Case # 304701

APPENDIX TO APPELLANTS' OPENING BRIEF

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.

Cornelius v. Dept. of Ecology
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Appendix No. 1

Permit G3-28278P

Priority Date:	January 28, 1987
Instantaneous Quantity (Qi):	2500 gallons per minute
Annual Quantity (Qa):	2260 acre-feet per year
Purpose:	municipal supply
Source:	A well - #7

An application for change has been filed on each of the above described water right documents. Each right will have its own determination.

Three claims, three certificates, and one permit are appurtenant to the WSU campus. Seven wells have been used since 1938. One of the wells, No. 2, was decommissioned and is no longer in use. The remaining wells and water use were integrated into two systems over the years to meet the delivery, fire control and design needs of the campus. Well No. 8 was recently drilled and is ready for use. The campus water system is divided into high distribution and low distribution systems to meet pressure control and operational needs. Wells 5, 6, and 8 serve the high system and wells 1, 3, 4 and 7 serve the low system. The goal of the subject application(s) is to integrate all of the wells of the individual rights to operate as the system is currently designed. Two emergency interties are designed into the City of Pullman, but the university has not had to exercise the intertie system. The high distribution system has 2 old wells and one new well (#8). The low distribution system has 3 old wells and one new well (#7). The proposal is to have one new well on each system become the primary service well for that system. At this time if one of the old wells were out of service the system may not be able to meet the demand on the system.

Well No.	Instantaneous Capacity	System	Pump HP
1	500 GPM	Low	60
2	Decommissioned	Low	N/A
3	1000 GPM	Low	150
4	1000 GPM	Low	225
5	500 GPM	High	75
6	1500 GPM	High	250
7	2500 GPM	Low	450
8	2500 GPM	High	700

Water Use

A review of the water use data for the source wells on campus for the period of 1989 through 2004 indicated an annual use ranging between 1711 acre-feet per year to 1988 acre-feet per year. The maximum annual water use occurring in 1994. WSU provided a graph of the annual water use between 1989 and 2004 and indicated a decline in water use of 0.3 % during this period.

Water Rights

Seven water right documents are appurtenant to the campus. There are additional rights held by the school for isolated locations that are not addressed in this review. The campus rights are as follows:

Water Right	Qi	Qa	Priority Date	Type	Source
Claim 098522	500	720	1934	Primary*	1
Claim 098523	500	720	1938	Primary	2
Claim 098524	(1000)	(1440)	1946 (not valid)	Not valid*	3
Cert 5070-A	1500	2260	1962	Primary*	4
Cert 5072-A	500	720	1963	Primary	5
G3-22065C	1500	1600	1973	Primary	6, 8
G3-28278P	2500*	2260*	1987	Supplemental*	7
Totals	**5000 GPM**	**5300 AFY**			

*Permit issued with a provision: "less those amounts appropriated underground Water Cert. 5070-A, and Ground Water Claims 98522 and 98524. Total combined quantity shall not exceed 2500 gallons per minute, 2260 acre-feet per year."

The above water analysis totals are consistent with the 2001 comprehensive water plan.

Evaluation of the Water Right Permit

Ground Water Permit G3-28278P authorized a use of 2500 gallons per minute, 2260 acre-feet per year for municipal supply. WSU has filed a Proof of Appropriation claiming the right has been put to beneficial use.

The existing water system for WSU is defined as a Group A Water System by Department of Health (DOH). The system qualifies as a "municipal water supplier" and serves water for "municipal water supply purposes" as defined under RCW 90.03.015. A new section was added to Chapter 90.03 RCW. The new section states the following: "When requested by a municipal water supplier or when processing a change or amendment to the right, the Department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in Chapter 90.03.015 RCW, are correctly identified as being for municipal water supply purposes." All WSU campus water rights are for "municipal supply" and for "domestic supply" purposes which meet the criteria under RCW 90.03.015(4).

WSU qualifies for municipal supply under RCW 90.03.015. WSU is not using its full allocation of water. Water use data for WSU was provided by Gary Wells. In 1994 WSU used approximately 1988 acre-feet. WSU currently has water rights (including the claims) totaling 5300 acre-feet. Therefore, this leaves 3312 acre-feet of inchoate water available for future use by WSU. The inchoate water available is consistent with the municipal legislation (SHB 1338) passed that allows for certainty for growth into these inchoate quantities by municipal providers.

Well 7 is the authorized well for this permit. The total annual quantity under all rights authorized for WSU is 5300 acre-feet. At this time it appears a large portion of this authorization is unperfected.

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Appendix No. 2

WSU PULLMAN CAMPUS WATER SYSTEM – ANNUAL VOLUMES PUMPED IN ACRE-FEET

Year	Well 1	Well 2	Well 3	Well 4	Well 5	Well 6	Well 7	Well 8	Total
1937									472
1938									499
1939									550
1940									
1941									473
1942									541
1943									576
1944									570
1945									530
1946									666
1947									784
1948									873
1949	718	347							1065
1950	763	264							1027
1951	895	275							1170
1952									
1953									
1954									
1955									
1956									
1957									
1958	41	146	1019						1206
1959	36	336	888						1260
1960	57	459	808						1324
1961	95	586	754						1434
1962	122	566	842						1530
1963	214	443	977	55					1689
1964	101	113	864	535					1613
1965	94	97	1004	592					1787
1966	180	183	605	867					1835
1967	156	157	582	1028					1924
1968	87	85	623	1033					1828
1969	168	135	858	1090					2251
1970	83	156	680	958					1876
1971	237	154	648	693	107				1838
1972	137	105	644	960	188				2034
1973	161	130	628	1042	156				2116
1974	146	118	631	949	213				2057
1975	206	171	688	659	184				1908
1976	136	113	618	938	228				2033
1977	125	18	378	735	138	713			2106
1978	116	0	367	672	34	878			2067
1979	121	0	377	874	20	855			2247
1980	124	0	344	829	16	662			1976
1981	163	0	564	790	20	536			2073
1982	120	0	431	876	13	703			2142
1983	180	0	451	808	16	607			2062
1984	236	0	493	802	0	746			2277
1985	222	0	377	1058	1	558			2215
1986	191	0	249	1085	0	565			2090
1987	275	0	263	915	0	623			2077
1988	293	0	392	818	0	458			1961
1989	260	0	448	639	0	503			1850
1990	234	0	263	644	0	726			1866

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Year	Well 1	Well 2	Well 3	Well 4	Well 5	Well 6	Well 7	Well 8	Total
1991	328	0	491	730	0	296			1846
1992	192	0	193	395	0	332	742		1855
1993	275	0	386	728	0	339	129		1857
1994	292	0	340	740	0	618			1989
1995	357	0	463	694	0	279			1793
1996	277	0	311	529	46	655			1818
1997	261	0	308	616	90	445			1720
1998	181	0	243	495	18	789	29		1755
1999	0	0	179	184	0	1102	295		1760
2000	2	0	83	141	0	1073	470		1769
2001	0	0	0	88	0	545	1295		1927
2002	0	0	0	129	0	389	1280		1798
2003	0	0	0	0	0	473	1394		1866
2004	0	0	0	0	0	187	1525		1711
2005	0	0	0	0	0	84	1497		1581
2006	0	0	0	0	0	44	1401	20	1466

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Appendix No. 3

Table 4.5

DOE Table 4 Forecasted Water Rights Status

Permit Certificate or Claim #	Name of Right holder or Claimant	Priority Date	Source Name/ Number	Primary or Supplemental	Existing Water Rights		Forecasted 20 Year Demand		Forecasted Water Right Status, 20 Year (Excess/Deficiency)	
					Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)
Permits/ Certificates					gpm	acre-feet	gpm	acre-feet	gpm	acre-feet
1. 5070-A	WSU	1962	Well #4	supplemental	1500	2260	1500	94	0	2166
2. 5072-A	WSU	1963	Well #5	inactive	500	720	0	0	500	720
3. G3-22065C	WSU	1973	Well #6	supplemental	1500	1600	1500	119	0	1481
4. G3-28278P	WSU	1987	Well #7	primary	2500*	2260*	2500	835	0	1425
5. Future		2002?	Well #8	primary	2500^	3040^	2500	1062	0	1978
Claims										
1. 098522	WSU	1934	Well #1	inactive	500	720	0	0	500	720
2. 098523	WSU	1938	Well #2	abandoned	500	720	0	0	500	720
3. 098524	WSU	1946	Well #3	inactive	1000	1440	0	0	1000	1440
TOTAL	-	-	-	-	5000^*	5300^*	5000^*	2110†	0^*	3190†^*

Intertie Name /Identifier	Name of Purveyor Providing Water	Existing Limits on Intertie Water Use		Forecasted Consumption Through Intertie		Forecasted Intertie Supply Status (Excess/Deficiency)	
		Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)
69880V/Pullman	City of Pullman	Emergency					
TOTAL							

Pending Water Right Application	Name On Permit	Date Submitted	Primary or Supplemental	Pending Water Rights	
				Maximum Instantaneous Flow Rate (Qi) Requested	Maximum Instantaneous Volume (Qa) Requested
none					

^The amounts to be granted under Well #8 are less those amounts used in 2,5,& 6

*The amounts granted under G3-28278P are less those amounts used in Wells 1,3& 4.

† based on conservative estimate of 1% increase per year

Table 4.4

DOE Table 3 Existing Water Rights Status

Permit Certificate or Claim #	Name of Right holder or Claimant	Priority Date	Source Name/ Number	Primary or Supplemental	Existing Water Rights		Existing Consumption		Current Water Right Status (Excess/Deficiency)	
					Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)
Permits/ Certificates					gpm	acre-feet	gpm	acre-feet	gpm	acre-feet
1. 5070-A	WSU	1962	Well #4	supplemental	1500	2260	1500	132†	0	2128†
2. 5072-A	WSU	1963	Well #5	supplemental	500	720	450	0	50	720
3. G3-22065C	WSU	1973	Well #6	primary	1500	1600	1500	1060†	0	540†
4. G3-28278P	WSU	1987	Well #7	primary	2500	2260	2500	452†	0	1808†
Claims										
1. 098522	WSU	1934	Well #1	inactive	500	720	0	0	500	720
2. 098523	WSU	1938	Well #2	abandoned	500	720	0	0	500	720
3. 098524	WSU	1946	Well #3	inactive	1000	1440	0	84†	1000	1356†
TOTAL	-	-	-	-	5000*	5300*	4450	1728†	550*	3572†*

Intertie Name /Identifier	Name of Purveyor Providing Water	Existing Limits on Intertie Water Use		Existing Consumption Through Intertie		Current Intertie Supply Status (Excess/Deficiency)	
		Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)	Maximum Instantaneous Flow Rate (Qi)	Maximum Annual Volume (Qa)
69880V/Pullman	City of Pullman	Emergency					
TOTAL							

Pending Water Right Application	Name On Permit	Date Submitted	Primary or Supplemental	Pending Water Rights	
				Maximum Instantaneous Flow Rate (Qi) Requested	Maximum Instantaneous Volume (Qa) Requested
none					

* The amounts granted under G3-28278P are less those amounts used in Wells 1,3,4.

† based on data from year 2000

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Appendix No. 4

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SCOTT CORNELIUS, PALOUSE WATER CONSERVATION NETWORK, and SIERRA CLUB PALOUSE GROUP, Appellants, v. WASHINGTON DEPARTMENT OF ECOLOGY and WASHINGTON STATE UNIVERSITY, Respondents.	PCHB No. 06-099 ORDER ON SUMMARY JUDGMENT *(AS AMENDED ON RECONSIDERATION)*[1]

This matter comes before the Pollution Control Hearings Board (Board) as part of the above-captioned appeal contesting the approval by the Department of Ecology (Ecology) of changes to six groundwater rights at Washington State University (WSU). This order addresses all of the parties' motions and cross motions for partial summary judgment, which collectively involves all of the legal issues identified by the parties in this appeal.

The parties submitted these motions to the Board for its consideration on the written record. The Board requested oral argument, which was held on October 29, 2007, at the Board's offices in Lacey, Washington. Attorneys Rachael Paschal Osborn, M. Patrick Williams of the Center for Environmental Law & Policy, and Harold Magistrale, represented Appellants Scott Cornelius, *et. al.* on the briefs, and Ms. Osborn and Mr. Williams presented Appellants' oral argument. Alan M. Reichman and Sarah M. Bendersky, Assistant Attorneys General, represented Respondent Ecology on the briefs and at oral argument. Respondent WSU was

[1] By the Board's Order on Reconsideration, issued January 18, 2008.

represented by Sarah E. Mack and James A. Tupper, of Tupper Mack Brower, PLLC, and Frank M. Hruban, Assistant Attorney General, on the briefs, and Mr. Hruban and Ms. Mack presented oral argument on behalf of WSU.

Board members Andrea McNamara Doyle, Presiding, Kathleen D. Mix, Chair, and William H. Lynch, Member, heard oral arguments, and reviewed and considered the pleadings and record pertinent to the motion in this case, including the following:

1. Appellants' Motion for Partial Summary Judgment on the Issues of Enlargement (Issue No. 7), Relinquishment (Issue No. 8D), and Abandonment (Issue No. 9B).
2. Declaration of Rachael Osborn, dated August 27, 2007 (***hereinafter "First Osborn Decl."***), with attachments 1-10.
3. Appellants' Motion for Summary Judgment re: Agreed Issues No. 17A, No. 17B, and No. 17C, Regarding SEPA.
4. Declaration of Patrick Williams, dated August 27, 2007 (***hereinafter "First Williams Decl."***), including Attachment 1 (Declaration of Kevin Brackney, with Attachments 1A & 1B), and Attachments 2-10.
5. Appellants' Motion for Summary Judgment Re: Agreed Issue No. 18A Regarding Jurisdiction Over Constitutional Issues.
6. WSU's Motion for Partial Summary Judgment [re: Issues 1, 2, 5-9, 12-15, and 17].
7. Declaration of Patrick Kevin Brown, dated August 27, 2007 (***hereinafter "First Brown Decl."***), including attached Exhibits 1-10.
8. Declaration of Ann Fulkerson, dated August 27, 2007.
9. Declaration of Thomas Matuszek, dated August 24, 2007, including attached Exhibit 1.
10. Declaration of Terry A. Ryan, dated August 24, 2007, including attached Exhibit 1.
11. Declaration of Sarah E. Mack, dated August 28, 2007, including attached Exhibits 1-6.
12. Declaration of Gary Wells, dated August 28, 2007 (***hereinafter "First Wells Decl"***), including attached Exhibits 1-11.
13. Respondent Department of Ecology's Motion for and Memorandum in Support of Partial Summary Judgment [re: Issues No. 4, 6, 11, 16 and 18A], (as amended by Errata Sheet dated September 11, 2007).
14. Declaration of Alan M. Reichman in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007, including Attached Exhibits 1-4.

