  
2 reached under a different statutory scheme. See id. at 723 (“An unauthorized change in well  
3 location is a misdemeanor, and if the owner . . . changed the location of his well after August 21,  
4 1931, without following the statutory procedure, and thereafter irrigated from the new well for four  
5 consecutive years, it resulted in a legal forfeiture of his water right. Irrigating from an unauthorized  
6 well must, insofar as forfeiture is concerned, be considered tantamount to not irrigating at all”).

7 A water right will be quantified below. From its pleadings, Lavinal clearly understands that it  
8 must comply with RCW 90.03.380 prior to transferring the point of diversion to Swauk Creek.  
9 Furthermore, unless or until that change is accomplished, Lavinal is ORDERED to discontinue the  
10 use of water from Swauk Creek.

11 The Court has quantified a right that differs from what Lavinal requested in two ways. First, the  
12 priority date is June 6, 1886, which is consistent with the date J.C. Pike filed a water right claim  
13 from Williams Creek. Second, the Court has modified the place of use to make it consistent with  
14 the RCW 90.14 claim filed by Mr. Burcham. The following right shall be inserted at page 113, line  
15 1 of the Schedule of Rights set forth in the Second Supplemental Report.

16 CLAIMANT NAME:	Lavinal, Inc.	Court Claim No. 06626
17 Source:	Williams Creek	
18 Use:	Mining	
19 Period of Use:	March 1 to November 30	
20 Quantity:	0.10 cfs; nonconsumptive	
21 Priority Date:	June 6, 1886	
22 Point of Diversion:	1600 feet west and 1730 feet north from the SE 23 corner of Section 2, being within the 24 NW1/4SE1/4 of Section 2, T. 20 N., R. 17 25 E.W.M.	
Place of Use:	S1/2N1/2SE1/4SE1/4 and S1/2SE1/4SE1/4 Section 3, T. 20 N., R. 17 E.W.M.	

d. Bernard P. Knoll (Claim Nos. 12061, 12062)

Mr. Bernard Knoll filed a number of exceptions to the Second Supplemental Report and testified at the August 8, 2002 hearing. Mr. Knoll utilizes three ditches, referred to as the “USFS”

1 Ditch, Ditch "A" and Ditch "B" and presented his exceptions in that fashion. The Court will use the  
2 same format below. The bulk of the exceptions pertain to the "USFS" Ditch. The Court ruled on  
3 many of the exceptions at the time of hearing and took four under advisement. The oral rulings will  
4 be summarized and an analysis provided for the four matters taken under advisement.

5 1. *USFS (Kirsch-Pettigrew) Ditch*

6 Mr. Knoll asked for the USFS ditch to be renamed the Kirsch-Pettigrew Ditch. There being no  
7 objection, the Court GRANTED the exception. Second, Mr. Knoll indicated the point of diversion  
8 is just above the confluence of Cougar Gulch and Williams Creeks. There being no objection, the  
9 Court GRANTED the exception. RP at p. 78.

10 Mr. Knoll initially believed the Referee had incorrectly quantified the conveyance flow portion  
11 of the right during the non-irrigation season and the Referee had recommended too great of a water  
12 right. However, after discussion at the hearing, Mr. Knoll seemed to understand the rationale  
13 behind the Referee's recommendation and appeared to withdraw his exception. RP at p. 78. To the  
14 extent Mr. Knoll did not withdraw his exception asking the right be reduced, the Court DENIES the  
15 exception. The instantaneous, non-irrigation season right shall remain 0.30 cfs as recommended by  
16 the Referee in the Supplemental Report at page 140, beginning at line 51/2.

17 Mr. Knoll also asserts a right for domestic use from Kirsch/Pettigrew ditch. The Referee denied  
18 the claim for a water right as no evidence was submitted showing water had been diverted from  
19 Williams Creek for domestic supply on the Bernard Knoll property. See Second Supplemental  
20 Report at 67 (emphasis in original). Considerable testimony was supplied by Mr. Knoll based on  
21 information he obtained from Mr. Pettigrew, a long-time resident of the area. That testimony was, in  
22 general, very difficult to follow. However, the Court interprets the facts to be as follows.

23 In the early 1930's, Mr. Pettigrew, moved onto the property now owned by Mr. Knoll to engage  
24 in a mining operation. He lived on that property for some time (unspecified in the record) and then  
25 moved to a parcel immediately south of the south boundary line of Mr. Knoll's property. While he  
lived on the Knoll property, he may have lived in a trailer, tent or perhaps constructed a cabin based  
on remnants of footings discovered by Mr. Knoll. While living on the Knoll property, Mr.  
Pettigrew may have used water directly from Williams Creek for domestic purposes. This would  
have occurred through dipping water with buckets. After Mr. Pettigrew moved to the area south of  
Mr. Knoll, he proceeded to use water from Ditch B (discussed below) and the use on the Knoll  
property was discontinued until Mr. Knoll acquired it.

