

NOV 08 2012

WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 304701

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

Appellants,

vs.

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

Respondents.

APPELLANTS' ANSWER
TO WWUC AMICUS CURIAE MEMORANDUM

Rachael Paschal Osborn
WSBA No. 21618
2421 W. Mission Ave.
Spokane, WA 99201
(509) 954-5641
rdpaschal@earthlink.net

FILED
NOV 08 2012
COURT CLERK
SPokane, WA

WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 304701

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

Appellants,

vs.

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

Respondents.

APPELLANTS' ANSWER
TO WWUC AMICUS CURIAE MEMORANDUM

Rachael Paschal Osborn
WSBA No. 21618
2421 W. Mission Ave.
Spokane, WA 99201
(509) 954-5641
rdpaschal@earthlink.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS..... 1

III. ARGUMENT 1

 A. *Lummi Nation* preserved as-applied challenges..... 1

 1. MWL resolution of ambiguities did not change
 the law of relinquishment 3

 2. Junior water rights are protected from illegal
 enlargement, and the “rights in good standing”
 proviso does not eliminate that protection. 4

 3. The “in good standing” proviso does not revive
 relinquished water rights. 6

 4. WSU’s water rights need not have been judicially
 adjudicated in order to find an improper legislative
 adjudication of facts. 7

 B. Other Principles of Water Law 8

 1. Unperfected groundwater certificates may not be
 amended pursuant to RCW 90.44.100. 8

 2. Ecology must revoke and diminish water quantities
 lost for non-use in the water right amendment process 12

 3. Washington law does not recognize or authorize
 “de facto” changes in point of withdrawal 15

 C. The efficiency goals of the Municipal Water Law
 do not prevent loss of water rights for non-use 19

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

Washington Appellate Cases

Belleau Woods II, LLC v. City of Bellingham,
150 Wn. App. 228, 208 P.3d 5 (2009)..... 14

Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.,
103 Wn.2d 111, 691 P.2d 178 (1984)..... 14

City of Tacoma v. O'Brien,
85 Wn.2d 266, 534 P.2d 114 (1975)..... 7

City of Union Gap v. Dep't of Ecology,
148 Wn. App. 519, 195 P.3d 580 (2008) 4, 8

Dep't of Ecology v. Theodoratus,
135 Wn.2d 582, 957 P.2d 1241 (1998)..... 6, 8, 9, 12

Edelman v. Publ. Discl. Comm.,
116 Wn. App. 876, 68 P.3d 296 (2003)..... 15

In Re Estate of Jones,
__ Wn.2d __ (2012) (2012 WL 3949399) 17

Johnson vs. Recreational Equipment, Inc.,
159 Wn. App. 939, 247 P.3d 18 (2011)..... 14

Lummi Nation v. Washington,
170 Wn.2d 247, 241 P.3d 1220 (2010)..... *passim*

Motley-Motley v. Dep't of Ecology,
127 Wn. App. 62, 110 P.3d 812 (2005),
rev. den., 156 Wn.2d 1004, 128 P.3d 1239 (2006) 2, 8

Okanogan Wilderness League v. Town of Twisp,
133 Wn.2d 769, 947 P.2d 732 (1997) 15, 17, 18

Pacific Land Partners v. Dep't of Ecology,
150 Wn. App. 740, 208 P.3d 586, *rev. den.* 167 Wn.2d 1007 (2009) 8

Postema v. Pollution Control Hrgs. Bd.,
142 Wn.2d 68, 11 P.3d 726 (2000)..... 15

PUD No. 1 of Pend Oreille County v. Dep't of Ecology,
146 Wn.2d 778, 51 P.3d 744 (2002)..... 10, 14

<i>R.D. Merrill v. Pollution Control Hrgs. Bd.</i> , 137 Wn.2d 118, 969 P.2d 458 (1999).....	9, 11, 17, 18
---	---------------