15. Declaration of Patrick Kevin Brown in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007 (***hereinafter "Second Brown Decl."***).
16. Declaration of Guy J. Gregory in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007.
17. Declaration of Keith L. Stoffel in Support of Ecology's Motion for Partial Summary Judgment, dated August 27, 2007.
18. Appellants' Response to Motions of Ecology and WSU for Partial Summary Judgment on Issues 1-18A.
19. Declaration of M. Patrick Williams, dated September 10, 2007 (***hereinafter "Second Williams Decl."***), including Attachments 1-5.
20. Declaration of M. Patrick Williams, dated September 11, 2007 (hereinafter ***"Third Williams Decl."***), including Attachment 1.
21. Declaration of Kent Keller, dated September 10, 2007, including Attachments 1-2.
22. Declaration of Rachael Osborn, dated September 10, 2007 (***hereinafter "Second Osborn Decl."***), including Attachments 1-12.
23. Declaration of Scott Cornelius, dated September 10, 2007, including Attachments 1-5.
24. WSU's Partial Joinder in Ecology's Motion for Partial Summary Judgment.
25. WSU's Memorandum in Response to Appellants' Motion for Summary Judgment re: Issues 7, 8D and 9B.
26. WSU's Memorandum in Response to Appellants' Motion for Summary Judgment re: Issue 17 (SEPA).
27. WSU's Memorandum in Opposition to Summary Judgment re: Issue 18.
28. Supplemental Declaration of Gary Wells in Opposition to Appellant's Motion for Summary Judgment, dated September 11, 2007 (***hereinafter "Second Wells Decl."***), including attached Exhibits 1-2.
29. Ecology's Response to Appellants' Motions for Partial Summary Judgment.
30. Ecology's Notice of Joinder in WSU's Motions for Partial Summary Judgment.
31. Response Declaration of Patrick Kevin Brown, dated September 11, 2007 (*hereinafter* ***"Third Brown Decl."***), including attached Exhibit 1.
32. Response Declaration of Victoria Leuba, dated September 11, 2007.
33. Appellants' Reply Brief on Issues of Enlargement, Relinquishment & Abandonment, and Reply to Ecology's Joinder Notice.
34. Appellants' Reply Brief on SEPA Issues 17A, 17B, 17C, dated September 21, 2007.
35. Appellants' Reply Brief on Constitutional Issue 18A.
36. Declaration of M. Patrick Williams in Support of Appellants' Reply to Issue 18A, dated September 21, 2007, (***hereinafter "Fourth Williams Decl."***), including Attachment 1.

37. Ecology's Corrected Reply to WSU's Memorandum in Opposition to Summary Judgment re: Issue 18, dated October 2, 2007 (superceding September 24 brief).
38. Ecology's Reply to Appellants' Response Memorandum.
39. WSU's Reply Memorandum in Support of Summary Judgment.
40. Declaration of Steven Russell in Support of WSU's Motion for Partial Summary Judgment, dated September 24, 2007.
41. Declaration of Terry Boston in Support of WSU's Motion for Partial Summary Judgment, dated September 24, 2007, including attached Exhibits 1-2.
42. Second Supplemental Declaration of Gary Wells in Support of WSU's Motion for Partial Summary Judgment, dated September 21, 2007 (***hereinafter "Third Wells Decl."***), including attached Exhibits 1-2.
43. Appellants' Notice of Additional Legal Authority.

BACKGROUND

In October 2004, WSU submitted applications to Ecology proposing to change/transfer all of its existing groundwater rights currently used to serve its Pullman campus. WSU proposes to integrate the water rights associated with its existing campus well system, by adding seven (7) of its existing wells as authorized points of withdrawal for each of its existing groundwater rights in the area, and changing the place of use for each right to be consistent with its approved water service area. In other words, WSU wished to be able to withdraw water under each of its groundwater rights from any or all of its existing wells. *First Brown Decl.*

The required notice of application was published in the Pullman Daily News on January 14 and 25, 2005, and a subsequent amended notice was published on May 5 and 12, 2005, to correct errors in the first notice. Two protests and one letter of concern were received during the protest period, including one protest on behalf of Appellant Scott Cornelius and one on behalf of Appellant Palouse Water Conservation Network.

Because the cumulative quantities of water for the integration proposal consist of more than 2,250 gallons per minute (gpm), a State Environmental Policy Act (SEPA) analysis was conducted. After review of a completed environmental checklist and other information, WSU issued a final Determination of Non-Significance (DNS) on June 7, 2004. WSU determined the proposal would not have a significant adverse impact on the environment, although the checklist did not specifically discuss the declining water level of the Grande Ronde Aquifer. In reviewing the change applications, Ecology relied on the DNS issued by WSU and did not conduct a new threshold determination or perform supplemental SEPA analysis.

The essential information contained in each of the WSU water right documents at issue in this appeal is summarized as follows:

Water Right Document	Source	Priority Date	Instantaneous Quantity (Qi) Gallons per minute	Annual Quantity (Qa) Acre feet per year	Purpose stated on document
Ground Water Claim 098522	Well - #1	1934	500 gpm	720 afy	Municipal supply, irrigation and stock
Ground Water Claim 098523	Well - #2	1938	500 gpm	720 afy	Municipal supply, irrigation and stock
Ground Water Claim 098524	Well - #3	1946	1000 gpm	1440 afy	Municipal supply, irrigation and stock
Certificate 5070-A	Well - #4	Aug 1, 1962	1500 gpm	2260 afy	Domestic supply for WSU
Certificate 5072-A	Well - #5	May 27, 1963	500 gpm	720 afy	Community domestic supply & stock water
Certificate G3-22065C	Well - #6 Well - #8	Nov 12, 1973	1500 gpm	1600 afy	Municipal supply
Permit G3-28278P	Well - #7	Jan 28, 1987	2500 gpm	2260 afy	Municipal supply

Over the years, the WSU Pullman campus water system has been integrated into two systems, a "low distribution system" served by Wells 1, 3, 4, and 7, and a "high distribution system" served by Wells 5, 6, and 8. *Third Wells Decl., Exh. 1.* As presently operated, the WSU campus water system is integrated or consolidated, in that all the water for the system is

withdrawn primarily from two wells. Water withdrawals from individual wells have not historically matched and do not presently match the quantities authorized under the water rights identified with those wells. In some instances, water has been withdrawn from wells other than the wells with which particular water rights are identified. The system integration has occurred without specific authorization from Ecology or its predecessor agencies. *First Brown Decl. at ¶8.*

As part of its review of the change applications, Ecology applied a number of provisions from the recently enacted Municipal Water Supply Act, commonly referred to as the 2003 Municipal Water Law (2003 MWL).[2] Most notably, Ecology determined that WSU is a "municipal water supplier" under the terms of the 2003 MWL, and that the rights it holds for the Pullman campus qualify as rights for "municipal supply purposes" as that term is defined by the 2003 MWL. In September 2006, Ecology issued Reports of Examination (ROE) for each of the change applications at issue in this appeal, approving, in large part, WSU's change/consolidation requests. Ecology denied integration of Claim No. 098524 (associated with Well No. 3) upon Ecology's tentative determination that this claim is invalid. Appellants timely appealed Ecology's decisions to this Board. WSU does not challenge Ecology's decision regarding the validity of Claim No. 098524. The parties subsequently filed a Statement of Agreed Legal Issues consisting of forty (40) issues, comprising eighteen (18) general topics, presented by Ecology's interpretation of the 2003 MWL and its application to WSU's rights.

These motions and cross motions for partial summary judgment addressing all the issues followed. More specifically, Appellants have moved for summary judgment regarding Issues 7

[2] 2E2SHB 1338, Chapter 5, Laws of 2003 (58th Leg, 1st Spec Session).

(Enlargement), 8D (Relinquishment), 9B (Abandonment), 17A-C (SEPA), and 18A (Constitutional Claims). Respondent WSU has moved for summary judgment in favor of Respondents as to Issues 1 (Municipal Water Supplier), 2A-F (Municipal Water Supply Purposes), 5 (Perfection), 6 (Beneficial Use), 7 (Enlargement), 8A-E (Relinquishment), 9A-F (Abandonment), 12A-F (Impairment to Existing Rights), 13 (Aquifer Depletion), 14 (Public Welfare), 15 (Impairment to Surface Water), and 17A-C (SEPA).[3] Ecology has moved for summary judgment in its favor as to Issues 2 (Municipal Water Supply Purposes), 3 (Reliance on 2003 MWL), 6 (Beneficial Use), 10 (Same Body of Public Ground Water), 11 (Expansion of Place of Use), 16 (Improper Delegation), and 18A (Constitutional Claims).[4]

ANALYSIS

Summary Judgment Standard

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).

[3] Ecology joined WSU's motion for summary judgment on each of these issues.
[4] WSU joined Ecology's motion for summary judgment as to issues 2, 3, 6, 10, 11, and 16, but not 18A.

If a moving party meets the initial burden of showing the absence of a material fact, the inquiry shifts to the party with the burden of proof at hearing. The party then must make a showing sufficient to establish that a triable issue exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989). In making its responsive showing, the nonmoving party cannot rely on mere allegations, unsubstantiated opinions, or conclusory statements, but must set forth specific facts showing that there is a genuine issue for trial. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). At that point, we consider the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.*

Legal Issues

We address Issue No. 18 first, because arguments concerning the interpretation and constitutionality of certain provisions of the 2003 Municipal Water Law permeate many of the Appellants' legal theories and specific legal issues raised in this appeal. We then address each of the remaining issues in the order presented by the parties' Statement of Agreed Legal Issues.

Legal Issue No. 18: Constitutional Claims.

Two constitutional issues are raised in connection with this appeal; first, whether the Board has jurisdiction to consider the constitutional claims raised in this appeal; and second, whether the application of the 2003 MWL in the water right decisions is contrary to the Washington State and United States Constitutions.

None of the parties suggest this Board is the proper forum to resolve a facial challenge to the constitutionality of the 2003 Municipal Water Law. We agree. However, WSU contends that the Board has jurisdiction to consider the constitutional claims raised in this appeal, including whether application of the 2003 MWL in this case is contrary to the Washington State

or United States Constitutions. Appellants and Respondent Ecology, on the other hand, argue that the Board is without jurisdiction to decide "as applied" constitutional questions raised by application of the 2003 MWL to the facts of this case.

The Board has jurisdiction to hear and decide appeals of Ecology water right change decisions. *RCW 43.21B.110(1).* This jurisdiction necessarily includes the authority to determine whether Ecology's water right change decision complied with applicable laws, including the 2003 MWL. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't.,* PCHB 99-067, 069, 097, 102, COL XXI (Order on Motions to Dismiss, September 23, 1999) (holding that, while the Board did not have jurisdiction to determine the facial constitutionality of a state statute, it did have jurisdiction over whether the challenged permit decision complied with the applicable laws, including the challenged statute).

To the extent that we must interpret the meaning of the 2003 MWL in order to apply it to the facts of this case, we have jurisdiction to do so. In so doing, we start with the presumption that it is constitutional. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). From that presumption, we attempt to construe it in such a way as to avoid unconstitutionality. *World Wide Web Video v. Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991), quoting *State v. Browet, Inc.* as follows: "[w]herever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." 103 Wn.2d 215, 219, 691 P.2d 571 (1984).

Regardless of how they are labeled by the parties, the constitutional questions raised by the Appellants in this appeal are tantamount to a facial challenge of the statute. The Board would necessarily have to consider the validity of the Legislature's decision to make portions of the 2003 MWL retroactive. The Board does not have jurisdiction over such a facial challenge to the statute. *Methow Valley Irrigation District v. Ecology,* PCHB Nos. 02-071, 074, XLI (Order on Partial Summary Judgment, February 27, 2003); *Tario v. Ecology,* PCHB No. 05-091, COL V

(Order Granting Summary Judgment, March 2, 2006). To that end, Appellants' and Ecology's motions for summary judgment on Issue No. 18A should be granted with respect to any claims amounting to a facial challenge to the constitutionality of the 2003 Municipal Water Law.

Legal Issue No. 1: Municipal Water Supplier.

Legal Issue No. 1 asks whether WSU is a municipal water supplier under chapter 90.03 RCW. A "municipal water supplier" means "an entity that supplies water for municipal water supply purposes." *RCW 90.03.015(3).* Thus, the question of whether WSU is a municipal water supplier turns on whether WSU holds any water rights that qualify for "municipal water supply purposes" as that term is defined in RCW 90.03.015(4). That section defines "municipal water supply purposes" in part, as "a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year...."

Respondents assert, and Appellants concede, that "[u]nder today's law, WSU fits within the definition of Municipal Water Supplier set forth in the amended RCW 90.03.015." *Appellants' Response at 11.* Additionally, Appellants concede that Water Right Certificate G3-22065C (associated with Well No. 6) "does appear to be a certificate issued for municipal water supply purposes." *Appellants' Response at 20.* Thus, this right and various other water rights identified as for municipal purposes, and which are used to supply a single integrated campus water system that serves well over fifteen residential service connections, make WSU a "municipal water supplier." We conclude that WSU is a municipal water supplier under Ch.

90.03 RCW and that, as a matter of law, WSU and Ecology are entitled to summary judgment on Legal Issue No. 1.[5]

Legal Issue No. 2: Municipal Water Supply Purposes.

Issue No. 2 pertains to whether the water rights associated with Wells No. 1, 2, 4, 5, 6, and 7 are rights for municipal water supply purposes under chapter 90.03 RCW.

The Legislature has defined "municipal water supply purposes" as follows:

> (4) "Municipal water supply purposes" means a beneficial use of water: (a) for residential purposes though fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes. *RCW 90.03.015(4).*

Because the Legislature defined "municipal water supply purposes" in the present tense (*i.e.,* it "means a beneficial use of water…"), we interpret this as requiring present, active compliance with the definition through actual beneficial use of the water at the time a right is being characterized. Thus, we must examine WSU's actual use of water under each right, and whether each right is presently being put to beneficial use for municipal purposes. Application of this test to the rights at issue, used in conjunction with the application of the statutory

[5] The question raised by Appellants regarding whether WSU *was* a municipal water supplier prior to adoption of the 2003 MWL amendments to the Water Code is not squarely before us because it calls into question the retroactive application of the MWL. The Board has declined to address the constitutional claims in this appeal.

definitions, leads to the conclusion that each of the rights at issue is for a municipal water supply purpose.

As we have concluded above, it is undisputed that the WSU campus water system presently includes the requisite number of residential service connections required by RCW 90.03.015(4)(a) for WSU's rights to be eligible to qualify for "municipal water supply purposes" under that statute. WSU contends that by virtue of the integrated nature of the campus water system (in which water from each of its rights and wells enters a unified distribution system serving the campus' residential connections), all the rights are therefore being beneficially used for municipal supply purposes. Ecology asserts that a water right qualifies as being for municipal purposes if it meets the statutory definition under RCW 90.03.015, regardless of the purpose stated on the water right document. *Ecology's Joinder in WSU' Motion for Partial Summary Judgment at 2.*

In analyzing whether each of WSU's water rights constitutes a right for municipal water supply purposes in this appeal, it is necessary to examine not only the language in RCW 90.03.015 but also the language in RCW 90.03.560.[6] As previously noted, RCW 90.03.015(4) specifically sets forth three separate beneficial uses that qualify as municipal water supply purposes. The key portion of this subsection for purposes of this analysis, however, is the language that also includes "any other beneficial use generally associated with the use of water within a municipality" within the meaning of "municipal water supply purposes."

RCW 90.03.560 addresses how Ecology processes changes or amendments to water rights held by a municipal water supplier to ensure that water rights held for municipal water supply purposes are correctly identified. It states, in part:

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[6] RCW 90.03.550 also lists beneficial purposes of use generally associated with a municipality, but none of those listed uses are at issue in this appeal.

> This section authorizes a water right or portion of a water right held or acquired by a municipal water supplier that is for municipal water supply purposes as defined in RCW 90.03.015 to be identified as being a water right for municipal water supply purposes. *However, it does not authorize any other water right or other portion of a right held or acquired by a municipal water supplier to be so identified without the approval of a change or transfer of the right or portion of the right for such a purpose. RCW 90.03.560 (emphasis added).*

Under this statute, the ability of Ecology to characterize a water right held by a municipal water supplier as being for municipal supply purposes is not without limitation. The fact that a municipal water supplier may hold a water right for municipal supply purposes does not automatically convert all water rights held by the municipal water supplier into municipal water rights or water rights for municipal supply purposes. Even if the municipal water supplier subsequently used other water rights for a municipal water supply purpose, RCW 90.03.560 requires a municipal water supplier to use the change process to change the purpose of use for other non-municipal water rights. RCW 90.44.100, which was not amended by the 2003 MWL, also prohibits changes in the purpose of use for groundwater.[7] *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 130, 969 P.2d 458 (1999); *City of West Richland v. Ecology*, 124 Wn. App. 683, 692-93, 103 P.3d 818 (2004). Therefore, if a portion of WSU's groundwater rights cannot be characterized under RCW 90.03.330 as being for municipal supply purposes, WSU is unable to change the purpose of use of these groundwater rights to municipal supply purposes. However, based on the analysis below, the Board concludes that each of the rights before us in this case qualify as a right for municipal water supply purposes, and there has not been a change in purpose of use of all or any portion of such rights.