1        There is little or no evidence regarding when Mr. Pettigrew made his move to the south. Since  
2 Mr. Knoll has not produced a permit or certificate, in order for the Court to confirm a right based on  
3 the riparian doctrine, the use must have been initiated by December 31, 1932. See Department of  
4 Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985). However, the activities of Mr. Pettigrew  
5 at that time are fairly sketchy. Further, if water was in fact used, it was done with a bucket through  
6 a dipping process, which, unlike a ditch, would leave no record and would not constitute a  
7 diversion. Rather the evidence tends to show Mr. Pettigrew moved his residence south of the Knoll  
8 property dating back into the 1920's or 1930's. The testimony of Jack Kirsch, who worked for  
9 Pettigrew beginning in about 1928, is instructive. He indicates Mr. Pettigrew always had a ditch  
10 running to his house in order to utilize Williams Creek water. See March 12, 1997 Report of  
11 Proceedings at 94. That evidence is consistent with Mr. Knoll's characterization of water use on the  
12 property south of the Knoll property, which is serviced by Ditch B. Mr. Kirsch makes no mention  
13 of the setup described by Mr. Knoll and the initiation and continued development of a water right  
14 on the Knoll property. The Court concludes that any domestic supply water right that may have  
15 been developed by Mr. Pettigrew was extremely limited and was abandoned when Mr. Pettigrew  
16 moved his residence south of the Knoll property.

14        The Court DENIES Mr. Knoll's request for a domestic water right from Williams Creek. The  
15 Court generally agrees with Referee's findings in the Second Supplemental Report. The evidence  
16 of historic use of water on the Knoll property is simply inadequate to confirm a water right.

17        Mr. Knoll requested confirmation of a quantity of water for conveyance loss for the Williams  
18 Creek diversion in the amount of 1.57 cfs. Referee Clausing recommended a water right for  
19 irrigation of 3 acres but lacked evidence to establish a quantity for conveyance loss. Supplemental  
20 Report of Referee at 65. Mr. Knoll, an engineer, diverted water into a pipe and then ran the water  
21 into the ditch and calculated the quantity based upon that diversion to be 1.91 cfs with 1.58 cfs  
22 required for conveyance. Ecology took no exception to the quantity. RP at 96.

22        The Court confirms a water right for conveyance loss and MODIFIES the right set forth at page  
23 140 as follows. At line 6, the Quantity section shall read "0.30 cfs; 30 acre-feet per year for  
24 irrigation, 1 acre-foot consumptively for stock water and 1.57 cfs for conveyance water May 1  
25 through September 30 and 0.30 cfs; 1 acre-foot consumptively for stock water from October 1  
through April 30."

1 Mr. Knoll also asked that a mining use be confirmed in relation to this ditch. However, Mr.  
2 Knoll's predecessor failed to claim that use on the RCW 90.14 claim appurtenant to the property --  
3 WRC No. 097175. Similar to the Court's ruling in regard to Mary B. Shelton, Claim No. 00519,  
4 failure to include that use on the claim form results in relinquishment of any right for that use. The  
exception is DENIED.

5 Mr. Knoll also asked the Court to direct Ecology to include on each certificate a statement that  
6 water may be used in the event of a fire emergency. Water may be used for fire suppression  
7 pursuant to the stipulation entered on December 12, 1996. See Document No. 12081. However, the  
8 Court does not believe there is any gain in putting such a statement on every certificate and  
therefore DENIES the exception.

9 *2. Ditch A*

10 Mr. Knoll filed two exceptions as to Ditch A. He first asked the Court to confirm a right to  
11 conveyance loss that results from the ditch running through his neighbor's property. Because of  
12 that seepage, a subirrigated wetland has developed. The Court DENIED that exception at the  
13 hearing. There is no diversion of water as required by the prior appropriation doctrine and  
14 Washington state law. See RCW 90.03.120; Ecology v. Grimes, 121 Wn.2d 459, 466, 852 P. 2d  
15 1044 (1993). Further, to grant a right in this instance could require the neighbors to run water  
16 through a leaky ditch when they might otherwise decide to make it more efficient, which would, in  
effect, result in a waste of water.

17 Mr. Knoll also excepted to the Referee's denial of a diversionary stock water right from Ditch  
18 A. The Referee found that Fred Knoll diverted from Ditch "A" or the muskrat pond just west of  
19 Ditch "A." Water flows unimpeded across a narrow part of Bernard Knoll's property. Stock drink  
20 from this water course year around. The question raised is whether this water course results from a  
man-made diversion or whether it's natural and conveys either return flow or spring water.

21 The facts are not clear -- the best the Court can determine is a diversionary process transpires  
22 that puts water into what was likely a natural channel. Fred Knoll uses the channel for irrigation as  
23 did his predecessors per the testimony of Jacob Kirsch. If water was used for irrigation it is  
24 reasonable to conclude the predecessors to the Knolls were using the channel for stock water. Thus,  
25 the Court confirms a diversionary right from Ditch "A" for stock water in the amount of 0.01 cfs, 1  
acre-foot per year on a year around basis with a December 1, 1894 priority date (date of Big Nugget  
patent). The following right shall be inserted at line 1, page 128 of the Supplemental Report.