Washington Superior Court Order

<i>Dep't of Ecology v. Acquavella</i> , Yakima County Sup. Ct. No. 77-2-01484-5, Memorandum Opinion & Order (Oct. 8, 2002).....	16, 17
---	--------

Out-of-State Appellate Cases

<i>Lengel v. Davis</i> , 141 Colo. 94, 347 P.2d 142 (1959).....	18
<i>Russell-Smith v. OWRD</i> , 152 Or.App. 88, 952 P.2d 104 (1998).....	16

Washington Statutes

RCW 70.119A.180.....	20
RCW 90.03.330	9, 12, 13, 14
RCW 90.03.330(1).....	9, 12
RCW 90.03.330(2).....	5, 13, 15
RCW 90.03.330(3).....	6, 10, 12, 13, 14, 20
RCW 90.03.330(4).....	10, 13
RCW 90.03.395	11
RCW 90.03.397	11
RCW 90.03.560	5
RCW 90.03.570	10, 11
RCW 90.14.130	1, 16, 17
RCW 90.14.160	16

RCW 90.14.170 16

RCW 90.14.180 1, 16

RCW 90.44.060 9

RCW 90.44.080 9, 12

RCW 90.44.100 5, 8, 11, 12, 13, 14

Oregon Statute

ORS 540.610..... 16

Session Laws

LAWS of 2003, 1st Spec. Sess., ch. 5. 13

Court Rules

RAP 10.1(e) 1

I. INTRODUCTION

Pursuant to RAP 10.1(e), Appellants Scott Cornelius, et al (Cornelius), respectfully submit this brief in answer to Washington Water Utilities Council's (WWUC) amicus curiae memorandum.

II. STATEMENT OF FACTS

Cornelius incorporates herein by reference the statement of facts set forth in Opening Brief of Appellants (Op. Br.) at 7-11.

III. ARGUMENT

A. *Lummi Nation* preserved as-applied challenges.

Cornelius raises two as-applied constitutional challenges in this appeal. First is a separation of powers claim based on the PCHB's default presumption of the constitutionality of the Municipal Water Law (MWL), which operated to validate WSU's invalid water right certificates 5070-A and 5072-A. Both rights, originally issued for non-municipal purposes, were never fully perfected and, what use there was partially or fully lapsed for more than five years. The two rights were therefore relinquished pursuant to RCW 90.14.130 (general relinquishment law) and RCW 90.44.180 (relinquishment of certificates). This relinquishment occurred long before the 2003 enactment of the MWL. The PCHB's ruling that the MWL retroactively converted the certificates into municipal rights and retroactively revived them, constitutes a separation of powers violation.

The legislature could not enact a law that reached back in time to change the legal status of WSU's relinquished water rights. *Lummi Nation v. State of Washington*, 170 Wn.2d 247, 263-65, 241 P.3d 1220 (2010).

Second, Cornelius raises a due process claim. The PCHB compounded its erroneous presumption that WSU had not lost its water rights due to non-use, by then refusing to allow Cornelius to submit proof of impairment based on an overall increase in WSU's pumping that was facilitated by the amendments.¹ This ruling deprived Cornelius of his right to present his claim of impairment to his water right. *Motley-Motley v. Dept. of Ecology*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (to establish due process violation in administrative proceedings, party must be prejudiced with regard to preparation or presentation of a defense).

Contrary to WWUC's argument, *Lummi Nation* did not decide these two specific as-applied claims. Indeed, WWUC's brief contains no argument specifically addressing these issues. Instead, WWUC offers broad-brush arguments about the MWL and *Lummi Nation* that are largely repetitive of Respondents' briefs, or irrelevant.

WWUC is correct that Cornelius and Sierra Club were parties to *Lummi Nation*. They and other plaintiffs submitted declarations outlining the injuries the MWL would cause them. This was done for standing and

¹ AR 85 at 39-42, 45; AR 89 at 3.

illustrative purposes. *Lummi Nation* at 266-67. Plaintiffs did not ask the Court to resolve their specific injuries, the issues pertaining to their injuries were not briefed, and *Lummi Nation* did not rule on their merits. WWUC cannot and does not cite to any part of *Lummi Nation* that resolves the claims in this appeal.