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[7] The Legislature chose to allow unperfected surface water rights for municipal water supply purposes to be changed for any purpose under certain circumstances when it enacted the MWL, but did not provide such broader authority for changes of groundwater rights. *See* RCW 90.03.570.

The Board analyzes each of WSU's water rights to determine if they meet the definition of "municipal supply purposes" contained in RCW 90.03.015(4), either as specifically listed for that purpose, or as a "right generally associated with the use of water within a municipality." In doing so, the Board also looks for guidance to the 2003 Municipal Water Law Intrepretive and Policy Statement adopted by Ecology on February 5, 2007 (POL-2030).[8] *Reichman Decl. Exh. 2.* We conclude each of WSU's water rights individually discloses its intended and actual purpose for municipal water supply under the statutory definition.

As previously noted, Appellants concede that Water Right Certificate G3-22065C (associated with Well No. 6) was issued for and is presently being used for municipal water supply purposes, so as a matter of law, WSU and Ecology are entitled to summary judgment on Legal Issue No. 2E.

It is also undisputed that Certificate 5070-A (associated with Well No. 4) was issued solely for domestic supply of the WSU campus. *First Wells Decl., Exh. 4.* Appellants argue that domestic supply and municipal water supply have historically been treated as separate purposes of use by Ecology. *Second Osborn Decl., Attachments 3, 4.* The Board, however, applies the MWL as written by the Legislature. The Legislature expressly listed residential use of water through 15 or more residential service connections as a municipal supply purpose. The Legislature further recognized domestic supply as a municipal supply purpose for purposes of the MWL by stating that community or multiple domestic water supply provided by a municipal water supplier is limited by the maximum instantaneous quantity and annual quantity rather than the specific number of connections or population. *RCW 90.03.260(4) and (5).* We conclude this

[8] This document also acknowledges that certain water rights held by a municipal water supplier, such as for agricultural irrigation and dairy purposes of use, are not generally for municipal purposes, and cannot be conformed to a municipal water supply purpose of use without an application for a change being filed and approved. *Id. at 2, 11* Agricultural irrigation, under certain circumstances, may constitute a municipal supply purpose for certain governmental entities. *Id. at 6.*

certificate falls squarely within the definition of "municipal water supply purposes" and that its present beneficial use by WSU entitles Respondents to summary judgment as to Legal Issue No. 2C.

When a purpose of use is not generally associated with the use of water within a municipality, such as irrigation or dairy use, Ecology policy recognizes that the purpose of use of these water rights must be evaluated on a case-by-case basis. *Reichman Decl., Exh. 2 (POL-2030) at 2.* In doing so, Ecology considers the entity that was originally issued the water right as well as the current holder of the water right in determining whether a water right qualifies for a governmental purpose. *Id. at 5.*

Four of WSU's water rights documents each list multiple purposes, including municipal or community domestic supply, combined with irrigation and/or stock water (WSU's Claims 098522, 098523, 098524, and Certificate 5072-A). *Wells Decl., Exhibits 1, 2, 3, and 5.* Where a water right includes multiple purposes of use, without apportioning the authorized quantity between/among the different purposes, Ecology at times has concluded that the entire right may properly be characterized as being for any of the listed purposes. *Reichman response to Board question at oral argument.* The Board notes that WSU has always been the holder of the water rights in question and did not acquire them from some other entity. The Board concludes that in this case where a water right includes multiple purposes of use without apportioning the authorized quantity between/among the different purposes, and when one of the listed purposes of use is for either municipal or domestic supply, that the entire right may properly be characterized as being for municipal supply purposes. Each of these four rights identifies a municipal purpose (either "municipal supply" or "community domestic supply"), without apportioning the quantities between/among the other identified purposes. *Id.* Each is presently

being put to beneficial use in support of WSU's institutional activities. Respondents are therefore entitled to summary judgment as to Legal Issues No. 2A, 2B, & 2D.[9]

Finally, Permit G3-28278P (associated with Well No. 7) was issued in 1988 for "continuous municipal supply." *First Williams Decl., Attachment 5 (Original ROE for G3-28278P).* To the extent it was also issued as a "supplemental" alternative source for Claims 098523, 098524 and Certificate 5070-A, which we have concluded are for municipal supply purposes, Respondents are entitled to summary judgment on Issue No. 2F.

Appellants argue that finding WSU's rights to be for municipal supply purposes requires a "retroactive" application of the 2003 MWL, which they object to on constitutional grounds. The Board is required to apply the presumably constitutional language of the statute to the water rights before us. To the extent that using definitions enacted in 2003 to characterize WSU's pre-existing water rights as part of the 2006 change decisions may be viewed as a "retroactive" application of the statute, we note only that we believe use of the definitions under these circumstances was intended. We leave to the Courts the related questions raised by Appellants regarding whether such use constitutes an impermissible retroactive application in violation of the Washington or United States Constitutions.

Legal Issue No. 3: Reliance on Municipal Water Bill.

Legal Issue No. 3 asks whether the MWL excuses consideration and application of any applicable criteria for an application to change a groundwater right. Appellants, who initially raised this issue, questioned Ecology's position that the MWL "affects" but does not excuse consideration of the applicable criteria for groundwater changes. Ecology maintains that the

[9] Claim No. 098524 (associated with Well No. 3) was not included within Issue No. 2.

provisions regarding evaluation of a change or transfer application for a water right must still be met, but the tentative determination of the validity and extent of the water right is affected by RCW 90.03.330.

Appellants specifically question whether Ecology is allowed to disregard a long history of non-use of a water right in assessing whether a water right has been abandoned when making its tentative determination of the validity of a water right. Ecology adopted a policy (POL 1120) on August 30, 2004, which allows for a simplified tentative determination of the validity of a water right when the existing water right is for a municipal water supply purpose, in accordance with RCW 90.03.330(3). *Second Brown Decl., Exh.2* (Policy 1120, "Water Resources Program Policy for Conducting Tentative Determinations of Water Rights"). Under POL 1120, an investigation of the complete history of the water right is not required under a simplified tentative determination. *Id. at 3.* Appellants also urge the Board to recognize that different cases involving transfers may require the consideration of other laws such as SEPA. *Appellants' Response at 22.*

We conclude that the 2003 MWL does not, as a matter of law, excuse consideration and application of any applicable criteria for WSU's change application to its groundwater rights, and that summary judgment should be granted to Respondents on Legal Issue No. 3. The Board also does not find anything in the MWL to indicate that the Legislature intended to change the law regarding abandonment of municipal water supply rights. Abandonment is discussed in more detail later in this opinion. In order to approve a groundwater right change application under RCW 90.44.100, Ecology must make the following conclusions: (1) that the water right is valid for change; (2) that the proposed additional points of withdrawal (groundwater wells) must tap the same body of public groundwater; (3) that there is no enlargement of the water right; (4) that the change will not impair other water rights; and (5) that the change must not be

detrimental to the public welfare.[10] This is the case because Ecology can only approve a change of the water right to the extent it is valid, and because RCW 90.44.100(2) states that groundwater change approvals require "findings as prescribed in the case of an original application."[11] *R.D. Merrill Co. v. Pollution Control Hearings Board,* 137 Wn.2d 118, 131, 969 P.2d 458 (1999). Ecology's determination of whether a right is valid for change may be affected by the application of the MWL, as it was in this case, and as discussed elsewhere in this opinion (Ecology determination of the validity and extent of the groundwater rights for municipal supply purposes based on past beneficial use). The Board also recognizes that depending on the facts and legal issues in a case, other provisions of law may be applicable regarding whether Ecology properly approved a change or transfer of a groundwater right.

Legal Issue No. 4: Application of Municipal Water Bill.

Legal Issue No. 4 asks the Board to decide: "Whether, if Washington State University is deemed a "municipal water supplier" and its water rights are for municipal water supply purposes, Ecology improperly applied the provisions of RCW 90.03.330(3) and (4)."

Appellants allege Ecology misapplied the provisions of the 2003 Municipal Water Law. In response to the summary judgment motion on this issue, however, Appellants now argue the misapplication based on their belief that some of WSU's rights do not qualify as municipal water rights. Appellants contend: "The problem presented in this appeal is not that Ecology improperly applied this provision to a municipal water right, but that Ecology applied it to two certificates [Certificates 5070-A and 5072-A] that do not qualify as municipal water rights."

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[10] The availability of water is not reevaluated for a groundwater change application because the availability of water subject to appropriation is determined at the time application is made for the permit. *R.D. Merrill Co, v. PCHB,* 137 Wn.2d 118, 132 (1999).

[11] Findings required for an original application are specified in RCW 90.03.290.

Appellants' Response at 23. Appellants also assert that only one of WSU's water rights, Certificate No. G3-22065C (associated with Well No. 6), appears to facially qualify as a water right certificate issued for municipal purposes based upon system capacity. Appellants contend that none of the other water rights, including WSU's water right claims, are therefore entitled to have their inchoate portion protected under the "right in good standing" language in RCW 90.03.330(3) because that subsection only applies to "pumps and pipes" certificates. Appellants argue that Ecology's finding the other two certificates qualified as rights for municipal water supply purposes thereby improperly validated the unused portions of those rights for future use (per RCW 90.03.330(3)) and wrongly immunized the certificates from past relinquishment and abandonment.

As argued by Appellants, much of Issue No. 4 is really a restatement of Issue No. 2, that is, whether Ecology properly characterized Certificates 5070-A and 5072-A as municipal water supply rights for purposes of applying RCW 90.03.330. Appellants do not challenge Ecology's interpretation of RCW 90.03.330,[12] nor do they present any legal argument to counter Ecology's analysis of how RCW 90.03.330(3) and (4) are to be applied when evaluating changes to municipal water supply rights documented by certificates that authorize inchoate water quantities. Indeed, Appellants concede Ecology properly applied and carried out the provisions of RCW 90.03.330(3) and (4) with respect to Certificate No. G3-22065C.

We have previously concluded in Legal Issue No. 2 that Certificates 5070-A and 5072-A are properly characterized as rights for municipal supply purposes. It is undisputed that Certificates 5070-A and 5072-A were issued prior to September 9, 2003, the date required for

[12] Except to the extent they have not waived their separate claim that RCW 90.03.330 violates the constitution because of its alleged "retroactive" effect on previously issued water rights. Appellants contend that neither the Legislature or Ecology, nor this Board, can rely on a 2003 change in the law to determine that WSU's pre-2003 water rights were immunized from loss for non-use. *Appellants' Response at 11-13, Reply at 14-15.*

RCW 90.03.330(3) to apply to a right. It is also undisputed that a portion of the annual quantities authorized under each certificate remains inchoate.

Appellants dispute Ecology's determination that these two certificates were issued under Ecology's former administrative practice of issuing certificates based on system capacity or "pumps and pipes" because there is no documentation to that effect. The Board finds that there is evidence, however, to support this finding. First, the declaration of Ecology's permit manager for Eastern Washington states that these certificates were issued based upon the policy of system capacity. *First Brown Decl., at 5-6.* In addition, the Permit Applications related to Certificate No. 5070-A (associated with Well No. 4) and Certificate No. 5072-A (associated with Well No. 5) state the current enrollment at WSU as well as the estimated enrollment for WSU in 1970 and 1980. *First Brown Decl., Exh. 3 & 4.* The ROE issued in response to the Permit Application for Certificate No. 5070-A specifically states that the recommended quantity is based on "the anticipated amount required for 15,000 students." *Second Osborn Decl., Attachment 3.* The historical pumping data relied upon by all parties in this proceeding also shows that the quantities authorized in the certificates far exceeded the amount of water that had previously been put to actual beneficial use under the permits.[13] The fact that Ecology considered the current and future enrollment of students at WSU when reviewing the water right applications, and issued the certificates for quantities in excess of what had previously been put to actual beneficial use under the permits, is clearly a capacity-based determination. Having determined that Certificates No. 5070-A and 5072-A were issued for municipal supply purposes pursuant to Ecology's administrative policy of issuing certificates on the basis of system capacity rather than

[13] *E.g.,* The annual volume pumped from Well No. 4 in the year prior to issuance of Certificate 5070-A was 535 acre feet, while the certificate was issued for 2260 acre feet per year. *Ryan Decl., Exh. 1, Matuszek Decl., Exh. 1, Third Wells Decl., Exh. 2.* Similarly, pumping from Well No. 5 never exceeded 228 afy, while the certificate was issued for 720 acy. *Id.*

actual beneficial use, the Board finds that the water rights represented by these certificates are rights in good standing as described in RCW 90.03.330(3). For these reasons, we conclude Ecology's application of RCW 90.03.330 to those certificates was proper. With respect to Claims No. 098522 and 098523, Ecology agrees that RCW 90.03.330(3) does not apply to them because these water rights are not documented by "pumps and pipes" certificates. However, Ecology notes that there is no inchoate water associated with these claims because they have been fully perfected. *First Brown Decl. at ¶18.*[14] Summary judgment should be granted to Respondents with respect to Legal Issue No. 4.

Legal Issue No. 5: Perfection.

Legal Issue No. 5 asks whether any quantity of water authorized for change with regard to Wells No. 1, 2, 4, 5, 6, and 7 is unperfected, and if so, whether Ecology lacks authority to change any of the water rights. The Appellants dispute Ecology's legal authority to change the point of withdrawal of unperfected or inchoate water rights that are documented by certificates or claims. Like Issue No. 4, above, this issue is a challenge to Ecology's application of the 2003 MWL to WSU's various water rights. This argument pertains specifically to Water Right Certificates No. 5070A, 5072-A, G3-22065C, and Water Right Permit No. G3-28278,[15] which have not been put to full beneficial use in the entire annual quantities authorized. See, *ROEs; Matuszek Decl. and Ryan Decl.*

[14] The Board notes that while Ecology has determined that WSU "fully perfected the water rights claimed under Water Right Claim Nos. 098522 and 098523," it has failed to indicate the instantaneous quantity (Qi) that has been perfected by WSU for these claims and the other rights under appeal.

[15] The Board has previously recognized that the water rights associated with Claim 098522 (Well No. 1) and Claim No. 098523 (Well No. 2) are fully perfected.

Both sides cite *R.D. Merrill* in support of their positions. *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 969 P.2d 459 (1999). Appellants contend that the Supreme Court's decision in *R.D. Merrill* upholding Ecology's authority to change the point of withdrawal of an unperfected *permit* should be read as a rejection of Ecology's authority to change the point of withdrawal of an unperfected *certificate*.

Ecology and WSU counter that the Supreme Court's holding in *R.D. Merrill* should be read to authorize changes in places of use and points of withdrawal (but not purposes of use) of inchoate groundwater *rights*, irrespective of whether they are represented by a permit or certificate. Respondents argue that Appellants misconstrue *R.D. Merrill* when they contend that the Court held such authority is limited to permits. Instead, Ecology argues that the Court's focus on the statute's inclusion of "permits" was simply to highlight the legislature's intent that *unperfected* rights may be changed to the same degree as *perfected* rights.