1	CLAIMANT NAME:	Bernard Knoll	Court Claim No. 12061
2	Source:	Williams Creek	
3	Use:	Stock water	
4	Period of Use:	Continuously	
5	Quantity:	0.01 cfs; 1 acre-foot per year	
6	Priority Date:	December 1, 1894	
7	Point of Diversion:	POD "A": 1580 feet north and 130 feet east of	
8		the south quarter corner of Section 36, being	
9		within the NW1/4SE1/4 of Section 36, T. 21	
10		N., R. 17 E.W.M.	
11	Place of Use:	That portion of Lot 4 of Joe Cromarty Short	
12		Plat 77-05 consisting of 1 acre in the	
13		E1/2SE1/4SW1/4 of Section 36 lying east of	
14		Williams Creek, T. 21 N., R. 17 E.W.M.	

13 3. *Ditch B*

14 Mr. Knoll excepted to the Referee's recommendation of a water right from Ditch B for  
 15 irrigation of 1 acre, stating he utilizes pumps to irrigate the 2 acres rather than the ditch. The Court  
 16 DENIED this exception on the basis that no historical use of the water on the additional acre was  
 17 demonstrated and would be unlikely since the land at issue lies above the ditch and a pump  
 18 necessary for irrigation.

18 e. First Creek Water Users Association (Claim No. 00648)

19 First Creek Water Users Association (First Creek) filed two exceptions to the Referee's  
 20 recommendation as set forth in the Second Supplemental Report. The first exception is somewhat  
 21 general in nature and attempts to establish that First Creek shareholders have been using water on  
 22 640 acres in the service area since some time in the 1920's. The Referee only recommended a right  
 23 for 350.5 acres. The basis for that exception is generally legal in nature and no new factual material  
 24 was supplied. The second exception pertains to the water duty appropriate for the acreage  
 25 recommended by the Referee as having rights. In support, First Creek filed the Declaration of  
 Richard Bain dated May 30, 2002. Mr. Bain also provided testimony at the August 8, 2002 hearing  
 as did Mr. J. P. Roan.

1                   1.     *Acreage Exception*

2             First Creek excepts to the Referee's recommendation that a right be confirmed for the  
3 irrigation of 350.50 acres and asserts that 640 acres are irrigated consistent with the place of use set  
4 forth in the RCW 90.14 claim. First Creek offers a variety of arguments distilled as follows. First  
5 Creek asserts the Referee utilized a too-strict interpretation of RCW 90.03.380. Second, it concludes  
6 that a confusing, "hit or miss chain of title record," should be ignored and a right confirmed because  
7 other, unspecified ownership documents show water has been used on 640 acres in the First Creek  
8 water service area. Third, it asks the Court to recognize no other party has asserted a right to the  
9 water the Referee did not recommend. Fourth, First Creek believes the testimony by Jack White  
10 established that as far as he could remember, all of the water claimed from the First Creek ditch was  
11 applied to the First Creek service area. Fifth, the preamble to the water code (90.03.310) states the  
12 provisions of RCW 90.03 et seq. should not affect "existing rights." Sixth, the Court should not  
13 penalize First Creek simply because it has not been the subject of any documented historical  
14 controversy, which could have supplied the necessary historical information to confirm a right.  
15 Similarly, the Court should recognize that many title transfers were effected in the area historically  
16 without being recorded and the water rights in question may well have been so conveyed. Seventh,  
17 to the extent the water rights were not conveyed to the owners of lands on which the water is now  
18 used, then those rights were adversely possessed in light of six decades of continuous use. Most, if  
19 not all of these arguments were addressed by the Referee in the *Second Supplemental Report*.

20             In regard to this exception, First Creek has not taken issue with any of the facts found by the  
21 Referee and has supplied no new factual material to contradict the Referee's analysis. Therefore,  
22 the Court believes it would only confuse the record and this decision to restate the facts as set forth  
23 in the Referee's reports. The Court refers to pages 60-81 of Report of Referee dated March 25,  
24 1996; pages 25-42 of Supplemental Report dated July 6, 1998 and pages 17-61 and Appendix A of  
25 the Second Supplemental Report dated March 20, 2002. Obviously, the Referee analyzed the First  
Creek claim in great detail, utilizing over 80 pages to interpret and synthesize hundreds of exhibits.  
The Court will restate only the facts and analysis that affect this decision.

           Generally, First Creek asks the Court to confirm water rights for the Wold ownership of the  
original Wold-Munson Ditch. The Wold-Munson Ditch provides the basis for First Creek's claim  
and had its genesis in Notices of Appropriation of Water Appropriation and Affidavits of Water  
filed by Alex Munson and Peter Wold between 1881 and 1890. The Referee recommended a water

1 right for much of the Munson ½ interest. The Referee also reviewed the record to trace the  
2 ownership of Wold's ½ interest and was unable to confirm water rights. Specifically, with the  
3 evidence before him, the Referee concluded as follows.