Further, the legal standard employed in *Lummi Nation* was very different than the standard here. The Court declined to find the MWL to be facially unconstitutional if there were “any circumstances where the statute can constitutionally be applied.” 170 Wn.2d at 258 (citations omitted).² In contrast, this Court evaluates the MWL in the context of a PCHB summary judgment order based on specific facts concerning WSU’s water rights and longstanding non-use of water.

The nature of this appeal, the legal standard, the record and the briefing, are all very different than what was before the *Lummi Nation* court. WWUC’s assertion that claims raised here were resolved there is not well taken and should be rejected.

1. MWL resolution of ambiguities did not change the law of relinquishment.

Regardless whether legal ambiguity attended the status of municipal rights, there was no ambiguity that WSU Certificates 5070-A

² In ruling that the plaintiffs had not met this burden the Court stated, several times, that the opportunity for as-applied challenges to the MWL was preserved. *E.g.*, 170 Wn.2d at 258 and n.4.

and 5072-A were issued for domestic, community domestic and stockwater purposes.³ WWUC Br. at 3-4. Rights issued for such purposes were subject to loss for non-use prior to 2003. *See Op. Br.* at 33. In *Union Gap v. Dept. of Ecology*, this Court held that relinquished non-municipal rights cannot be revived and transferred to municipal purposes. 148 Wn. App. 519, 531-32, 195 P.3d 580 (2008). WWUC's assertion regarding the "clarifying" purpose of the MWL does not resolve the question presented here, i.e., whether the MWL can operate to retroactively revive rights that WSU relinquished for failure to use.

2. Junior water rights are protected from illegal enlargement, and the "rights in good standing" proviso does not eliminate that protection.

WWUC argues that *Lummi Nation* stands for the proposition that Cornelius (as a junior user) could not be legally harmed because the amendments to WSU's two non-municipal certificates were nothing more than an "improvement in position" of WSU's senior rights. WWUC Br. at 6. This argument fails to recognize that WSU's two water rights were already relinquished at the time the MWL was enacted. Here, the Court must decide as a legal matter whether the laws of non-use (e.g., relinquishment, failure to perfect) applied to WSU's non-municipal

³ Exs. A-8 through A-12 and A14 through A-18 are the applications, reports of examination, permits, proofs of appropriation and certificates for Certificates 5070-A and 5072-A. All documents indicate the rights were issued for non-municipal purposes.

certificates prior to 2003. Assuming these laws did apply, an interpretation of the MWL that revives those rights would violate separation of powers by legislatively adjudicating facts.

WWUC's citation to *Lummi Nation*'s facial due process discussion is irrelevant to the separation of powers claim. WWUC Br. at 4-5. WWUC also wrongly implies that a junior water right holder could never prove a constitutional violation. Quite the opposite, *Lummi Nation* recognized that a fact-based, as-applied challenge might well demonstrate the invalidity of the MWL. Here, it is the illegal enlargement of WSU's rights via the transfer process that harms junior water users such as Cornelius, particularly in the context of a shrinking groundwater supply.

WWUC's citation to RCW 90.03.560 is also inapt. That statute requires that non-municipal rights go through the change process, which in turn invokes the "revoke and diminish" provisions of RCW 90.03.330(2) and tentative determination requirements of RCW 90.44.100.

Finally, WWUC incorrectly states that Cornelius has made only a "generalized assertion" of harm. WWUC Br. at 6. This is patently incorrect. Cornelius specifically asserts that WSU's expansion of pumping, facilitated by the PCHB's re-defining of its non-municipal rights and reinstatement of quantities previously lost for non-use, will lead to increased pumping in the Palouse Basin's Grande Ronde Aquifer. This in

turn will cause water levels in the Cornelius well to continue to decline.⁴ The PCHB's presumption that the MWL was constitutional and protected WSU's non-municipal certificates from loss was an interpretation that violates separation of powers by allowing for legislative adjudication of the validity of the WSU rights. Moreover, the PCHB's legal conclusion as to the relevance of Cornelius' evidence regarding increased pumping by WSU violated procedural due process protections. *Lummi Nation* preserved the ability of Cornelius and others to challenge the MWL in the context of specific facts such as these.