First, we note that water rights documented by certificates were not at issue in the *R.D. Merrill* case, nor were water rights for municipal water supply purposes documented by the so-called system capacity or "pumps and pipes" certificates, which is the status of three of the WSU water rights. Clearly, RCW 90.44.100 authorizes changes of points of withdrawal and places of use for inchoate groundwater rights. *R.D Merrill Co.*, 137 Wn.2d at 129-130. However, in this case we are presented with certificates that have inchoate rights associated with them, an issue not before the Court in *R.D. Merrill*. Western water law normally requires actual application of water to beneficial use in order to perfect the right, at which time a certificate issues. System capacity has been rejected as inconsistent with these beneficial use requirements and as a basis

for perfecting a water right. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 592, 957 P.2d 1241 (1998).

However, in the context of municipal water supply rights, RCW 90.03.330(2) now protects certain municipal water supply rights documented by system capacity certificates from diminishment except in specified situations. This was not the case when the Court decided *Theodoratus*. *Theodoratus*, 135 Wn.2d at 594. Ecology must now assess whether any of the inchoate quantity specified in a water right certificate that was issued based on system capacity remains valid. This assessment arises out of application of RCW 90.03.330(3), which provides that water rights for municipal water supply purposes documented by certificates issued prior to September 9, 2003, with maximum quantities based on system capacity (*i.e.* "pumps and pipes" certificates), are rights in good standing. Thus, under the 2003 MWL, the inchoate portion of these certificates need not have been put to beneficial use, and can continue to be exercised to serve new growth. These inchoate rights are subject to application of the change criteria of RCW 90.44.100, and Ecology is not authorized to revoke or diminish those municipal water supply rights documented by certificates except through the application of those change criteria. Accordingly, the Board holds that under the 2003 MWL, Ecology has the authority to change the point of withdrawal of the unperfected or inchoate portions of water rights documented by certificates. Ecology did so with respect to Certificates No. 5070A, 5072 A and G3-22065C.

Moreover, in *R.D. Merrill*, the Supreme Court addressed a change to an unperfected groundwater right permit, but its decision includes no language expressly limiting its analysis to permits. We find nothing in the decision to support an interpretation of RCW 90.44.100 that

limits changes of inchoate groundwater rights to only those documented by permits. The statute itself draws no distinction between permits and certificates with respect to eligibility for change, allowing amendment of both a *permit* and *certificate* of groundwater right. *RCW 90.44.100.* Where the Supreme Court distinguishes permits from certificates in its decision, it does so only to contrast the most common difference: perfection, noting that "a certificate of groundwater right is issued when a water right is perfected." *R.D. Merrill*, 137 Wn.2d at 129 (internal citations omitted). The *R.D.Merrill* Court simply did not address, or contemplate, certificates authorizing inchoate water quantities such as those at issue in this case and other municipal water right contexts.

That said, we find the Court's reasoning in *R.D. Merrill* applies equally to a valid inchoate water right issued for municipal supply purposes, regardless of whether the right is represented by an unperfected permit, or a claim, or a certificate issued prior to enactment of the 2003 MWL under Ecology's prior system capacity approach. The groundwater change statute allows flexibility in the physical location and means of withdrawal so permit holders can beneficially use the groundwater they are entitled to appropriate, subject to some limitations. *R.D. Merrill,* 137 Wn.2d at 131. The same reasoning applies to facilitating use of the inchoate portions of a groundwater certificate issued for municipal supply purposes. The applicability of the *R.D. Merrill* holding to municipal water supply certificates with inchoate water quantities is further supported by the Court of Appeals' decision in *City of West Richland v. Dep't of Ecology*, 124 Wn.App. 683, 103 P.3d 818 (2004) (holding that RCW 90.44.100 does not authorize changes in purpose of use of inchoate *water rights*, without limitation to permits). The Court has

also subsequently noted that the Legislature has plainly provided that the groundwater change statute (RCW 90.44.100) *does* authorize a change in the place of withdrawal under an *unperfected right,* not distinguishing how that right is expressed, whether by permit, certificate or claim. *Pub. Util. Dist. No. 1 of Pend Oreille County v. Ecology,* 146 Wn.2d 778, 791-792, 51 P.3d 744 (2002) (Sullivan Creek).

Appellants also argue that WSU has not exercised reasonable diligence to perfect the inchoate portion of its water rights. Appellants point to language in *R.D. Merrill,* in which the Supreme Court cautions that even where unperfected permits are transferable, reasonable diligence still applies and that RCW 90.44.100 cannot be used to speculate in water rights. *R.D. Merrill,* 137 Wn.2d at 130-31. Ecology acknowledges that the Legislature intended through the enactment of the MWL that Ecology's issuance of certificates based on system capacity did not take these water rights out of good standing, but that these water right holders would still have to meet such principles as due diligence in project development to keep these rights in good standing. *Ecology's Memorandum in Support of Motion for Partial Summary Judgment at 12.*

Appellants point to the long period of time that has passed since some of WSU's water rights have been issued and their subsequent lack of perfection. Well No. 4, for example, was drilled in 1963, but Certificate No. 5070-A has yet to be put to full use. Ecology's judgment that WSU is exercising good faith and due diligence in exercising its inchoate water rights by developing facilities and increasing the enrollment of students is entitled to deference. *Port of Seattle v. PCHB,* 151 Wn.2d 568, 90 P.3d 659 (2004). Furthermore, WSU has not engaged in marketing of these water rights. *Second Brown Decl. at 3.*

The Supreme Court has stated that reasonable diligence "must depend to a large extent upon the circumstances." *In re Water Rights in Alpowa Creek*, 129 Wash. 9, 14, 224 P. 29 (1924). The "reasonable diligence" requirement is a flexible standard, and the Board believes that flexibility in interpreting it is particularly important with regard to water rights for municipal supply purposes. Jurisdictions grow at uneven rates and need to be able to serve their growing populations. In addition, water conservation by governmental entities might be discouraged by the imposition of rigid timelines for putting water to beneficial use. At the same time, the government entity must be able to grow into the water right at some time in the forseeable future.[16] *City of Ellensburg v. Ecology*, PCHB No. 96-194 (1996). The Board finds in the present case Ecology was within it discretion to determine that WSU is exercising due diligence in putting its water rights to full beneficial use and that WSU's water rights remain in good standing.

We conclude that Respondents' motion for summary judgment on Legal Issue No. 5 should be granted insofar as certificates and claims representing water rights for municipal supply purposes are eligible for change in point of withdrawal to the same extent as water right

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[16] The Board notes that Ecology only established a date for putting water to full beneficial use for Permit G3-28278P. *First Wells Decl. Exh. 7.* There is no similar timeline established for perfecting the substantial inchoate portion of WSU's other water rights. RCW 90.03.260, made applicable to groundwater withdrawals by RCW 90.44.060, requires an application for a water right to contain the time for completely putting the water to the proposed use. In *Lake Entiat Lodge, Associated v. Ecology*, PCHB No. 01-025 (Decision by Board Member Jensen, November 27, 2001). Ecology's responsibility to establish a construction schedule for the inchoate portion of the certificate was emphasized. The Board has also recognized that the imposition of a construction schedule is a critical tool to ensure that limited water resources are not delayed from being put to beneficial use for years on end. *Petersen v. Ecology*, PCHB No. 94-265, COL V (1995). The Legislature has provided additional flexibility in fixing construction schedules for municipal supply purposes in RCW 90.03.320. The Appellants have not raised, and the Board does not decide, the issue of whether Ecology must establish a construction schedule for the inchoate portion of WSU's certificated water rights.

permits. The Board finds that WSU has exercised reasonable diligence in perfecting the inchoate portions of its water rights. Having so concluded, it is therefore unnecessary for the Board to resolve the question of whether any quantity of water authorized for change under the challenged claims and certificates is unperfected for purposes of being lawfully transferred.

Legal Issue No. 6: Beneficial Use.

Legal Issue No. 6 asks whether the water rights decisions are contrary to beneficial use requirements. No disputed issues of material fact have been raised regarding the *types* of uses to which WSU is putting its water, which include irrigation water for a golf course. Appellants contend irrigation of the golf course, facilitated by approval of the change applications, fails to satisfy beneficial use requirements.

The Water Code explicitly declares several types of uses as beneficial, including uses for domestic, irrigation, and recreational purposes. *RCW 90.54.020(1).* The Legislature has also specifically defined "beneficial use" of water to include, among other things "uses for *domestic water, irrigation,* fish, shellfish, game and other aquatic life, *municipal, recreation,* industrial water, generation of electric power, and navigation." *RCW 90.14.031(2)* (emphasis added). We conclude as a matter of law, without commenting on the relative merits of golf as a recreational endeavor, that WSU's use of water for golf course irrigation constitutes a beneficial use of water.

Appellants further contend that WSU's irrigation of its golf course occurs in a wasteful manner contrary to the beneficial use doctrine requirement that an appropriator's use of water must be reasonably efficient. They allege that WSU is currently overwatering and wasting water at the golf course, relying on personal observations, photographs and local climate information to

support their claim. Respondents counter that this evidence is inadequate to defeat summary judgment.

Beneficial use requires that an appropriator's use of water must be reasonably efficient, although absolute efficiency is not required. *Ecology v. Grimes*, 121 Wn.2d 459, 472, 852 P.2d 1044 (1993). In *Grimes*, several factors were relevant to determining the reasonable efficiency of the water systems: local custom, the relative efficiency of water systems in common use, and the costs and benefits of improvements to the water systems, including use of public and private funds to facilitate any improvements. *Id.* at 474.

The facts material to deciding this issue are those related to the "reasonable efficiency" of WSU's water use. By virtue of Respondent's motion for summary judgment, Appellants have the burden to show that a triable issue exists regarding whether WSU's water use is reasonably efficient. Without more, the observations of Mr. Cornelius, who is admittedly not an expert in this area, along with the photographs and temperature data, fail to establish a genuine dispute about the reasonable efficiency of WSU's water use. We agree with Respondents that Appellants' allegations may be more properly evaluated in the context of an enforcement action, which is beyond the purview of this appeal. We conclude summary judgment should be granted to Respondents on Legal Issue No. 6 because the change decisions are not contrary to beneficial use requirements.

Legal Issue No. 7: Enlargement of Rights.

Legal Issue No. 7 asks whether the water right decisions will unlawfully "enlarge" the rights under Claims 098522 and 098523, Certificates 5070-A, 5072-A, and G3-22065C, and Permit G3-28278P.

As a legal principal in water rights law, enlargement prohibits Ecology from authorizing additional wells for a groundwater right if the combined total quantity withdrawn from the original well and any additional well(s) enlarges the right conveyed by the original permit or certificate. *RCW 90.44.100 (2).* Appellants' motion for summary judgment on this issue is based on two separate theories: the first assumes WSU will increase the quantity of water withdrawals beyond those amounts previously put to beneficial use (*i.e.,* perfected) as a result of approval of the change application; and the second assumes use of water based on the transfer of quantities associated with an invalidated claim. We address each in turn, rejecting Appellants' first theory and finding material facts in dispute that prevent us from reaching summary judgment on their second.

Appellants' seek a ruling from this Board that enlargement of a water right occurs, as a matter of law, whenever a change in the point of withdrawal enables a water right holder to exercise a greater quantity of an existing right than is being exercised at the original point of withdrawal. Appellants argue the approval of WSU's change applications will allow WSU to pump a greater amount of water than it is physically capable of pumping from its existing well locations and configurations, and that this change therefore amounts to an unlawful "enlargement" of WSU's water rights.

It is undisputed that the change/consolidation of WSU's rights will enable WSU to pump more water than it currently withdraws. However, WSU asserts that it could fully exercise its authorized quantities through its current configuration of wells, either by deepening its existing wells or by drilling replacement wells at the original locations as authorized by RCW 90.44.100(3) (which all parties agree can occur without Ecology's approval). Appellants contend it is irrelevant what WSU *could* do under its existing rights because WSU indisputably

will be withdrawing larger quantities of water after approval of the change application. Appellants assert this is sufficient to constitute enlargement of the existing rights.

We conclude, as a matter of law, that enlargement of a water right does not occur by virtue of a change in the point of withdrawal merely because it may result in a water right holder exercising more of a previously, and validly, authorized quantity of water. This is in accord with previous Board decisions. See *Kile v. Ecology*, PCHB No. 96-131, COL V (1997) (holding that where an amendment of a groundwater certificate for second well is authorized for appropriation of no more water than the original well, which had limited production due to drought, "there is no enlargement of the right conveyed by the original certificate.")

In so concluding, we specifically overrule this Board's earlier conclusory statement in *Jellison v. Ecology*, PCHB No. 88-124 (1989) to the contrary (that granting a change in a surface water point of diversion that would allow a water right holder to exercise a greater amount of a previously authorized quantity of water would be to "enlarge" the right). *Jellison v. Ecology*, PCHB No. 88-124, COL V (1989).

Appellants' second theory of enlargement raises the question of whether an *invalid* claim may be used as a basis to award additional quantities at an alternative location. It is undisputed that Ecology tentatively found Claim No. 098524 (associated with Well No. 3) to be invalid and denied its integration with the other rights at the same time it approved the rest of the changes at issue in this appeal. *First Osborn Decl., Attachment 3 (2006 ROE for Claim No. 098524).* It is also undisputed that WSU did not appeal Ecology's denial of the claim.

Permit No. G3-28278 was issued as a "supplemental" water right. The permit was originally issued with language specifying that its quantities were issued "less those amounts appropriated under ground water Cert. 5070-A, and Ground Water Claims 98522 and 98524. Total combined quantity shall not exceed 2500 gallons per minute, 2260 acre-feet per year."

Brackney Decl., Attachment 5 (1988 ROE for Permit No. G3-28278) at 3. The 2006 Report of Examination approving the change application for Permit No. G3-28278 notes this limitation and also indicates Ecology's tentative determination that the quantities associated with Claim No. 098524 are invalid. *First Osborn Decl., Attachment 1 (2006 ROE for Permit No. G3-28278)* at 3.

Appellants interpret the ROE as excluding the annual quantities associated with Claim No. 098524 from the annual quantities authorized under Permit No. G3-28278P and approved as part of the change applications. They also interpret the Permit as incorporating the instantaneous quantities from Claim No. 098524 and argue that inclusion of such quantities constitutes an unlawful enlargement of WSU's water rights. To allow the transfer of any quantity that is based on an invalid claim, Appellants argue, would improperly validate illegal water use.

WSU argues that Appellants mischaracterize the nature of Permit No. G3-28278, misconstrue the legal effect of Ecology's determination that Claim No. 098524 is not a valid water right, and are barred from making a collateral attack on the permit.

This Board has jurisdiction to consider the extent and validity of water rights claims, and to reach tentative determinations regarding the same, when such evaluations are necessary to render a decision implicating those rights. *Madrona Community, Inc., and Kidder v. Ecology and Burkum,* PCHB No. 86-55 (1987) (reviewing Ecology's tentative determination as to the extent and probable validity of an Appellant's claim in evaluating the impact of a water right applicant's proposed diversion on the claimed rights).[17] In this case, it may be necessary to

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[17]See also *MacKenzie v. Ecology, PCHB No. 77-70,COL III (1977)* (holding that the details set forth in a statement of claim regarding quantity, acreage, and priority, are not controlling in the Board's de novo proceedings or in court), *PUD No. 1 of Pend Oreille County v. Ecology, PCHB No. 97-177, 98-043, 98-044, Finding XXII (Amended Summary Judgment, October 15, 1998)* ("Ecology, and, by imputation, the PCHB, does have jurisdiction to reach a tentative determination as to the validity of the water rights in order to render a decision under RCW 90.03.380 [regarding the propriety of the change of the surface water right]"), *aff'd 146 Wn.2d 778, 794 (2002)* ("Ecology has authority to tentatively determine whether a water right has been abandoned or relinquished when acting on an application for a change...and the Board may also do so when reviewing action on a change application.")

consider the validity of Claim No. 098524 in order to decide whether Ecology's approval of the change to Permit No. G3-28278 is lawful. In any event, it is necessary to understand the relationship between the two rights, including facts related to overlapping characteristics of the rights, the amount of water embodied in each right and the basis for those amounts, and the original intent of Permit No. G3-28278P with respect to Claim No. 098524.