4 As far as the Referee can determine, due to lack of compliance with the change procedures  
5 in RCW 90.03.380, the Wold water right is still appurtenant to the Robinson land described  
6 in DE - 357, land not served by FCWUA. The Referee declines to recommend confirmation  
7 of any water right based on the former Peter Wold undivided one-half interest in the Wold-  
8 Munson Ditch and First Creek water rights due to lack of evidence of beneficial use of the  
9 water, quantification and chain of title questions. Second Supplemental Report at 32.

10 The Referee successfully traced the Peter Wold component of the water right through 1916.  
11 As of that date, he determined, the water right was appurtenant to the N1/2 of Section 8, N1/2 of  
12 Section 9, E1/2E1/2 of Section 4 and the NW1/4 of Section 3, All in T. 18 N., R. 18 E.W.M.; also  
13 the SE1/4 of Section 33 and the W1/2SW1/4 of Section 34, T. 19 N., R. 18 E.W.M. That finding  
14 was based on a review of the County Water Commissioner's Schedule of First Creek Water Rights  
15 (DE - 357). The Court has reviewed SE - 1, Ecology's map depicting where water is currently  
16 used, and none of the land identified in the Water Commissioner's Schedule is now being irrigated  
17 by First Creek. The Court agrees with the Referee's finding that as of June 30, 1916, this land was  
18 the place of use of the entire Peter Wold component of the Wold-Munson Right. At that time, the  
19 land appears to have been owned by W.W. Robinson. Although Mr. Robinson recorded  
20 instruments conveying water to other parties, there was no evidence the water was actually used by  
21 those parties. Further, even if there were such evidence, there is no proof of what land was  
22 irrigated. The best evidence of use and ownership was DE - 357, the Water Commissioner's  
23 Schedule. First Creek provides no analysis nor does it point to anything in the record to counter that  
24 conclusion. The Referee was correct to follow that trail and the Court will do likewise. Thus,  
25 although there was some conveyance of the interest in the Wold component of the water right prior  
to 1917, the record shows the right as of June 30, 1916 was appurtenant to and had been  
beneficially used on the lands set forth above.

26 The 1917 Water Code was passed through both houses by March 7 and signed by the  
27 Governor on March 14, 1917. See Session Laws of the State of Washington 1917, page 468.  
28 According to the Explanatory preceding the Session Laws, the non-emergency laws took effect June  
29 6, 1917, 90 days after the legislature's adjournment. Section 39 of the 1917 Water Code states:

30 The right to the use of water which has been applied to a beneficial use in the state shall be  
31 and remain appurtenant to the land or place upon which the same is used: *Provided,*

1           *however*, That said right may be transferred to another or to others and become appurtenant  
2 to any other land or place of use without loss of priority of right theretofore established if  
3 such change can be made without detriment or injury to existing rights. . .Before any  
4 transfer of such right to use water or change of the point of diversion of water or change of  
5 purpose of use can be made, any person having an interest in the transfer or change, shall  
6 file a written application therefor with the state hydraulic engineer, and said application shall  
7 not be granted until notice of the hearing upon said application shall be published shall be  
8 published as provided in section 20 of this act. See 1917 Session Laws at 465.

9           This statute is now codified at RCW 90.03.380 and the relevant portion has remained  
10 unchanged with the exception the State Hydraulic Engineer has been changed to Department and  
11 Section 20 codified at as RCW 90.03.280. Therefore, between June 30, 1916 and June 5, 1917, a  
12 transfer of the water rights might have occurred from the W.W. Robinson property set forth above  
13 to the lands currently irrigated by First Creek without following the requirements of that Code.  
14 First Creek took no such exception nor did it supply any such evidence such a transfer occurred.  
15 Consistent with the law, any change after June 6, 1917 would only occur through the process set  
16 forth above. Lacking any evidence to the contrary, the Court concludes the Wold right remained  
17 appurtenant to the land identified above owned by W. W. Robinson.

18           Turning to First Creek's arguments, we start with the assertion RCW 90.03.380 was applied  
19 too strictly by the Referee. The Court disagrees – the Referee has interpreted/applied the provisions  
20 of the transfer statute exactly as written. Since June 6, 1917, it has been the uninterrupted law of  
21 this state that water rights remain appurtenant to the lands on which they have been beneficially  
22 used. RCW 90.03.380. The only method for changing the place of use, the point of diversion and  
23 manner of use is through application to Ecology and the concomitant opportunity for inquiry as to  
24 injury or detriment to existing rights provided, including the necessary notice. Any doubt about the  
25 strictness of this statute was removed in 1985 when the Supreme Court decided Department of  
Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071. At issue was a historic sawmill use between the  
early 1920's and the early 1950's followed by an irrigation use for a similar quantity. The water  
user sought confirmation of a quantity of water commensurate with the amount diverted for log  
washing. The Abbott Court rejected that argument and stated the following.

          Since 1917, however, by statute changes in use must first be approved by the supervisor of  
water resources. In this case, a change in use from log washing to irrigation should be  
allowed only if an application to do so was filed with and approved by the supervisor of  
water resources. Neither Fuher nor Riddle appears to have sought approval for the change  
in use. Abbott at 696.