3. The “in good standing” proviso does not revive relinquished water rights.

WWUC next argues that the “in good standing” proviso of RCW 90.03.330(3) protects WSU's rights from an as-applied challenge. WWUC Br. at 7. As discussed below in Section B(2), this proviso may have protected WSU's inchoate certificates in the status quo, but did not create new or different evaluation criteria once WSU applied to amend its rights. Moreover, Cornelius' separation of powers claim is not based on the *Theodoratus* decision, but on the legislative adjudication of facts that has occurred here, a different separation of powers violation specifically recognized in *Lummi Nation*. 170 Wn.2d at 263-65. WSU failed to

⁴ The PCHB did not disagree that this would happen. It simply found that it was legally irrelevant. AR 89 at 3.

perfect and failed to use its domestic and community domestic water rights. If the MWL did what WWUC claims it did, i.e., revived these rights by retroactively re-defining them as municipal and then retroactively exempting them from relinquishment, that would be a legislative adjudication of facts that violates separation of powers.

4. WSU's water rights need not have been judicially adjudicated in order to find an improper legislative adjudication of facts.

WWUC next argues that to find that the MWL as applied to Cornelius' situation is an unconstitutional "adjudication of facts" requires legislative tampering with an actual court judgment. This is incorrect. In *Tacoma v. O'Brien*, the principle case cited in *Lummi Nation* to explain how an "adjudication of facts" violation might occur, the contracts at issue were not previously adjudicated.⁵ Rather, the Legislature enacted a law stating that the contracts were impossible to perform and therefore void. This violated separation of powers. 85 Wn.2d at 271-72 (citing numerous cases finding improper legislative adjudication of facts without prior legal judgment). Similarly, interpretation of the MWL to make a default determination as to the validity of WSU's pre-2003 non-municipal rights is an adjudication of facts. It is the function of the judiciary, not the

⁵ Indeed, there had been no prior judicial decision of any kind, the Washington Supreme Court instead exercising original jurisdiction to hear the case. *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 268, 534 P.2d 114 (1975).

legislature, to apply the law of relinquishment to a set of facts. See, for example, *City of Union Gap, supra*; *Pacific Land Partners v. Dept. of Ecology*, 150 Wn. App. 740, 208 P.3d 586, *rev. den.* 167 Wn.2d 1007 (2009); *Motley-Motley, supra*.

In making this argument, WWUC confuses the *Theodoratus*-type separation of powers violation, i.e., improper legislative disturbance of a pre-existing judgment, with the “adjudication of facts” type of violation, in which the legislature engages in adjudicative fact-finding (particularly with retroactive effect) that is the purview of the judicial branch. WWUC is wrong to argue that WSU’s water rights had to have been previously adjudicated in the courts in order to find that separation of powers is violated.

B. Other Principles of Water Law

1. Unperfected groundwater certificates may not be amended pursuant to RCW 90.44.100.

WWUC offers two arguments regarding the transfer of unused groundwater certificates. WWUC Br. at 11-12. First it argues that the law always allowed such transfers. Second, it argues that the MWL, by implication, authorizes such transfers. Both arguments are incorrect.

This case is the first to specifically address whether RCW 90.44.100 allows transfer of unused quantities of water contained in a

groundwater certificate. The question matters because three of WSU's water rights are certificates that were never perfected. Once WSU voluntarily applied to change those certificates, the prohibition on transfer of unused water should have applied.