The language of Permit No. G3-28278 uses the term "supplemental," which Ecology's own policy statement concedes is disfavored due to its "historic ambiguity" and inconsistent use. *Third Brown Decl., Exh. 1 (POL 1040).* The Permit also states that it was issued "less those amounts appropriated under groundwater claims....98524."

Respondents ask us to find that the use of the term "supplemental" in Permit No. G3-28278 was intended to indicate that Well No. 7 provided an "alternate" source of water for WSU, up to 2500 gpm, less instantaneous quantities withdrawn under other water rights, including Claim No. 098524. They assert that a permit which has been explicitly made "supplemental" to (*i.e.,* an alternate source for) existing quantities of claimed water survives intact, even if the "primary" rights upon which the quantities are based are later determined to be invalid.

While WSU concedes the permit was clearly intended to limit WSU's pumping from Well No. 7, it argues there is no evidence Ecology intended a conditional authorization of the water right only to the extent the underlying "primary" rights remain valid. Similarly, Ecology argues "the permit includes no provision stating that any portion of the quantities it authorizes will become unavailable should a later determination be made that the rights documented by Certificate No. 5070-A, Claim No. 098522, or Claim No. 098524 become invalid." *Ecology's Response at 4.* WSU contends the intent and purpose of the permit was to include the quantity of water that WSU and Ecology believed WSU could pump from Well No. 3 (as well as Wells No.

1 and 4), irrespective of the fact that no independent right for Well No. 3 existed apart from the claims for Wells No. 1 and 2.[18]

The Board finds that material facts remain in dispute regarding the relationship between the rights at issue, including facts related to overlapping characteristics of the rights, the amount of water embodied in each right and the basis for those amounts, and the original intent of Permit No. G3-28278P. These factual disputes make a legal conclusion on the issue of enlargement of Permit No. G3-28278P premature. The Board believes, because there are disputed facts, conflicting interpretations of the law, and potentially significant implications for the regulatory scheme involving supplemental water rights, it is appropriate to reserve judgment at this time. Summary judgment should be denied on Legal Issue No. 7 with respect to enlargement of Permit No. G3-28278P. Respondents' motion for summary judgment on Legal Issue No. 7 should be granted with respect to Water Right Claims 098522 and 098523, and Water Right Certificates 5070-A, 5072-A, and G3-22065C.

Legal Issue No. 8: Relinquishment.

To the extent that each of WSU's rights are claimed for, and meet the definition of, "municipal water supply purposes" under Ch. 90.03 RCW, we conclude as a matter of law that they are categorically exempt from relinquishment without respect to non-use or perfection. State law provides the following specific exemption from relinquishment for municipal water supply rights:

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[18] It is undisputed Well No. 3 was constructed in 1946. The parties also agree that Well No. 3 was used, after 1945, as an unauthorized point of withdrawal, which allowed WSU to pump at least some (disputed) quantity of water associated with Claims No. 098522 and 098523. The claimed use of Well No. 3 was not prior to 1945 as required by the Claims Registration Act, and therefore Ecology concluded "It does not appear that Claim 98524 represents a valid water right." *First Brown Decl., Exh. 1.*

(2) Notwithstanding any other provision of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right:

...

(d) If such right is claimed for municipal water supply purposes under chapter 90.03 RCW.... *RCW 90.14.140(2)(d).*

For the reasons explained in Legal Issue No. 2, each of WSU's rights qualifies as a right for municipal water supply purposes and, therefore, is exempt from relinquishment by operation of law. We reach this conclusion by interpreting and applying the statutes as they are written, without reaching Appellants' facial challenge to the constitutionality of the 2003 MWL.

Legal Issue No. 9: Abandonment.

Respondents seek judgment as a matter of law that WSU has not abandoned any of its water rights. They point to the fact that, beginning in the 1930's, WSU continued to construct wells capable of supplying the needs of its Pullman campus, expanded its water use, and sought alternative ways to exercise its rights including withdrawal of water associated with certain rights from wells not authorized for those rights.

Appellants also seek summary judgment on Issue 9B with respect to abandonment of Claim No. 098523 (associated with Well No. 2). As to this claim, they argue evidence shows WSU intended to abandon not just Well No. 2 but also the claim associated with the well. As to WSU's other rights, Appellants contend that exercise of the rights via unauthorized points of withdrawal cannot overcome WSU's non-use of its rights from their authorized points of withdrawal. Alternatively, Appellants argue that disputed material facts prevent summary judgment on the remaining rights.

The issue of abandonment of WSU's rights is amendable to summary judgment. Although the parties vigorously contest the legal implications of the facts, the material facts themselves are not in dispute.

Abandonment is a common law doctrine that occurs when there is intentional relinquishment of a water right. *Okanogan Wilderness League, Inc. v. Twisp*, 133 Wn.2d 769, 781, 947 P.2d 732 (1997); *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 115, 685 P.2d 1068 (1984); *Miller v. Wheeler*, 54 Wash. 429, 435, 103 P. 641 (1909). The burden of proving abandonment rests with the party alleging abandonment. *Okanogan Wilderness League*, 133 Wn.2d at 781. Courts have historically required both intent and an act of voluntary relinquishment, making proof of abandonment difficult. The Washington Supreme Court has indicated a high standard of proof is necessary and "will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region." *Jensen, supra* (quoting *Miller*, 54 Wash. at 435). The intent to abandon is determined with reference to the conduct of the parties. *Jensen, Id.*

Appellants argue that WSU's long period of non-use of Well No. 2 (associated with Claim No. 098523), when combined with statements in WSU's water service plan and made by its primary water system employee, constitute evidence of abandonment of Claim No. 098523. We disagree, both with respect to WSU's intent and its exercise of the right.

Initially we note the important distinction between abandoning a *well* and abandoning a water *right*. While it is undisputed that WSU, in fact, stopped pumping from Well No. 2 by 1977, that alone is not dispositive of any intent to abandon the right associated with the well.[19]

[19] We disagree with Appellants' interpretation of the tables in WSU's 2002 water system plan as an admission by WSU that it had abandoned *Claim* 098523. *First Osborn Decl., Attachment 4, Tables 4.3 and 4.4.* These tables identify Well No. 2 as abandoned but also identify "Existing Water Rights" and "Current Water Right Status" as *including* Claim No. 098523 in the amounts of 500 gpm Maximum Instantaneous Flow Rate and 720 acre-feet Maximum Annual Volume.

Similarly, WSU's undisputed shifting of a portion of its authorized quantities from its authorized wells to other interconnected but unauthorized wells is not evidence of an intent to abandon the rights associated with the original wells. WSU's relevant conduct consists of more than its abandonment of Well No. 2 or any periods of nonuse of other wells. Its intentions are further evidenced by the steps it took after abandoning Well No. 2 and reducing withdrawals from other source wells.

Nonuse alone does not constitute abandonment *per se*, although long periods of nonuse may create a rebuttable presumption of intent to abandon a water right and shift the burden to the holder of the water right to explain reasons of nonuse. *Pend Oreille County PUD*, 146 Wn.2d at 799. *Okanogan Wilderness League*, 133 Wn.2d at 783.

Even where some question may exist about the extent to which quantities exercised under the authorized locations were, in fact, exercised at alternative locations, we find no intent to abandon to the rights. Notably different than the Town of Twisp in the *Okanogan Wilderness League* case, here WSU does not rely solely on its continued existence as a municipality to rebut any presumption of intent to abandon or non-use of its water rights arising from its non-use of certain wells, including Well 2. Unlike the Town of Twisp, which failed to mention or list its prior appurtenant water rights when seeking groundwater certificates several years after ceasing to divert surface water from previously authorized surface water rights, WSU has continuously identified and claimed the rights now challenged by this appeal.

It is undisputed that in 1962, when WSU applied for the right which subsequently became Certificate No. 5070-A, WSU reported each of the three wells (Nos. 1, 2, an 3) used to withdraw water under its pre-Water Code groundwater rights. *First Brown Decl, Exh. 3.* In 1973, when it applied for the right which subsequently became Certificate No. G3-22065C, WSU again reported its pre-1945 groundwater rights together with its permitted rights to Wells

No. 4 and 5. *First Brown Decl., Exh. 4.* In 1974, WSU filed claims identifying the water it was withdrawing from Wells No. 1, 2, and 3. *First Wells Decl., Exh. 1 – 3.* In 1987, WSU applied for a right for Well No. 7, "as a supplemental source of water for the university campus." *First Brown Decl., Exh. 6.* Ecology's Protested ROE for Well No. 7 stated: "Three existing wells, presently on-line, are considered to have a very limited future. It is the expressed intent of WSU to bring the proposed well on-line as a direct substitute for these wells as they eventually decrease in productivity, or fail." *Id.* The Protested ROE issued in 1988 identified each existing groundwater right and claim appurtenant to the WSU campus, and the permit for Well No. 7 was issued "to replace, as necessary, those waters originally authorized or claimed for appropriation from Wells No. 1, 3 and 4." *Id.*

These undisputed actions alone are sufficient to defeat an allegation of abandonment of Claim No. 098523 or any of WSU's other rights. In this respect, we find the facts more similar to those in *Pend Oreille County PUD*, where the Supreme Court concluded, even if it agreed there had been a long period of nonuse, the PUD's continuous and undisputed actions in search of new ways to exercise its rights from 1956 onward "established that it did not intend to abandon its 1907 water right." *Pend Oreille County PUD, 146 Wn.2d* at 799-800.

Having found no intent to abandon its right, it is not necessary for us to evaluate in detail the precise quantities of withdrawals WSU exercised under each right via unauthorized points of withdrawal. It is enough to recognize that taking steps to continue exercising one's water right, whether such actions are authorized or unauthorized, successful or unsuccessful, may be evidence of intent to not abandon a right. To that end, we conclude that, without more, an appropriation is not abandoned by reason of changing a point of withdrawal.

We also note, without condoning unlawful self-help, that WSU's actions changing to unauthorized points of withdrawal allowed WSU to put its water rights to continuous beneficial

use.[20] Since 1962, WSU's total pumpage has never been less than 469,226,064 gallons per year, or 1,440 acre-feet (the maximum amount claimed under its perfected Water Right Claims No. 098522 and 098523). *See Matuszek and Ryan Decl., Exh. 1 at 6-16.* Water Right Certificate No. 5070-A has, to the extent it was partially perfected, been exercised by withdrawal from other University wells in addition to Well No. 4, including Well No. 7. *See Matuszek and Ryan Decl., Exh. 1.* Water Right Certificate No. 5072-A has, to the extent it was partially perfected, been exercised by withdrawal from other wells, including Wells No. 6 and 8. *First Wells Decl. at 3-4.* Water Right Certificate No. G3-22065C has, to the extent it was partially perfected, been exercised by withdrawal from other wells, including Wells No. 7 and 8. *See Matuszek and Ryan Decl., Exh. 1; First Wells Decl.* We find these rights have been exercised continuously, and the water put to beneficial use serving the water supply needs of the WSU Pullman campus.

Legal Issue No. 10: Same Body of Public Groundwater.

In response to Respondents' motion for summary judgment on this issue, Appellants concede they "have no information to suggest the WSU Wells do not tap the same body of groundwater." *Appellant's Response at 37.* In the absence of any genuine dispute regarding the source of groundwater for any of the WSU wells, Respondents' are entitled to summary judgment on Legal Issue No. 10.

Legal Issue No. 11: Expansion of Place of Use.

[20] Ecology Policy recognizes that "in some situations, historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes..." and allows for consideration of the beneficial use to be the measure of the right. *First Brown Decl., Exh. 2 (POL 1120) at §7.*

Based on stipulated facts, the now parties agree the water right decisions in this case do not improperly expand the place of use of the WSU water rights. Respondents' are therefore entitled to summary judgment on this issue.

Legal Issues No. 12: Impairment of Existing Rights.

Issue 12 asks the Board to decide whether Ecology's decision approving changes to each of WSU's contested water rights will impair existing uses. WSU and Ecology have moved for summary judgment, arguing that consolidation of WSU's water rights does not authorize any increase in the quantity of water previously authorized under the separate rights. Withdrawals under the change, they allege, will not affect existing rights, the aquifer, or the public welfare any differently than authorized withdrawals under WSU's existing rights.[21] WSU supports Respondents' position with the Declaration of Patrick Devin Brown, the Ecology Environmental Specialist who reviewed the change applications. Mr. Brown concluded that there would be no impairment because the continuous pumping of WSU water rights for many years had resulted in no reported well interference problems. Even with the integration of WSU well operations that has occurred over time, and the resulting concentration of pumping to fewer wells, there have been no reported well interference problems. *First Brown Decl. at ¶31.* Mr. Brown found "no evidence that pumping those [currently authorized] quantities from any one of the wells, as opposed to pumping those quantities from multiple wells, would cause different or greater

[21] WSU proposes to consolidate its water use from its original six wells into two wells, No. 7 and the new Well No. 8 which is located some distance from WSU's existing wells. *Second Williams Decl., Attachment 4 (Map of WSU Well Locations).* WSU is projecting Well No. 8 to account for half of its production, based on the fact that Well No. 8 can produce 2,500 gpm and WSU's claimed right is 5,000 gpm. *First Osborne Decl., Attachment 1 (ROE for G3-28278P, p. 3).*

impacts to water users or to ground water or surface water resources in the Palouse Basin Area." *Id.*

Appellants argue that, in fact, withdrawals under the consolidation will have adverse impacts that are different and greater than withdrawals under existing rights. They offer declarations that assert increased pumping of WSU wells will affect the Cornelius well, and raise factual questions about the results of pump tests by WSU of test wells. They assert that they can show a detrimental effect on the Cornelius well from the consolidation of the WSU wells, and presumed increased pumping of these wells. *Declarations of Keller, Cornelius.* Appellants have presented evidence in this summary judgment proceeding that Well No. 8 is approximately 2.8 miles from Mr. Cornelius' well, and Well No. 7 is approximately 2.9 miles from his well. *Cornelius Decl.* They have also submitted evidence of a strong correlation suggesting that the Cornelius well and the WSU and Ecology test wells are hydraulically connected. *Keller Decl., Attachment 2.* To some extent, Appellants' impairment arguments are based more generally on the declining state of the Grand Rhonde aquifer, and the potential for future exercise of WSU's water rights. They do not assert an immediate effect on the Cornelius well, but suggest it will occur over some unknown period of time.

Changes in points of withdrawals must be analyzed under the same standards as an original application for a new right, which includes an analysis of whether the change will impair existing rights. *RCW 90.44.100, RCW 90.03.290.* Appellants correctly note the Board has held that an approval cannot be granted where there is incomplete information to determine whether the existing rights of others would be impaired. *Andrews v. Ecology*, PCHB No. 97-20 (1997). However, the Board also concluded in *Andrews*, that "impairment does not arise where the effect of the changed right upon other rights is the same as the original right." *Id.* at COL V.

In this case, while the change/consolidation of the subject rights does not *authorize* any greater quantity of withdrawals than is currently available under existing valid rights (with the exception of Claim 098524 addressed in Legal Issue No. 7), we are not persuaded that is the end of the necessary impairment inquiry. Even accepting the conclusion urged by Respondents from *Kile v. Ecology & James* (that "a change in the point of diversion which would affect other rights no differently than if the diversion were made in the certificated amount at the original point of diversion is not impairment"),[22] we must answer the predicate question of whether the change, in fact, will affect existing rights to the same degree or in the same manner as no consolidation of the rights.