1 RCW 90.03.380 makes clear changes in place of use are treated identical to changes in  
2 manner of use. This Court would be remiss to ignore the holding in Abbott as well as the  
3 unmistakable provisions of RCW 90.03.380.

4 The second argument deals with the chain of title vis-à-vis other documents allegedly  
5 evidencing leases and containing references regarding obligations to irrigate. There is no question  
6 that legal documents are in the record showing that water rights were transferred to lands now  
7 irrigated by First Creek. This fact, however, only exacerbates the lack of compliance with RCW  
8 90.03.380. Further, First Creek does not indicate which documents it believes provide that proof  
9 and how those records connect ownership from 1916. The record supplied by First Creek is so vast,  
10 constituting over 150 documents, the Referee was compelled to compose an exhibit table, to the  
11 Court's knowledge the first and only of its kind in the Subbasin pathway. If First Creek believed it  
12 had a legal instrument or any other proof showing the beneficial use and transfer of water to  
13 property within their service area in or about 1917, it should have pointed that exhibit out. A water  
14 user maintains the burden of proving the existence of a water right. United States v. Ahtanum Irr.  
15 Dist., 124 F.Supp 818 (1954) *rev'd on other grounds* United States v. Ahtanum Irr. Dist., 236 F.2d  
16 321 (9<sup>th</sup> Cir. 1956). Ironically, it is not a legal document that provides the basis for the Referee's  
17 conclusion that the place of use in 1916 was Robinson's property – the Referee relied on the Water  
18 Commissioner's Schedule for that determination.

19 Further, the warranty deeds supplied by First Creek show that as late as the 1940's, portions  
20 of the Wold and Munson water rights were being purchased by First Creek members. Indeed, some  
21 of the First Creek area that is now alleged to have an appurtenant water right was owned by the  
22 railroad well into the 1930's. Therefore, it is not necessarily the lack of chain of title that causes  
23 First Creek's claim to fail in some respects but the presence of some deeds that make the history  
24 difficult to interpret in the manner it advocates.

25 Third, First Creek attempts to convince the Court that since no other party has asserted a  
right based on the Wold portion of the Wold-Munson Ditch, then First Creek's claim must be valid.  
The Court is not persuaded. The record of this adjudication is replete with reference to notices of  
water right that were never perfected. Indeed, such is the very point of conducting an adjudication –  
to allow a user to demonstrate such claims to water rights are valid. A right can be based solely on  
proof of historic and continuous beneficial use and compliance with state requirements such as  
RCW 90.14.041, RCW 90.03.380, 90.03.290 and RCW 90.03.330.

1 First Creek's fourth argument concerns the testimony of Jack White (now deceased) that  
2 water had been used on First Creek lands since the 1920's. That statement is technically correct but  
3 somewhat overbroad. The testimony of Jack White was taken by the Referee on November 22,  
4 1991. Mr. White testified his father purchased land in the First Creek service area in 1929 and that  
5 he worked for his father from then until 1936 when he purchased the farm. He testified that First  
6 Creek water via the Wold-Munson ditch had been used on that farm since its purchase in 1929 and  
7 that there had been no change in water use practices on the Jack White property for 50 years, the  
8 early 1940's. Mr. White did not provide testimony regarding uses by other First Creek water users.

9 Even if the Court interpreted the testimony as First Creek suggests, that does not negate a  
10 claimant's obligation to demonstrate the *basis of the right* to use the water or RCW 90.03.380. First  
11 Creek has chosen to rely on the notices of water right filed by Wold and Munson as the basis of its  
12 water right. First Creek lands are not riparian to the water source. The claimant must show how the  
13 water right (if it is ultimately perfected) represented by that notice became appurtenant to the lands  
14 in question, particularly when the record shows the right in question was perfected and appurtenant  
15 to lands not owned by the claimant. The Referee successfully traced the water right to W. W.  
16 Robinson as of June 30, 1916. The right remains appurtenant to those lands. Those lands are not  
17 presently irrigated by First Creek. That water in general was used on the property at some point in  
18 the late 1920's does not negate First Creek's obligation to show how the specific right in question  
19 became appurtenant to that property. After June 6, 1917, the water code's transfer provision made  
20 the appropriate resource agency a necessary party to that transfer.

21 Fifth, the preamble to the water code (90.03.010) states the provisions of RCW 90.03 et seq.  
22 should not affect "existing rights." That provision is very general and applies primarily to the  
23 appropriation of water. The Court does not read the Referee's analysis to dispute the appropriation  
24 of the water right predating the water code. Nor does it appear to dispute any transfers that occurred  
25 prior to the enactment of the water code. Rather, it was the transfer of the right subsequent to the  
passage of the 1917 Water Code that has created the problem. RCW 90.03.380 simply serves to  
make the water right appurtenant to the land upon which it had been beneficially used and that no  
future transfers could occur without an examination by the state as to whether they interfere with  
existing rights. Abbott also makes clear that RCW 90.03.380 applies to changes even when the  
initial uses predated its adoption.