In *R.D. Merrill*, the Court assumed that certificates always represent perfected water. This assumption was grounded in statute. RCW 90.03.330,⁶ made applicable to groundwater by RCW 90.44.060, authorizes Ecology to issue a certificate once the applicant demonstrates “that any appropriation has been perfected in accordance with the provisions of this chapter.” See also RCW 90.44.080 (certificate shall issue once appropriation has been perfected). “Perfection” means actual use, thus a certificate could not be granted until the permittee actually used the water right. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998). This was the law as it existed at the time *R.D. Merrill* was decided.⁷ *R.D. Merrill v. Pollution. Contr. Hrgs. Bd.*, 137 Wn.2d 118, 129, 969 P.2d 458 (1999). WWUC's argument (including an illogical construction of a truncated quote, WWUC Br. at 12) fails to acknowledge that unperfected certificates were simply not contemplated

⁶ Now RCW 90.03.330(1).

⁷ Later in its brief, WWUC acknowledges that the perfection requirement of RCW 90.03.330(1) “is a general statement applicable to all water rights that predates the MWL.” WWUC Br. at 14.

under the statutes until enactment of the MWL. Indeed, RCW 90.03.330(4) instructs that Ecology is never again to issue a certificate for unperfected water rights, demonstrating that the special treatment afforded to unused municipal certificates is an exception to the rule that perfection is always required. The prohibition on transfer of unused water is intended to prevent enlargement of rights to the detriment of other water users (junior and senior). *PUD No. 1 of Pend Oreille County v. Dept. of Ecology*, 146 Wn.2d 778, 794, 51 P.3d 774 (2002).

WWUC also argues that the “in good standing” proviso of RCW 90.03.330(3), rehabilitating the status of unused municipal certificates, necessarily changed the groundwater amendment statute. But treating inchoate municipal certificates like “any other vested . . . certificate,” as *Lummi Nation* requires, 170 Wn.2d at 265, means that these certificates may not be transferred for the various reasons raised in this appeal, including failure to perfect, failure to use with diligence, and relinquishment (with respect to pre-2003 non-municipal rights) – just like any other vested certificate. *Id.*

WWUC’s argument regarding enactment of RCW 90.03.570 also fails. WWUC Br. at n. 24. There are two reasons why that statute, which changed the law to allow amendments to inchoate surface water rights, does not signify a legislative assumption that unused groundwater

certificates were already transferable. First, close reading of the statute indicates the Legislature's concern was for the impact of surface water transfers on surface water instream flows.⁸

Second, RCW 90.03.570 references surface "rights" – and is not specific to certificates. It is equally plausible that the Legislature was making transfer law relating to surface water permits congruent with transfer law relating to groundwater permits. Prior to 2003, transfer of unperfected groundwater permits was permissible, but transfer of unperfected surface permits was not. *R.D. Merrill*, 137 Wn.2d at 130. Indeed, this interpretation of RCW 90.03.570, enacted shortly after the *R.D. Merrill* decision, is more plausible than that offered by WWUC, given the stark differentiation in treatment of surface versus groundwater permits that was explicated in *R.D. Merrill*.

In sum, WWUC is wrong to suggest that unused groundwater certificates may be amended pursuant to RCW 90.44.100. But for the exception created by the MWL, perfection is, and has always been, the rule for issuance of certificates.

⁸ Specific legislative treatment for surface water rights is not unusual. The Legislature had at least twice prior to enactment of the MWL liberalized the restriction on transfer of inchoate surface water permits. See RCW 90.03.395; 90.03.397.

2. Ecology must revoke and diminish water quantities lost for non-use in the water right amendment process.

WWUC argues that Ecology is permitted, but not mandated, to “revoke or diminish” WSU’s water rights as part of the water right amendment process. WWUC Br. at 13-15. Cornelius agrees that this Court must review all four sections of RCW 90.03.330 and determine how they fit together. WWUC is incorrect, however, to assert that the “in good standing” proviso of RCW 90.03.330(3) permanently immunizes unused municipal certificates from evaluation of their impact on other users and the public welfare – an evaluation that occurs when a groundwater right is amended.