We conclude that Appellants have put material facts into dispute on the question of impairment, sufficient to defeat summary judgment. Even assuming the wells all tap the same body of groundwater (as all parties agree and we have concluded in Issue No. 10), and even assuming WSU could withdraw the full amount of its rights from each right's existing authorized point of withdrawal, the physical shifting of the withdrawals from one location to another has the potential to affect existing right holders. It is premature to make a conclusion on this question at summary judgment. Our decision on whether Ecology has properly concluded there is no impairment of existing rights must be informed by the parties putting forward evidence that Ecology either needed more information to make the impairment decision, or that the actual effect of pumping the integrated WSU wells will impair existing rights. The burden is on the Appellants in this regard.[23]

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[22] *Kile v. Ecology & James*, PCHB 96-131, COL VI (1997).

[23] If the evidence at hearing supports Appellants' allegation that the proposed change will, beyond speculation, have a detrimental effect upon a lawful existing well, or a substantial cumulative increase in pumping lift, then a remand to Ecology would be appropriate for its determination of the reasonable or feasible pumping lift that it will protect in existing lawful wells. This would then become the new starting point for determining whether or not the change impairs existing rights. *Pair v. Ecology & Lehn Ranches, Inc.*, PCHB No. 77-189, COL III (1978) ("If however, neither threshold condition is found to exist, there can be no impairment. The burden of proof is on the appellant

That being said, we specifically reject Appellants' theory that impairment results simply because consolidation of the rights may allow WSU to pump more of its authorized rights from a declining source aquifer than is presently possible from its existing wells. Having defeated summary judgment on the impairment issue, Appellants now have the burden at hearing to demonstrate that Ecology's "no impairment" conclusion was in error. To meet this burden, they must demonstrate that existing water right holders such as Mr. Cornelius will be impaired as a result of changing the *location* of the total authorized amount of withdrawals, from the locations authorized in the existing rights to the newly authorized points of withdrawal. This is not the same inquiry as that suggested by the Appellants, either as to whether the change will allow WSU to exercise a greater amount of its authorized quantities from a declining source than it is currently able to, or whether an increase in the aggregate amount of WSU withdrawals will generally contribute to lowering the level of the Grande Ronde Aquifer.

Legal Issue No. 13: Aquifer Depletion

This issue asks the Board to decide whether consolidation of WSU's rights will unlawfully deplete the source aquifer (the Grande Ronde). Respondent WSU moves for summary judgment on this issue, contending that because consolidation of its water rights does not authorize withdrawal of any additional quantities of water, the change affects the source aquifer no differently than the lawful exercise of WSU's existing rights. Appellants assert the

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who has failed to show either of the threshold conditions, thereby failing to prove that issuance of the present permit will impair an existing water right. The permit must therefore issue.") At this point in the proceeding, we conclude Appellants have brought forward sufficient information to put the impairment issue in dispute but have failed to establish, beyond speculation, the threshold conditions that would have required Ecology to determine the reasonable or feasible pumping lift prior to issuing the change approvals.

consolidation will result in an increase in the total quantity of water withdrawn from the Grande Ronde, exceeding the amount WSU exercises under its current configuration of rights/wells.

Withdrawals in the Grande Ronde Aquifer are currently exceeding the recharge rate. *Second Osborn Decl., Attachment 10.* This aggregate increase in pumping, Appellants further argue, will accelerate depletion of the aquifer contrary to the safe sustaining yield requirements of RCW 90.44.130.

RCW 90.44.130 provides, in relevant part:

> As between appropriators of public ground water, the prior appropriator shall as against subsequent appropriators from the same ground water body be entitled to the preferred use of such ground water to the extent of his appropriation and beneficial use, and shall enjoy the right to have any withdrawals by a subsequent appropriator of ground water limited to an amount that with maintain and provide a safe sustaining yield in the amount of the prior appropriation. The department shall have jurisdiction over the withdrawals of ground water and shall administer the ground water rights under the principle just set forth, and it shall have the jurisdiction to limit withdrawals by appropriators of ground water so as to enforce the maintenance of a safe sustaining yield from the ground water body. *RCW 90.44.130.*

Appellants contend this requirement imposes a continuing duty on Ecology to administer groundwater rights to maintain a self sustaining yield, including during evaluation of change applications. Such an evaluation, Appellants suggest, would require Ecology to deny the WSU change applications "to address the problems of overdraft and water mining in aquifers where withdrawals exceed recharge, as is occurring in the Grande Ronde Aquifer." *Appellants' Response at 49-50.*

Ecology interprets this statute to reflect one aspect of the determination it makes as to the availability of water when a water right permit is first issued by the agency. The principle of

"safe sustaining yield" in this statute protects vested groundwater rights against later appropriations, to prohibit "mining" of groundwater resources.[24]

Ecology interprets the requirement to maintain a "safe sustaining yield" as applying only to the evaluation of new water rights and not to changes in existing water rights. RCW 90.44.130 refers to prior appropriators being preferred over subsequent appropriators, and that Ecology has jurisdiction and shall administer groundwater rights under this principle. The Board agrees with Ecology's interpretation of this statute and finds that the "safe sustaining yield" requirement does not apply to a change in a water right. Summary Judgment is granted to Respondent WSU on this issue.

Finally, we note that Appellants concede, legally and practically, WSU could modify or reconstruct its existing wells or construct replacement wells to enable greater withdrawals from the aquifer and full utilization of its existing water rights. *Appellants' Response at 7.* Appellants' arguments regarding aquifer depletion fundamentally challenge the ***exercise*** of WSU's water rights, not the change or consolidation of them.

Unlike the impairment arguments advanced by Appellants, which necessarily require consideration of the change in the point of withdrawal relative to the location of other right holders, the aquifer depletion argument goes to the heart of the prior appropriation system. Here there is no allegation that exercise of WSU's rights via any configuration authorized by the change would affect the aquifer any differently than full exercise of WSU's rights from its currently authorized well configuration. Again, Appellants' arguments must be rejected on this issue.

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[24] See generally, *An Introduction to Washington Water Law,* V:12-13 (Jan. 2000).

Legal Issue No. 14: Detriment to Public Welfare

This issue addresses whether approval of WSU's change applications will harm the public welfare. Under RCW 90.44.100, changes in points of withdrawal must be analyzed under the same standards as an original application, which include the public interest review set out in RCW 90.03.290 (made applicable to groundwater via RCW 90.44.060). Evaluation of the public interest involves a wide range of considerations, and the exercise of discretion by Ecology. Ecology's public interest determinations are accorded due deference and will not be set aside unless shown to be manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Schuh v. Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983).

Nevertheless, this Board has recognized that public interest and impairment determinations are related, and inadequate impairment analysis may bring into play the public interest criterion. *Black Star Ranch v. Ecology*, PCHB No. 87-19 (1988). In this case, our conclusion that the impairment issue should proceed to hearing necessarily prevents summary judgment on the issue of the public welfare. The issue will be addressed at the completion of hearing.[25]

Legal Issue No. 15: Impairment to Surface Water Right.

The parties have stipulated that the Grande Ronde Aquifer is not hydraulically connected with any surface water body. We therefore conclude that no impairment of surface water rights

[25] This conclusion differs from that contained in the Board's November 1, 2007 letter apprising the parties of the Board's forthcoming opinion.

will occur as a result of the consolidation of WSU's water rights, and Respondents' motion for summary judgment on this issue should be granted.

Legal Issue No. 16: Improper Delegation.

Based on stipulated facts, we conclude that Ecology did not improperly delegate water allocations and management authority to the Palouse Basin Aquifer Committee. Respondents' motion for summary judgment on this issue should be granted.

Legal Issue No. 17: Adequacy of SEPA DNS for Water Right Consolidation.

Issue No. 17 involves three questions related to the State Environmental Policy Act (SEPA), Ch. 43.21C RCW; first, whether Ecology violated SEPA requirements when processing and issuing the water right decisions (17A); second, whether Appellants are time-barred from objecting to the environmental analysis in WSU's Determination of Nonsignificance (DNS) (17B); and third, whether Ecology's reliance on WSU's DNS was sufficient to constitute prima facie compliance with the procedural requirements of SEPA (17C).

Appellants argue that Ecology violated the requirements of the SEPA by relying on the DNS prepared by WSU. Appellants do not challenge the adequacy of the DNS for WSU's decision making purposes, but assert that Ecology should have supplemented the DNS, or prepared a new environmental analysis, when it considered the water right change applications. Appellants assert that the original DNS failed to disclose material, significant, and adverse impacts of increased pumping by WSU on the declining water levels in the Grande Ronde Aquifer. The Appellants' arguments are based on the assumption that but for the well consolidation, WSU would not have been able to pump enough water from existing wells to serve campus needs, including recreational activities.

Appellants rely on WAC 197-11-600(3)(b), which addresses the circumstances under which an agency may not rely on existing SEPA documents. The regulation allows an agency to assume lead agency status when dissatisfied with a DNS, or to prepare new environmental documents when new information (including discovery of misrepresentation or lack of material disclosure) indicates a proposal's probable significant adverse environmental impacts.[26] Appellants note that while the decision to assume lead agency status is discretionary, the decision to prepare a new threshold determination or supplemental EIS is not, if the standard of the SEPA rule is met. Although Appellants admittedly did not object to the original WSU prepared DNS, they assert they are not precluded from challenging Ecology's decision to utilize that DNS, based on these independent SEPA procedural requirements. While a substantial question is presented as to whether or not the Appellants have waived objection to the DNS by their admitted failure to comment on it, the Board will address the merits of the argument on this issue. See, *WAC 197-11-545.*

The governmental agency's determination that an EIS is adequate is entitled to substantial weight. *Citizens v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 3990 (1993). The

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[26] WAC 197-11-600(3) provides:

> Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:
>
> (a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may assume lead agency status (WAC 197-11-340(2)(e) and 197-11-948).
>
> (b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:
>
> (i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or
>
> (ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.
>
> (c) For EISs, the agency concludes that its written comments on the DEIS warrant additional discussion for purposes of its action than that found in the lead agency's FEIS (in which case the agency may prepare a supplemental EIS at its own expense).

adequacy of an EIS is tested under the "rule of reason." *Id.*, 122 Wn.2d at 633; *Cheney v. Mountlake Terrace,* 87 Wn.2d 338, 552 P.2d 184 (1976). Under this rule, the EIS must present decisionmakers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision." *Id.* When reviewing a claim that a supplemental EIS is required, a reviewing court, including the PCHB, applies a clearly erroneous standard of review, and will reverse the SEPA determination only if left with a definite and firm conviction that the agency has made a mistake. *Preserve Our Islands v. Hearings Board*, 133 Wn.App. 503, 539, 137 P.3d 31 (2006). Here, we cannot conclude that Ecology's decision to rely on the existing DNS is clearly erroneous.

The Board concludes that SEPA does not require Ecology to analyze the effects of pumping the consolidated water rights on the Grande Ronde Aquifer through a new threshold determination or supplemental EIS. The change itself does not allow any more water to be withdrawn on an instantaneous or annual basis than is allowed under the existing scheme of water rights. Thus, we can find no need for additional environmental analysis. Appellants are concerned that the consolidation of the water rights to a limited number of more efficient wells will result in development of the inchoate portion of the water rights, and result, in fact, in more water use by WSU, with resulting harm to the aquifer. Even if this were true, it does not translate into the need for supplemental environmental review, when the existing water rights authorize withdrawal of the same amount of water from the aquifer. WSU presently has the right to use an amount of water defined by existing water rights, whether through retrofitting or replacement of existing wells, or through the water rights change process. In either case, the source of the water is the same body of public groundwater, and the affect on the aquifer is unchanged in this regard.

Moreover, we are unpersuaded that there was any misrepresentation or lack of material disclosure at the point Ecology accepted the DNS prepared by WSU. Declining water levels in the aquifer have been well-established for many years, and are the subject of multiple studies and action by Ecology. *See Brackney Decl., Gregory Decl., Mack Decl., Exh. 1 & 2.* There was no "new information" sufficient to trigger any requirement to prepare additional environmental analysis under these facts. Respondents are also correct that even if there were "new" information about the status of the Grande Ronde Aquifer, this water right change does not authorize any increased pumping or total annual withdrawals beyond the amounts currently allowed by existing rights. The Board holds that it was not clearly erroneous for Ecology to conclude that there is not a probable significant adverse environmental impact from the water rights change application. Ecology correctly relied on the DNS prepared by WSU under these circumstances.

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Based on the foregoing analysis, the Board hereby enters the following:

ORDER

1. Summary judgment is GRANTED IN FAVOR OF RESPONDENTS on Legal Issues No. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, and 17.[27]
2. Respondents' motion for summary judgment on Legal Issue No. 7 is GRANTED with respect to Water Right Claims 098522 and 098523, and Water Right Certificates 5070-A, 5072-A, and G3-22065C. Both sides' motions for summary judgment are DENIED with respect to enlargement of Water Right Permit G3-28278P, and this issue is set over for hearing.
3. Respondents' motion for summary judgment on Issues No. 12 (Impairment of existing rights) and 14 (Detriment to Public Welfare) is DENIED. The question of whether approval of the water right changes will impair existing rights or be detrimental to the public welfare will proceed to hearing for further development of the record.
4. Appellants' and Ecology's motions for summary judgment on Issue No. 18A are GRANTED with respect to any claims amounting to a facial challenge to the constitutionality of the 2003 Municipal Water Law.

DATED this 18th day of January 2008.

POLLUTION CONTROL HEARINGS BOARD

Andrea McNamara Doyle, Presiding

Kathleen D. Mix, Chair

See separate Concurrence and Dissent
William H. Lynch

[27] Appellants' motions for summary judgment on Legal Issues No. 7, 8D, 9B and 17A-C are DENIED.

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Appendix No. 5

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SCOTT CORNELIUS, PALOUSE WATER CONSERVATION NETWORK, and SIERRA CLUB PALOUSE GROUP, Appellants, v. WASHINGTON DEPARTMENT OF ECOLOGY and WASHINGTON STATE UNIVERSITY, Respondents.	PCHB No. 06-099 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter comes before the Pollution Control Hearings Board (Board) as part of the above-captioned appeal contesting the approval by the Department of Ecology (Ecology) of changes to six groundwater rights at Washington State University (WSU). Appellants challenged the consolidation of WSU's groundwater rights on several bases related to Ecology's interpretation of the recently enacted Municipal Water Supply Act, commonly referred to as the 2003 Municipal Water Law (2003 MWL)[1] and its application to WSU's rights. Most of the issues in this matter have been resolved prior to hearing on summary judgment.[2] The Board conducted a hearing on the three remaining legal issues in the appeal, related to questions of impairment, public welfare, and enlargement.

Attorneys Rachael Paschal Osborn, M. Patrick Williams of the Center for Environmental Law & Policy, and Harold Magistrale, represented Appellants Scott Cornelius, *et. al.* at hearing.

[1] Chapter 5, Laws of 2003 (58th Leg, 1st Spec Session) [2E2SHB 1338].
[2] See the Board's Amended Order on Summary Judgment, issued January 18, 2008.

Alan M. Reichman and Sarah M. Bendersky, Assistant Attorneys General, represented Respondent Ecology. Frank M. Hruban, Assistant Attorney General, and Sarah E. Mack, of Tupper Mack Brower, PLLC, represented Respondent WSU. The first two days of hearing were held on January 22-23, 2008 in Pullman, Washington. The final half-day of hearing was held on January 31, 2008, in Lacey, Washington, with some counsel and witnesses participating via video and teleconference.[3]

The Board was comprised of Andrea McNamara Doyle, Presiding, Kathleen D. Mix, Chair, and William H. Lynch, Member. Court reporting services were provided by William Bridges of Bridges & Associates, and Kim Otis of Olympia Court Reporters.