1 First Creek also asks the Court to not penalize it simply because it has not been the subject  
2 of any documented historical controversy, which could have supplied the necessary historical  
3 information to confirm a right. Contrary, to First Creek's position, the Wold-Munson right was the  
4 subject of controversy, resulting in several court decrees that assisted in determining the extent of  
5 the rights and lands to which it was appurtenant. Similarly, First Creek suggests the Court should  
6 recognize that many title transfers were effected in the area historically without being recorded and  
7 the water rights in question may have been so conveyed. As this Court has previously noted, the  
8 claimant to a water right bears the burden of supplying the evidence to support the confirmation of a  
9 right. The Court must have an evidentiary basis to support confirmation of a right.

10 Finally, First Creek argues the Referee should have accepted its adverse possession  
11 argument and confirmed water rights to First Creek on that basis. The Referee went to some length  
12 in the first Supplemental Report to document his concerns with the adverse possession claim. First  
13 Creek apparently supplied no additional information or analysis after the Supplemental Report and  
14 the Referee made no additional findings other than to note the active water market in the area, as  
15 reflected by the plethora of deeds in the record. Accordingly, it appears that any changes in the  
16 water right's place of use were bargained for and not obtained through the use of adverse  
17 possession. Supplemental Report at 50. With that addition the Court will examine the Supplemental  
18 Report to determine the Referee's rationale for denying the adverse possession argument.

19 The Referee stated the adverse possession theory failed primarily for lack of evidence.  
20 Supplemental Report at 40. He noted prescriptive rights are not favored by the law and the burden  
21 of proving the existence of a prescriptive right is placed upon the one who would benefit. Further,  
22 the use must be open, notorious, exclusive, hostile and continuous. It must deprive the owner of his  
23 right to use the water and cause damage. The Referee concluded First Creek had not provided any  
24 evidence to show it acquired the right through adverse possession, or that the use was open,  
25 notorious, exclusive, and hostile or that it deprived the landowner of his water and caused damage.  
There was no record as to what lands or owners First Creek acted against, whether such entities had  
knowledge of that use and that the use was uninterrupted.

Even if the Court accepted the adverse possession argument, the failure to comply with  
RCW 90.03.380 remains a barrier unless that adverse possession was accomplished prior to 1917.  
Indeed, in light of the passage of that statute along with the rest of the provisions in RCW 90.03 and  
90.14, this Court seriously questions whether a water right can be the subject of adverse possession

1 to the extent the adverse use is initiated after 1917. This result follows for two reasons. First, as of  
2 June 6, 1917, a transfer of a water right can only be accomplished through the transfer statute.  
3 Second, the goal of a centralized permit/certificate method for administering water rights is  
4 inconsistent with prescription. Ecology would be unable to perform its delegated function of  
5 ensuring that third parties can rely on their water rights if it cannot properly inventory the existing  
6 uses of water when transfer or permitting decisions are made. Accordingly, First Creek, like any  
7 other water user, has essentially two opponents it must conquer in order to win an adverse  
8 possession argument – the water right holder and Ecology. It is no different then purchasing a  
9 water right. To transfer a water right, a prospective water user must obtain title from the prior  
10 owner and permission from Ecology. Similarly, an adverse possessor may obtain title vis-à-vis  
another water user but doing so still does not allow the actual water right to transfer without RCW  
90.03.380 compliance.

11 McCleary v. Dep't of Game, 91 Wn.2d 647, 591 P.2d 778 (1979) is instructive. There, the  
12 Supreme Court rejected the Department of Game's argument that a prior owner had established the  
13 necessary elements for a prescriptive claim by using water since 1945. The McCleary Court stated:

14 The 1924 decree is a barrier to this claim. Its effect was to transfer to the state, for  
15 management through the appropriation permit procedure, those rights not otherwise  
allocated in the decree. Adverse possession may not be acquired against the state. *Id.* at 652.

16 Just as the permitting/certification of new water rights was handed to Ecology in 1917 for  
17 any new claims to water rights, so has the oversight of transfers of water rights. The Supreme Court  
18 has said there can be no adverse possession against the state. Similarly, the flipside of adverse  
19 possession is abandonment or relinquishment – for someone to take a water right someone has to  
20 lose it. The effect of abandonment/relinquishment is not to place the right with another entity but  
21 rather to transfer it to the state for reallocation pursuant to the permit/certificate process. That result  
22 is also necessary because the function of assigning water rights is not simply between one user and  
23 another – there are third party impairments and public interest matters to investigate. That function  
is short-circuited through an adverse possession process. Such results led many states to abolish  
prescription as a way to obtain appropriative water rights.<sup>1</sup> First Creek provided no analysis as to

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24  
25 <sup>1</sup> Arizona (Ariz. Rev. Stat. § 45-188), Nevada (Nevada Revised Stat. § 533.060) Montana (Mont. Code Ann §85-2-  
301(3)) and Utah (Utah Code Ann. § 73-3-1). See also A. Dan Tarlock, Law of Water Rights & Resources, Page 5-79-  
80 (1989).