As discussed in the previous section, and as set forth in RCW 90.03.330(1) and 90.44.080, water rights must be perfected before certification. Ecology acted in an ultra vires manner when it issued non-municipal certificates based on system capacity, rather than actual beneficial use. *Theodoratus*, 135 Wn.2d at 598. In enacting the MWL and adding three sections to RCW 90.03.330, the Legislature did what it could to rehabilitate questionable unused certificates. But it could go only so far. The MWL gave water suppliers some breathing room but it did not, as WWUC suggests, re-write the Groundwater Code. The requirements of RCW 90.44.100, including judicial interpretations of the

statute, are incorporated into the MWL via RCW 90.03.330(2). And, as noted above, the statute prohibits Ecology from ever again issuing a certificate for unperfected water. RCW 90.03.330(4). Read as a whole, RCW 90.03.330 requires perfection of all certificates with the narrow exception set forth in RCW 90.03.330(3), and even those certificates are subject to evaluation for actual use when they are amended.

Review of the Municipal Water session law supports this reading. The Legislature was meticulous in how it chose to address municipal supply water rights, making specific amendments to specific sections throughout the Water Code. LAWS of 2003, 1st Spec. Sess., ch. 5. The Legislature could have stated that the tentative determination of extent and validity required under RCW 90.44.100 does not apply to municipal rights, or that evaluation of proposed water right amendments was limited to determining “good faith and reasonable diligence” as WWUC (and Ecology) argue. But it did not do so. The MWL nowhere revised the tests for groundwater right amendments. The interpretation that WWUC asks this Court to read into the statute is simply not there.

Instead, the Legislature retained and expressly cited Ecology’s authority to revoke and diminish a municipal supply water right when processing amendments to that right. RCW 90.03.330(2). That was it. No revisions to the transfer statutes, no exceptions added, no deletion of

authority. For the Court to find that the Legislature impliedly re-wrote and eliminated key elements of water right transfer law, much more would be required. The “in good standing” proviso of RCW 90.03.330(3) preserves the status quo, but once a water supplier voluntarily applies to amend its rights, water transfer law remains intact and applicable.

This Court must construe each part or section of a statute in connection with every other part to harmonize the whole. *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 242-43, 208 P.3d 5 (2009). Read together, the four sections of RCW 90.03.330 reveal that perfection rules continue to apply except to the select set of rights described in RCW 90.03.330(3). Further, the Legislature did not impliedly repeal the pre-existing requirements of RCW 90.44.100. *See Johnson vs. Recreational Equipment, Inc.*, 159 Wash. App. 939, 950, 247 P.3d 18 (2011), *citing Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 123, 691 P.2d 178 (1984) (“Repeals by implication are not favored and will not be found to exist where earlier and later statutes may logically stand side by side and be held valid.”).

The law of water right transfers, pre-dating the MWL, is clear. "If a right has not been beneficially used to its full extent, or if the right has been abandoned, then issuance of a certificate of change, in the amount of the original right, could cause detriment or injury to other rights." *PUD*

No. 1 of Pend Oreille County, supra, citing Okanogan Wilderness League v. Town of Twisp, 133 Wn.2d 769, 779, 947 P.2d 732 (1997). Pursuant to the “revoke and diminish” authority of RCW 90.03.330(2), Ecology should have tentatively determined the extent and validity of WSU’s water rights and eliminated unused quantities to prevent enlargement.

3. Washington law does not recognize or authorize “de facto” changes in point of withdrawal.

WWUC cites two out-of-state cases and a superior court decision for the proposition that Washington law recognizes “de facto” changes, i.e., unauthorized changes in points of withdrawal as a defense to relinquishment and abandonment.⁹ WWUC Br. at 15-18. WWUC’s arguments present several problems.