SUMMARY OF DECISION

After consideration of the competing legal theories and review of the expert hydrogeologic testimony in this matter, we conclude Appellants have failed to meet their burden of proof to establish that Ecology erred when it determined the subject water rights changes will not impair other existing water rights. We conclude a preponderance of the evidence demonstrates that consolidation of WSU's existing water rights will not impair Mr. Cornelius' well or other existing water right holders. In the absence of impairment, we also therefore conclude that the public welfare will not be harmed by Ecology's approval of these water right changes. Finally, we conclude Ecology's approval of the application for change of Permit No. G3-28278P did not unlawfully "enlarge" the water right represented by that permit. We reach

[3] Participating via videoconference from Pullman were Ms. Osborn, Mr. Cornelius, and Dr. Keller (witness) for the Appellants, and Mr. Hruban for Respondents. Participating via telephone was Mr. Magistrale for Appellants and Mr. Gregory (witness) for Respondents.

this conclusion based on our finding that the quantities authorized by Permit No. G3-28278P were not derived from or based on the instantaneous and annual quantities associated with Claim No. 098524 (Well No. 3), the claim that Ecology had tentatively determined to be invalid.

In reaching these conclusions, the Board is mindful that all parties concede 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. The testimony and evidence were undisputed in this respect, and also revealed a flavor of the on-going scientific, regulatory, public policy, and personal efforts that are underway to address this complicated problem. That being said, the Board has previously made clear the legal issues in this hearing were not about the declining aquifer or how Ecology should manage groundwater in the Pullman area. Nor was it about whether WSU should be allowed to withdraw more water than it presently does from the aquifer, or about the uses to which WSU chooses to apply the water it is currently authorized to withdraw. Instead, this case was focused on the much narrower question of whether WSU is legally entitled to consolidate its existing water rights in order to be able to pump its currently authorized quantities from a different configuration of wells within its integrated campus water system.

PROCEDURAL BACKGROUND

Although previously detailed in the Board's summary judgment ruling, we briefly review the procedural history of the water right change applications at issue in this appeal.

In October 2004, WSU applied to Ecology to change/consolidate all of the existing groundwater rights currently used to serve the Pullman campus. WSU proposed to integrate the water rights associated with the existing campus well system, by adding seven (7) of its existing wells as authorized points of withdrawal for each of the existing groundwater rights in the area, and changing the place of use for each right to be consistent with the approved water service area. In other words, WSU wished to be able to withdraw water under each of its groundwater rights from any or all of the existing wells that serve the campus. The required notice of application was published and three letters of protest or concern were received, including ones on behalf of Appellants Scott Cornelius and Palouse Water Conservation Network.

The university conducted a State Environmental Policy Act (SEPA) analysis and issued a final Determination of Non-Significance (DNS) on June 7, 2004. The university determined the proposal would not have a significant adverse impact on the environment. In reviewing the change applications, Ecology relied on the DNS issued by WSU and did not conduct a new threshold determination or perform supplemental SEPA analysis.

As part of its review of the change applications, Ecology applied a number of provisions from the 2003 MWL. Most notably, Ecology determined that WSU is a "municipal water supplier" under the terms of the new law, and that the rights it holds for the Pullman campus qualify as rights for "municipal supply purposes" as that term is now defined. In September 2006, Ecology issued Reports of Examination (ROEs) for each of the change applications at issue in this appeal, approving, in large part, WSU's change/consolidation requests. Ecology

denied integration of Claim No. 098524 (associated with Well No. 3) upon Ecology's tentative determination that this claim is invalid.

Appellants timely appealed Ecology's decisions to this Board. The parties' joint Statement of Agreed Legal Issues originally identified forty (40) issues, comprising eighteen (18) general topics, presented by Ecology's interpretation of the 2003 MWL and its application to WSU's rights. As previously noted, the Board resolved all but three of the legal issues through the parties' cross motions for summary judgment.[4] The issues remaining for hearing at the Board level included whether Ecology's decision approving the change of WSU's water rights will impair existing rights (Legal Issue No. 12), harm the public welfare (Legal Issue No. 13), or enlarge Water Right Permit No. G3-28278P to the extent it may include quantities from an invalid claim (Legal Issue No. 7).

The Board hereby incorporates by reference those facts concerning the WSU water rights and campus water system contained in the Board's Amended Order on Summary Judgment and makes the following additional:

FINDINGS OF FACT

[1]

WSU Campus Water System

The WSU Pullman campus water system is comprised of an integrated network of source wells (each historically associated with its own individual water right), storage reservoirs, and

[4] See Amended Order on Summary Judgment, issued January 18, 2008, rejecting several of Appellants' challenges to the changes and declining to address those based on constitutional claims. The Order reserved the latter for the parties to litigate in a court with jurisdiction to hear claims related to the constitutionality of the 2003 MWL.

distribution pipelines. The system is divided into two zones, the "low pressure" zone which includes Wells No. 1, 2 (decommissioned), 3, 4, and 7, and the "high pressure" zone which includes Wells No. 5, 6, and 8. The system was developed to fit the needs of the topography of the campus and integrated without specific authorization from Ecology or its predecessor agencies. As presently operated, all the water for the system is withdrawn primarily from one well in each zone, Wells No. 7 and 8. *Testimony of Wells,*[5] *Exh. R-1.*

[2]

The system includes a small area of overlap, and a number of emergency crossover connection points, between the two zones. *Testimony of Wells, Exh. R-59, Exh. R-63A.* From an operational standpoint, it is most desirable to supply approximately two-thirds of the campus water needs from the low zone and approximately one-third from the high zone, although the present ratio is closer to 60:40 or 50:50. No single well on campus can pump more than 2,500 gallons per minute (gpm). *Testimony of Wells.*

[3]

In the low pressure zone, Wells No. 1, 3, and 4, are clustered closely together and completed to similar depths. All three of their well house buildings are located within approximately 80 feet of one another. They are drilled to depths of 247, 223, and 275 feet, respectively, and the pumps for each are located at nearly the same elevations. Collectively,

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[5] Gary Wells is a licensed civil engineer with a master's degree in sanitary engineering. Presently he is the manager of facilities and operations for WSU, where he has been employed for nearly 23 years. In that capacity, Mr. Wells is responsible for managing the preparation and construction of campus public works projects and rights of way and providing technical assistance and support to other engineers and construction workers related to the campus water, sewer and steam systems. *Testimony of Wells.*

their pumping capacity is just over 3,000 gpm, although Wells No. 1 and 3 are inactive, leaving Well No. 4 with a current pump capacity of 1,500 gpm. The primary active well in the low zone is Well No. 7, which is also located in the same general area of the campus, to the southeast. It is drilled to a depth of 1,814 feet, with a pump location approximately 150 feet lower than Well No. 4, and has a current pump capacity of 2,500 gpm. *Testimony of Wells, Exh. R-58, Exh. R-60, Exh. R-63A.*

[4]

In the high zone, Wells No. 5 and 6 are located in the north central and north eastern portions of the campus. Well No. 5 is completed to a depth of 394 feet and has a pump capacity of 450 gpm, although the pump has been removed and it presently inactive (other than for use as a monitoring point). Well No. 6 is 702 feet deep, with its pump located at an elevation nearly 100 feet above the elevation of the pump for Well No. 7. *Testimony of Wells, Exh. R-58, Exh. R-60, Exh. R-63A.*

[5]

WSU's newest well, Well No. 8, is located in the overlap area between the low and high zones. It is drilled to a depth of 812 feet, with a pump located at an elevation approximately 100 feet deeper than Well No. 7. It has a current pump capacity of 2,500 gpm. *Testimony of Wells, Exh. R-58, Exh. R-60, Exh. R-63A.* Well No. 8 was drilled in 2003, first pumped in 2006, and started producing at 2,500 gpm in 2007. *Testimony of Wells.*

[6]

The campus water system relies on a number of storage reservoirs to maintain sufficient water on-demand to meet the needs of the campus. The reservoirs are attached to the distribution system rather than directly to any of the individual wells. Water pumped from the wells travels first into the distribution system, then into one of several reservoirs where it comingles with water drawn from other wells, and finally back into the distribution system as needed. *Testimony of Wells, Exh. R-59, Exh. R-63A.*

[7]

Over the past two decades, a major focus of WSU's water system planning has been on developing greater capacity and redundancy in its system. In furtherance of these goals, the university has sought ways to ensure it will be able to meet peak demands for the entire campus, including emergency fire suppression, from one source in each of its two zones. *Testimony of Wells, Exh. A-49, Exh. R-1.* It has employed several strategies in this regard, including obtaining a new water right in 1987 for a new higher capacity well, Well No. 7; development of a second new high capacity well, Well No. 8; and consolidation of WSU's existing water rights to allow the university to pump all of its authorized quantities from any one or more of its existing wells. *Testimony of Wells, Exh. A-26, Exh. R-90, Exh. R-1.*

[8]

Prior to the development of Well No. 8, only Well No. 7 was physically capable of supporting the entire campus. In connection with Well No. 7, WSU had applied for and received a new water right in 1987 to withdraw 2,500 gpm water from this new well. *Testimony of Wells,*

Exh. R-41, Exh. A-25. As part of its investigation into the 1987 application, Ecology noted at the time:

> WSU proposes to develop a new well, Well No. 7, as a supplemental source of water for the university campus. Three existing wells, presently on-line, are considered to have a very limited future. It is the expressed intent of WSU to bring the proposed well on-line as a direct substitute for these wells as they eventually decrease in productivity, or fail. *Exh. A-26.*

Ecology then issued Permit No. G3-28278P (for Well No. 7) with a priority date of 1987 and included the following proviso:

> The quantities granted under this permit are issued less those amounts appropriated under Ground Water Certificate No. 5070-A and Ground Water Claims No. 098522 and No. 098524. The total combined withdrawal under this permit and Ground Water Certificate No. 5070-A shall not exceed 2500 gallons per minute, 2260 acre feet per year. *Exh. A-25.*

[9]

Well No. 8 was also developed in response to concerns about the need for greater capacity and redundancy in the system. The largest pump in the high zone has an instantaneous capacity of 1,500 gpm, and the water right historically associated with that well (Well No. 6) was limited to an instantaneous quantity of 1,500 gpm. *Testimony of Wells, Exh. A-20 (Cert. No. G3-22065C).* A design was developed in 1998 for the new well with a capacity of 2,500 gpm to serve the high zone and provide back-up to the entire system. Well No. 8 was constructed as an additional point of withdrawal under the right previously associated with Well No. 6 (G3-22065C), and a showing of compliance was submitted to and accepted by Ecology in January 2005. The university chose to apply for an additional point of withdrawal, rather than simply

replacing Well No. 6, so that it could keep both wells. *Testimony of Wells, Exh. A-19, R-43 and 44.*[6]

[10]

In 2007, WSU's Well No. 7 broke down due to failure of a control transformer. During the three to four weeks it took for Well No. 7 to get back on line, the university relied on Well No. 8 to provide water to the campus. Well No. 4 was also activated during this time, but it took a couple of weeks before Well No. 4 was operational. *Testimony of Wells.*

[11]

WSU Water Right Change Applications & Decisions

During the same time period WSU was preparing the change request to add Well No. 8 as an additional point of withdrawal under Certificate No. G3-22065C, it decided to seek regulatory approval for the operational flexibility offered by integrating and consolidating its historic water rights, which it did in October 2004 . *Exhs. R-45, R-8, R-10, R-13, R-16, R-23, R-30, R-37.*

[12]

Ecology processed the WSU change applications in the typical manner, by assigning a permit writer to investigate and prepare findings and recommendations in consultation with technical staff. In this case, Kevin Brown, an Ecology environmental specialist, prepared the Reports of Examination with technical assistance from senior hydrogeologist, Guy Gregory. Mr.

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[6] The reference in Exh. 44 to a "replacement well" appears to be a ministerial error and not a decision or determination by Ecology that Well No. 8 is a replacement well rather than an additional point of withdrawal. *Testimony of Brown.*

Brown's supervisor, Keith Stoffel, gave final approval to the ROE decisions. *Testimony of Stoffel.*

[13]

Kevin Brown is a senior permit writer for the eastern regional office Water Resources Program. His educational background is in civil engineering technology, and he has been employed by Ecology since 1991. *Testimony of Brown, Exh. R-82.*

[14]

Keith Stoffel is the Section Manager of the Water Resources Program in Ecology's eastern regional office. He is a geologist by training and previously worked for more than ten years as a hydrogeologist with Ecology. Currently his responsibilities include directing the regional administration of Ecology's water resources permitting, compliance, well construction, technical assistance, watershed management, adjudications, and data management. In that capacity, he had review and approval authority over the agency's decisions on the water right change applications at issue in this appeal. *Testimony of Stoffel, Exh. R-83.*

[15]

Guy Gregory is a Washington licensed hydrogeologist and Oregon registered geologist. He has been a senior hydrogeologist with Ecology since 1991, and presently is the Technical Unit Supervisor for the Water Resources Program in Ecology's eastern regional office. In that capacity, he has served as the agency or unit lead for significant aquifer investigations involving the Spokane Valley – Rathdrum Prairie Aquifer, the Odessa Subarea, and the Walla Walla basin. His experience includes coordinating hydrogeologic investigations and field studies related to

measurements of groundwater levels and surface water flows, and supervising regional well drilling regulatory programs. *Testimony of Gregory, Exh. R-84.*

[16]

Enlargement

Ecology approved each of WSU's change applications except for the one associated with Well No. 3. Ecology denied WSU's request to integrate the quantities from Claim No. 098524 into its campus water system, and to add additional points of withdrawal to Claim No. 098524. The denial was based on Ecology's tentative determination that the original claim was invalid because the first use of water represented by the claim had occurred in 1946 when Well No. 3 was constructed, which was after adoption of the state's Ground Water Code in 1945. *Exh. A-5, Testimony of Stoffel.* Appellants have asserted that the annual and instantaneous quantities associated with this invalid claim were wrongfully credited to WSU as a result of the consolidation decision.