1 how the water it has allegedly taken by adverse possession can escape this statutory provision, or to  
2 the contrary, was accomplished prior to the statute's passage.

3 There is simply a lack of evidence to support any and all of First Creek's arguments in  
4 regard to the fate of the Wold portion of the Wold-Munson right. Additionally, its adverse  
5 possession analysis is incomplete and otherwise unpersuasive pursuant to the analysis above. The  
6 exception is therefore DENIED.

## 7 2. Water Duty

8 First Creek took exception to the per acre water duty of 3.83 acre feet per year  
9 recommended by the Referee. Rather, it asserts the appropriate water duty should be 5.72 acre-feet  
10 per year per acre. First Creek submitted the Declaration of Richard Bain in support and also  
11 provided the testimony of Mr. Bain and Mr. Roan.

12 The Referee had originally assigned a water duty of 5 acre-feet per acre per year. See  
13 *Supplemental Report* at 42. First Creek excepted to that water duty and requested 7 acre-feet per  
14 acre. In support, First Creek offered a letter report authored by Mr. Bain. However, the Referee  
15 concluded from the report that Mr. Bain was actually identifying a lesser use of between 2.14 acre-  
16 feet/acre and 4.20 acre-feet per acre on an annual basis. Referee Clausen then utilized an aggregate  
17 quantity of water that First Creek diverts during a plentiful year (2688 acre-feet) reduced that by a  
18 conveyance loss of 50% (identified by the Referee in *Supplemental Report*) and divided by 350.50  
19 acres. That resulted in a recommendation of 3.83 acre-feet.

20 In his Declaration and during the hearing, Mr. Bain, a consulting engineer recognized as an  
21 expert on water matters in this adjudication, basically changed the inputs set forth above. First,  
22 relying on USGS stream flow data from the 1974 irrigation season, he determined the annual  
23 aggregate diversion to be 3085.3 acre-feet based on a March 15 through October 31 season of use.  
24 That, however, is not the recommended irrigation season – the Referee has recommended April 1  
25 through October 15, which would reduce the irrigation season use by 120 acre-feet. With that  
modification, the annual diversion would be 2965.3 acre-feet. Mr. Bain then identified a  
conveyance loss of 35% based on soil characteristics and water use patterns. That would result in  
an on-farm use of 1,927.45 acre-feet during the identified irrigation season and 5.5 acre-feet per  
acre based on 350.50 acres. The Court accepts Mr. Bain's analysis as modified and determines the  
annual quantity portion of the right to be 1,927.45 acre-feet, resulting in an on-farm use of 5.5 acre-  
feet per acre. Ecology did not object to the overall quantity set forth by Mr. Bain. It did point out

1 Mr. Bain's analysis relied on a diversion analysis that maximized the use of the available water  
2 supply. Thus, First Creek's exception to add additional acres could not result in additional  
3 quantities of water. Although the point is moot since the Court denied First Creek's exception to  
4 add acres, the Court does agree with Ecology. The overall quantity of 1,927.45 acre-feet of water is  
5 the most First Creek can divert whether it irrigates 10 acres or 10,000. Adding additional acres  
6 would only serve to lessen the amount of water per acre available for use.

7 Changing the percentage of conveyance loss also requires the Court to modify the  
8 instantaneous quantities set forth in the Schedule of Rights at pages 97 and 101. There, the Referee  
9 relied on per acre water duty established by the historic decrees. Here the Court will start with the  
10 fact that 13.9 cfs has been historically diverted. See Declaration of Richard Bain dated July 19,  
11 1996. If a 35% conveyance loss factor is used, that leaves 9.035 cfs for on-farm use. The Court will  
12 then divide that proportionately between the senior (1877 - 4.693 cfs) and junior (1881 - 4.795 cfs)  
13 rights. The Court will similarly divide the conveyance loss quantity proportionately between the  
14 senior (1877 - 2.283) and the junior (1881 - 2.582). The Court recognizes that this may result in the  
15 First Creek lands receiving a larger per acre instantaneous quantity than the prior decrees  
16 authorized. However, in light of potential shortages of water, certain users may have reduced the  
17 acreage irrigated to ensure the acres that were irrigated received an adequate supply. The Court  
18 believes its decision is consistent with the prior decrees so long as the total quantity confirmed does  
19 not exceed the amount the decrees authorized on an overall basis to First Creek lands.

20 The Court Orders the following modifications to First Creek's 1877 water right set forth at  
21 page 97. Beginning at line 6, the section following quantity should be changed as follows:

22 Quantity: 4.24 cfs; 904.45 acre-feet per year for irrigation  
23 and stock watering during irrigation season;  
24 2.283 cfs for conveyance loss; 6.523 cfs, 27  
25 acre-feet per year (consumptive) for stock  
watering from October 16 through March 31.

26 The Court Orders the following modifications to First Creek's 1881 water right set forth at  
27 page 101. Beginning at line 6, the section following quantity should be changed as follows:

28 Quantity: 4.795 cfs; 1023 acre-feet per year for irrigation  
29 and stock watering during irrigation season;  
30 2.582 cfs for conveyance loss.