First, the PCHB ruled that WSU effectively transferred its rights by pumping from unauthorized wells. AR 85 at 36. WWUC fails to address the primary problem with this ruling, i.e., the evidence does not show that WSU actually used most of its rights. WSU’s pumpage records

⁹ WWUC also cites Ecology’s POL-1120. It is axiomatic that Ecology cannot promulgate or utilize a policy that is contrary to law. See *Postema v. Pollution Control Hrgs. Bd.*, 142 Wn.2d 68, 97-98, 11 P.3d 726 (2000); *Edelman v. Publ. Discl. Comm.*, 116 Wn. App. 876, 882, 68 P.3d 296 (2003); Op. Br. at 26-27; App. Reply Br. at 13.

do not show any correlation between increased pumping in one or more wells and a decrease in pumping in others.¹⁰ Op. Br., App. 2.

Second, the fact of WSU's non-use distinguishes this case from the Oregon decision and the *Acquavella* order cited by WWUC. There, the courts relied explicitly on the fact of continuing beneficial use of water to find that forfeiture had not occurred. *Russell-Smith v. OWRD*, 152 Or.App. 88, 98, n.6; *State v. Acquavella* at 6, ll. 15-17 (Att. to WWUC Br.). In contrast, WSU did not use most of its water. Even if Washington adopted Oregon's de facto change rule, WSU would not qualify.

Third, a key difference is found in the language of the forfeiture statutes for Oregon and Washington. Unlike Oregon,¹¹ Washington's forfeiture law specifically identifies the "point of diversion" as a component of the water right that is subject to relinquishment for failure to use. RCW 90.14.130.¹² This is consistent with other sections of the

¹⁰ The PCHB refused to make any finding as to how much water was being pumped from unauthorized wells. AR 85 at 36-38 ("Having found no intent to abandon the right, it is not necessary for us to evaluate in detail the precise quantities of withdrawals WSU exercised under each right via unauthorized point of withdrawal.")

¹¹ ORS 540.610 does not discuss or reference the point of diversion or withdrawal as a feature of a water right subject to relinquishment.

¹² RCW 90.14.130 provides, in part: "When it appears to the department of ecology that a person entitled to the use of water has not beneficially used his water right or some portion thereof, and it appears that said right has or may have reverted to the state because of such nonuse, as provided by RCW 90.14.160, 90.14.170, or 90.14.180, the department of ecology shall notify such person by order . . . The order shall contain: (1) A description of the water right, including the approximate location of the point of diversion, the general description of the lands or places where such waters were used, the

Water Code that identify the location of a water withdrawal as an element of a water right. *See* Op. Br at 60. The *Acquavella* order fails to discuss RCW 90.14.130 and its identification of “point of diversion” as an element of a water right.¹³

Fourth, WWUC argues that *Twisp* and *R.D. Merrill* lack precedential value because they reject application of the de facto change principle “to the facts that were before the court in those specific cases.” WWUC Br. at 17. As an initial problem, this argument appears to dispense with the principle of *stare decisis*. Moreover, numerous factual similarities are found between WSU’s actions and the two cases. *See* Op. Br. at 58-64. Like *Twisp*, WSU filed applications for entirely new water rights that it now claims it used as unauthorized withdrawal points. In *Twisp*, the de facto change was alleged to have occurred when the new water rights were issued whereas here, the de facto changes purportedly occurred at a later date. *Twisp* represents an even harsher rejection of the de facto change principle than argued for here, because the town was

water source, the amount involved, the purpose of use, and the apparent authority upon which the right is based; (2) a statement that unless sufficient cause be shown on appeal the water right will be declared relinquished; and (3) a statement that such order may be appealed to the pollution control hearings board.” (Emphasis added.)

¹³ Nor did the *Acquavella* order discuss Washington precedents, particularly *Twisp* and *R.D. Merrill*. It appears that no parties opposed the de facto change argument. The *Acquavella* order is not only not binding, it is not even persuasive. *See In Re Estate of Jones*, __ Wn.2d __ (2012) (2012 WL 3949399) (trial court decisions have no precedential value). Indeed, the *Acquavella* case has not reached final decree and the de facto change order could still be appealed.

actually using and dependent on the invalid water rights, 133 Wn.2d at 734, unlike WSU, which has neither used nor shown a need for its full allotment. Finally, *Twisp* explicitly rejected *Lengel v. Davis*, the Colorado case cited by WWUC, as a defense to abandonment of municipal rights in Washington.

With respect to *R.D. Merrill*, WWUC misconceives the argument. The Wilson right at issue in that case was never perfected. 137 Wn.2d at 134-38. Similarly, three of WSU's rights were also never perfected, but the Board held (without reference to evidence) that they were being exercised at unauthorized wells.

R.D. Merrill instructs that changes to unperfected rights cannot occur, because there is no right to change. *Id.* at 138. The Court also specifically rejected the argument offered here, that beneficial use is the only important consideration and the means of diversion are incidental. *Id.* at 137. Finally, *R.D. Merrill* confirms that the location where water is withdrawn is an important element of a water right in Washington. *Id.* at 138, n.8 (in Washington, actual diversion of water retains importance and includes the location and description of the water works).

Important policies, including protection of other users and the public welfare, underlie the rule that Washington water users must obtain permission before moving their wells. Washington statutes and case law

make explicit that de facto changes in water rights are neither recognized nor legal. This Court should reject WWUC's invitation to adopt an out-of-state rule that clearly conflicts with Washington law.

C. The efficiency goals of the Municipal Water Law do not prevent loss of water rights for non-use.

Cornelius congratulates WSU for reducing its water use over time, but finds it appalling that the university's conserved water is squandered on a golf course. While overall campus use has decreased, WSU substantially increased the amount of water used for golf course irrigation.¹⁴ If water use was in balance perhaps this expanded use would not be an issue, but the Palouse Basin's Grande Ronde Aquifer system is not in balance and WSU's increased golf course irrigation constitutes a threat to the public welfare. AR 89 at 3 ("the Grande Ronde aquifer (GRA) is experiencing a long-term and troubling trend of declining water levels that, if not adequately addressed, will eventually threaten all water users in the basin), 20 ("it is . . . impossible to predict with any degree of certainty how long the water in the GRA will last").

WWUC opines that the Legislature intended a connection between the exceptional benefit provided to inchoate municipal certificates in

¹⁴ Because the PCHB dismissed on summary judgment Cornelius' claim concerning inefficient water use on the golf course, evidence regarding quantities used was not fully developed. However, the doubling of the size of the golf course was expected to substantially increase irrigation water use. AR 34, Ex. 1.

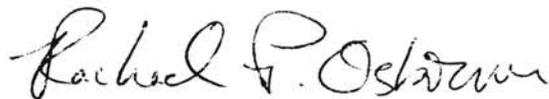
RCW 90.03.330(3), and the duties of water conservation planning set forth in RCW 70.119A.180. But, the MWL contains no statutory recognition of the quid pro quo that WWUC suggests. The Legislature did not say that the adoption of a water conservation plan would immunize water suppliers from loss of rights for non-use in the water right amendment process.

Further, notwithstanding the MWL's conservation requirements, WSU offered no evidence connecting its water use reduction to a long-term planning process for putting its enormous "paper" quantities to use. On the contrary, a WSU witness testified that student enrollment numbers and water use are not connected. AR 49 at 2 (¶7). WWUC offers no explanation of how or why WSU might use water in the future. Its policy argument regarding water conservation should be rejected.

IV. CONCLUSION

For the foregoing reasons, Cornelius requests that the Court reject the arguments set forth by the Washington Water Utilities Council.

Respectfully submitted this 8th day of November, 2012.



Rachael Paschal Osborn, WSBA No. 21618
2421 W. Mission, Spokane, WA 99201
(509) 954-5641 / rdpaschal@earthlink.net
Attorney for Appellants Cornelius, et al.