1 f. Liberty Mountain Ownership Association, Inc. (Claim No. 01095)

2 Liberty Mountain was recommended a water right in the Report of Referee for Subbasin 4  
3 dated March 25, 1996. Liberty Mountain did not pursue an exception to the Report nor did it file an  
4 exception to the Supplemental Report of Referee issued July 6, 1998. However, after the initial  
5 right was carried into the Schedule of Rights set forth in the Second Supplemental Report, Liberty  
6 Mountain filed exceptions and did appear at the August 8, 2002 hearing in support thereof. With  
7 some reluctance in light of missed earlier opportunities, the Court agreed to consider the exceptions.

8 Liberty Mountain takes exception to the priority date, the source of water, and the quantity  
9 of water set forth in the Report of Referee.<sup>2</sup> The Report provides no analysis and notes the proposed  
10 right was recommended for confirmation in the Plaintiff's Report. See Report at 17. The basis for  
11 that recommendation is obviously a Certificate of Water Right issued to Liberty Mountain in 1969.  
12 See SE - 3; Certificate of Water Right Record No. 22, Page 10944. The right recommended  
13 includes the terms set forth in that certificate: a priority date of June 30, 1965; a quantity of 0.014  
14 cfs, 5 acre-feet per year and a source of two unnamed springs located in Spring Lot C and Park Lot  
15 A, both within the Plat of Liberty Mountain No. 1, Section 18, T. 21 N., R. 18 E.W.M.

16 Liberty now asks for a domestic right based upon a patent issued to John A Nicholson with a  
17 priority date of October 22, 1915. They provided testimony that Mr. Nicholson may have been on  
18 the property as early as 1911. Liberty's arguments were not well synthesized, but it seems to assert  
19 that language regarding water rights in the federal patent provides the property some sort of federal  
20 right that passed with the property. It asks for a substantially higher quantity - 0.0775 cfs and 27.5  
21 acre-feet per year through diversions from eight unnamed springs.

22 The Court is unaware of any federal reserved water right that attaches to federal patents -  
23 rather what Liberty refers to is standard patent language and would, in fact, be directed at some  
24 other entity that might have developed a water right pursuant to state law that crossed the property  
25 now owned by Liberty. Thus any right that Liberty's predecessor might have perfected would need  
to conform to state law. RCW 90.14 is the applicable state law and to preserve a right for a cabin  
constructed by Nicholson prior to 1917 a claim pursuant to that statute must have been filed with  
Ecology. Robert and Afton Langhurst filed WRC 145945 on June 17, 1974 and did so on the so-  
called short form, which applies to very small quantities of water. See RCW 90.14.051; RCW

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<sup>2</sup> Liberty Mountain also requested a change in the point of contact which the Court has noted and utilized.

1 90.44.050 (exempting from permit requirements groundwater withdrawals under 5,000 gallons per  
2 day). Liberty attempted at the hearing to link this 90.14 claim with the original Nicholson cabin.  
3 The deed attached to the short form provides the following property description - "Lot 16 Liberty  
4 Mountain Unit 1, as per plat thereof recorded in Book 4 of Plats, Page 34, of records of the Kittitas  
5 County Auditor." Lot 16 lies within Section 18, T. 21 N., R. 18 E.W.M. The claim also indicates a  
6 use of 10 gallons per minute, 1 acre-foot per year from Ryan Creek and springs. The Langhursts  
7 used the water for domestic purposes including irrigation of lawn and garden.

8 This decision hinges on the connection between the historical use of water at the location of  
9 the Nicholson cabin and the right claimed by the Langhursts in the WRC Claim No. 145945.  
10 Failure to substantially comply with the claim requirements of RCW 90.14 results in the  
11 relinquishment of any right. RCW 90.14.071. The RCW 90.14 claim form would be the maximum  
12 extent of the right and Liberty's request far exceeds the amount set forth in the claim.

13 Although some evidence was produced regarding the historic and continued use of water at  
14 the original Nicholson cabin, the connection between the use and the RCW 90.14 claim filed by the  
15 Langhursts is too vague to allow the Court to confirm a right. Further, there is some question  
16 regarding the relationship between the certificate Ecology issued to Liberty Mountain and any right  
17 that might have been perfected by Nicholson and his successors. Liberty Mountain's exception is  
18 therefore DENIED and their right shall remain as quantified in the Report of Referee.

### 19 III. CONCLUSION

20 The Court ORDERS that the claims addressed in this Opinion are modified to reflect the  
21 Court's findings. The Court further ORDERS that those decisions be included in the Referee's  
22 Schedule of Rights set forth in the Second Supplemental Report. This Memorandum Opinion and  
23 Order resolves the exceptions to the Second Supplemental Report. Subbasin 4 shall therefore  
24 proceed to Conditional Final Order as set forth in the Proposed Conditional Final Order  
25 accompanying this Opinion. A Notice of Entry is also included.

Dated this 8<sup>th</sup> day of October, 2002.

  
Sidney Ottem, Court Commissioner