[17]

In 1988, Ecology issued a ROE, recommending approval of WSU's application for a new municipal supply water right to be associated with a proposed Well No. 7 (Permit No. G3-28278). Ecology approved this new water right in the amount of 2,500 gallons per minute and 2,260 acre feet per year for continuous municipal supply. The ROE includes the following provisions relevant to quantities:

> The quantities granted under this permit are issued less those amounts appropriated under Ground Water Certificate 5070-A, and Ground Water Claims

98522, 98524. The total combined withdrawal under this permit and Ground Water Certificate No. 5070-A shall not exceed 2500 gallons per minute 2260 acre-feet per year.
The amount of water granted is a maximum limit that shall not be exceeded... *Exh. A-26.*

[18]

When Ecology acted on WSU's consolidation request, it allowed WSU the total quantities previously authorized by Permit No. G3-28278P, and neither included nor subtracted the 1,000 gpm of instantaneous quantity (Qi) or the 1,440 afy of annual quantity (Qa) represented by Claim No. 098524. Ecology determined that Permit No. G3-28278P, associated with Well No. 7, was a new water right, with a new priority date, not tied to the validity or invalidity of other rights. This new water right was intended to be a non-additive, alternative source of up to 2,500 gpm, to be used as other wells associated with other water rights failed. *Testimony of Brown, Exhibits A-25, A-26.*

[19]

In reaching this conclusion with respect to Permit No. G3-28278P, Mr. Brown applied the guidance contained in Ecology's Policy No. 1040, "Use of Terms that Clarify Relationships between Water Rights." *Testimony of Brown, Exh. R-85.* He also examined the original intent behind Well No. 7 and the associated water right (G3-28278), by examining all the related water rights documents mentioned in the 1988 ROE and the amounts authorized by each one. Mr. Brown concluded that the intent behind these rights was to allow a total maximum pumping of 2,500 gpm/2,260 afy from the combination of four wells, so long as the total combined pumping amount never exceeded 2,500 gpm/2,260 afy from any combination of the wells. He concluded

that Permit No. G3-28278P was "non-additive" in the sense that it did not increase the water available through existing rights, and "alternate" in the sense that it could be used either instead of, or simultaneously with, other water rights, up to the 2,500 gpm/2,260 afy maximum. *Testimony of Brown, Exh. R-85.* Accordingly, Ecology concluded it should not subtract the quantities represented by the invalid Claim No. 098524 from the 2,500 gpm or 2,260 afy authorized in Permit No. G3-28278P.[7] Based on that conclusion, Ecology approved the consolidation action because the permit represented a new right for a non-additive, alternative source of water to replace water from older sources as needed, and a change or transfer of that right was not legally dependent on those prior rights for its authorized quantities. *Testimony of Stoffel, Testimony of Brown.*

[20]

Impairment

Ecology's analysis of the change applications included a qualitative assessment of whether integration of WSU's water rights would impair existing water right holders. Ecology considered a number of factors in its qualitative assessment, including that: (1) despite the historically declining water levels in the aquifer, existing domestic water right holders in the area had not previously experienced any interruptions or difficulties withdrawing water from their wells; (2) no new additional instantaneous or annual quantities of water were authorized by the

[7] As part of its analysis of the water rights appurtenant to the WSU campus, Ecology recognized that these claimed quantities from Claim No. 098524 were tentatively determined to be invalid. Ecology then attempted to graphically depict this tentative determination by listing the Qi and Qa for Claim No. 098524 in parenthesis in the water rights summary table included in the ROE for Permit No. G3-28278P. *Exh. A-24 (p. 3), Testimony of Stoffel, Testimony of Brown.*

change applications beyond those WSU already had rights to withdraw; (3) the distance between the originally authorized point of withdrawal for each existing right and the additional points of withdrawal being sought was relatively small compared to the distance between the WSU campus wells and the domestic wells in the nearby area; and (4) a review of Ecology's database revealed the majority of the neighboring domestic wells penetrated fairly deep into the aquifer, as they were completed to a depth in the range of 250 feet, with a few between 300-400 feet deep, and one at approximately 450 feet. *Testimony of Gregory.*

[21]

Prior to approving WSU's change applications, Ecology did not make a "reasonable or feasible pump lift" determination for the Cornelius well, or any other well. Based on its analysis of the change applications, Ecology concluded there was no reason to expect that integration of WSU's water rights would interfere with any nearby wells to a level where any other water right holders might have trouble withdrawing water from their wells. Based on that conclusion, as well as the general qualitative assessment, Ecology determined the change applications would not impair existing rights and there was no reason to undertake a reasonable or feasible pump lift determination. *Testimony of Stoffel, Testimony of Gregory.*

[22]

Since the approval of WSU's change applications in 2006, and the resulting consolidation of pumping from Wells No. 7 and 8, Ecology has received no complaints of well interference and has no data indicating water levels in surrounding observation or test wells have declined more rapidly than before the consolidation. *Testimony of Stoffel.*

[23]

Reasonable or Feasible Pump Lift

Although referenced in state law, the term "reasonable or feasible pump lift" is not defined in the Ground Water Code, and neither is the process for when or how a reasonable and feasible pump lift should be determined. The term is generally used to describe the depth a water right holder can reasonably and feasibly be expected to pump water from in order to get groundwater to the surface. *Testimony of Stoffel.*

[24]

The concept of a reasonable or feasible pump lift is typically applied to a specific well or to a sub-area within a basin, rather than to an entire aquifer or basin, because it is usually dependent on site-specific variables such as the thickness of an aquifer at a particular location relative to well construction. It may be possible to make a pumping lift determination on an aquifer-wide basis if the conditions are known to be sufficiently uniform throughout the area. *Testimony of Stoffel.*

[25]

Ecology normally works through the process of making reasonable or feasible pump lift determinations on a case-by-case basis, depending on the aquifer system and what is known about specific wells in the system. The agency does not undertake a formal pump lift determination unless it has reason to believe water levels in a particular well are in peril or it has an indication that a water right holder is having trouble exercising its water right. *Testimony of Stoffel.*

[26]

While aware of the declining water levels of the GRA, Ecology has not made any determination of a reasonable or feasible pump lift for the aquifer as a whole or any sub-area in the Pullman-Moscow region because it has no indication that any water right holders are presently at risk of not being able to pump water from their wells. *Testimony of Stoffel.* The Board was provided with no evidence that any water right holders in the area have been unable to exercise water rights from existing wells as a result of WSU's pumping regime.

[27]

Ecology recognizes it may need to do an analysis of what constitutes a reasonable and feasible pumping lift in the GRA at some point in future. Presently it is working collaboratively through the Palouse Basin Aquifer Committee (PBAC) to address the declining aquifer levels. The PBAC is considering strategies that may result in new regulations for groundwater management in the basin, or one or more sub-areas. Such regulations could include reasonable and feasible pump lifts or could set maximum annual rates of decline. *Testimony of Stoffel.*

[28]

Objections to Change Decisions

The Sierra Club Palouse Group is a regional branch of the Northern Rockies Chapter of the Sierra Club. The Group's mission is to preserve, protect, and enjoy the natural world, including water resources such as the Palouse Aquifer. A large majority of the group's 467 members live in the area above the aquifer and depend on it for drinking water and all aspects of life. They are troubled about its declining condition and have appealed the consolidation of

WSU's water rights because they are concerned that re-arranging the water rights will lead to greater exploitation of the aquifer. *Testimony of Coombs.*

[29]

The Palouse Water Conservation Network (PWCN) is a group of concerned citizens whose goal is to promote awareness and action to preserve water resources in the Pullman-Moscow area. They are generally concerned about water mining of the aquifer and are particularly concerned that WSU's consolidation of its water rights will cause greater pumping of water from the aquifer. *Testimony of French.* PWCN submitted a letter to Ecology in February, 2005, protesting WSU's application for change of its groundwater rights, and also filed a formal Protestant Questionnaire the following month. *Exh. A-28, R-51.* At that time, no members knew of any specific personal wells that had been affected by WSU's pumping or withdrawals. *Testimony of French, Exh. R-51.* PWCN was aware that the City of Pullman's change applications were approved by Ecology at the same time WSU's were approved. PWCN chose not to appeal the city's consolidation because it has been working cooperatively with the city as a municipality. *Testimony of French.*

[30]

Scott Cornelius lives outside the city limits of Pullman, approximately three to three and one half miles south of the WSU campus. He has long had concerns about the condition of the Grande Ronde aquifer and the rate at which it has been declining throughout the basin. He generally follows the trends in water usage by the Pullman area's largest water users, including the City of Pullman and WSU. He is concerned with both the decline of the aquifer system

generally, as well as potential impacts to his personal water supply, which comes from a domestic well drilled to a depth of approximately 250 feet. The water level in Mr. Cornelius' well has dropped an average of approximately 10 inches per year over the fifteen years he has lived there. Mr. Cornelius is unsure whether the rate of decline in his well has accelerated since WSU Well No. 8 came on line in 2006. *Testimony of Cornelius, Exh. A-34.*

[31]

Grande Ronde Aquifer Background

At the request of Appellants, Dr. Kent Keller prepared a report on the hydrogeology of the Grande Ronde aquifer for the purpose of providing background information on the aquifer's hydrogeology. *Testimony of Keller, Exh. A-31.* Dr. Keller is a professor in the School of Earth and Environmental Sciences at WSU. He has a Ph.D. in Earth Sciences with a specialty in hydrogeology and has spent fifteen years researching the Palouse Basin and the Grande Ronde aquifer at the University of Idaho and WSU. *Testiomony of Keller, Exh. A-30.* Dr. Keller has also directed the research of numerous graduate students related to the hydrology and geochemistry of the Palouse Basin. He has authored, and co-authored with Dr. James Osiensky and others, a number of articles and reports concerning the Palouse Basin Aquifer System, including publications on the hydrostratigraphy of the basin, and groundwater recharge and residence times in the Pullman-Moscow Basin. *Exh. A-30.*

[32]

The Grande Ronde aquifer is a subregion of the Columbia River Basalts and associated sediments. It is comprised of that portion of the Grande Ronde basalt in the Palouse Basin

containing groundwater that can be exploited by pumping in the Pullman-Moscow region. *Exh. A-31.*

[33]

The Grande Ronde aquifer lies within the Grande Ronde Formation, which is comprised of millions of years of episodic flood-basalt flows and interstratified rubble and sediments, piled onto an irregular topography which now lies beneath the present-day Pullman-Moscow region. Far from being a simple, uniform "layer-cake," the numerous strata are irregular and interconnected, resulting in a complex system with substantial groundwater transmissivity (horizontal movement of water) and irregular but relatively small vertical hydraulic conductivity. *Exh. A-31.*

[34]

The GRA contains water that is distinct from waters in overlying basalts and sediments, based on isotope-geochemical characterization. It also exhibits distinct water levels and water-level time trends relative to surrounding areas and overlying basalts and sediments. Using isotope-geochemical age-dating, the mean residence time of water in the system is estimated at approximately 20,000 years. *Testimony of Keller, Exh. A-31.*

[35]

The extent and availability of groundwater resources in the GRA are poorly known, due in part to lack of precise information about the aquifer's rate of recharge. It is therefore impossible to predict with any degree of certainty how long the water in the GRA will last. This is also due in part to the fact that when drawdowns get large enough, important aquifer properties

(such as the relative thickness of the aquifer) change, causing the magnitude and direction of water movement to change. Sub-basins begin to isolate themselves and interconnections between various parts of the system decrease. *Testimony of Keller.*

[36]

Despite this uncertainty, known reductions in pore pressure currently indicate that the amount of groundwater stored is declining relative to amount of groundwater pumped. Although the precise recharge rate in the Palouse Basin and GRA is not known, it is very low. Generous estimates of the natural flow rate into the GRA are substantially smaller than pumpage rates for Pullman-Moscow area (approximately one-tenth to one-quarter). The GRA is a declining aquifer because the pumpage from the GRA exceeds the amount of recharge into the GRA. *Testimony of Keller, Exh. A-31.*

[37]

The present, aggregate withdrawal rate from the GRA is approximately 2.7 – 2.8 billion gallons per year. *Testimony of Keller.* Increases in aggregate pumpage from the GRA in the Pullman-Moscow region will necessarily cause water-level declines within the aquifer, because increased flows to wells can only occur under increased hydraulic gradients, which are generated by lowering water levels in pumping wells. *Testimony of Keller, Exh. A-31.*

[38]

Wells completed in the GRA show hydrographs that trend downward. Water levels have typically declined, on average, more than 100 feet over the period of record. Research has shown that wells distributed across the entire Pullman-Moscow basin all behave similarly; that

is, they are all declining at approximately the same rate, when measured over the course of weeks, months, or years. A consistent finding of the research into the Grande Ronde shows that the aquifer system is well interconnected laterally at the basin scale. *Testimony of Keller.*

[39]

It is Dr. Keller's opinion that water level trends in the aquifer are affected primarily by aggregate pumping, and that changes in the position or point of withdrawals from the aquifer would have only minor effects on the water levels of any given well in the system. *Testimony of Keller.*

[40]

Due to wide variations in the hydraulic properties that are distributed laterally throughout basalt aquifer systems such as the GRA, drawdowns at different radial distances cannot be reliably predicted through 3-10 day pumping tests. It is possible for a well farther from the point of withdrawal to show levels of decline before a different well closer to the point of withdrawal exhibits impacts from pumping. *Testimony of Keller.*

[41]

Interference/Impairment

At the request of Appellants, Kevin Brackney reviewed data and information related to the water rights at issue in this appeal in order to formulate an opinion about how consolidation of WSU's water rights might impact the GRA. Kevin Brackney is a professional geologist and certified groundwater professional, with a master's degree in hydrology from the University of Idaho. Mr. Brackney is currently employed as a hydrogeologist and water planner for the Nez

Perce Tribe and previously worked for ten years as a research support scientist at the University of Idaho's Environmental Biotechnology Institute. Mr. Brackney's knowledge of the Grande Ronde aquifer is based on his education and work experience. He has been working in the Palouse Aquifer Basin since 1992. *Testimony of Brackney, Exh. A-29.*

[42]

Although Mr. Brackney did not specifically analyze or attempt to calculate the possible impact of WSU's pre-consolidation or post-consolidation withdrawals on the Cornelius or other neighboring wells, he is of the opinion that pumping more water from WSU's newer, deeper wells will cause a greater impact on nearby wells than pumping from WSU's older and shallower wells. His opinion is based on his understanding of changes in the aquifer's hydraulic properties with respect to vertical conductivity and transmissivity between layers of the basalt flows, and his understanding of the depths of the existing wells at issue. *Testimony of Brackney.*

[43]

The most porous portion of each basalt layer is the flow top, which consists of rubble and ranges from one-two feet up to 15-20 feet thick in this aquifer system. Due to the many layers of basalt flows that collectively comprise the GRA system, Mr. Brackney opines that well construction can play a significant role in the effects experienced by neighboring wells. He reasons that because Well No. 7 fully penetrates the aquifer to a depth of 2,225 feet, it draws water from the entire thickness of the aquifer, and pumping more water from it will have a greater impact than WSU's previous withdrawals from shallower wells that tap only a portion of

the aquifer thickness.[8] In Mr. Brackney's opinion, steep slopes associated with the drawdowns from the WSU well suggest that a shallower well like Mr. Cornelius' will respond much later to the withdrawals. *Testimony of Brackney; Exh. A-39.*

[44]

At the request of WSU, Dr. James Osiensky analyzed potential interference drawdown at the Cornelius well that may result from WSU's pumping its full authorized quantities of groundwater.[9] Dr. Osiensky is a professor of hydrogeology in the Geological Sciences Department at the University of Idaho, where some of his areas of specialization include hydrogeology site characterization, hydrogeologic property testing, hydrogeophysical applications in hydrogeology, and groundwater hydraulics. Since 1981, he has held various appointments as an associate professor of hydrogeology and geology, and as a research associate and research scientist, all with the University of Idaho and WSU. *Exh. R-67.*

[45]

Dr. Osiensky has published numerous refereed and peer-reviewed articles and research papers on a range of hydrogeologic topics, and has conducted and supervised many

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[8] Mr. Brackney testified that the general rule of thumb is for a well to be considered fully penetrating if it penetrates 60 percent of the aquifer.

[9] The Presiding Officer allowed the testimony of Dr. Osiensky over the objection of Appellants regarding his predictions of the relative interference drawdown resulting from different pre and post-consolidation pumping scenarios of WSU's wells. Appellants' motion to strike the testimony was denied after considering the arguments of counsel. The Board found that while it appeared the substance of Dr. Osiensky's testimony had not been seasonably supplemented to the Appellants in a timely fashion as required by CR 26E, the subject matter about which he testified had previously been known and available to Appellants through discovery of another of Respondents' expert witnesses, Dr. Banton. Given the highly relevant nature of the testimony, the Board determined the preferable remedy was to allow Appellants additional time to prepare cross examination and expert rebuttal testimony. Appellants' expert, Dr. Keller, provided his rebuttal testimony to the Board one week later, on January 31, 2008.

investigations into various aspects of the Palouse Basin and Grande Ronde aquifer. Dr. Osiensky has also worked as a consultant on various hydrogeologic and groundwater issues for the U.S. Nuclear Regulatory Commission and other entities in Idaho over the past two and one-half decades. *Exh. R-67.*

[46]

Since 1999, Dr. Osiensky and Dr. Keller have collaborated on at least four occasions as co-principal investigators of the hydrostratigraphic conditions in the Palouse Basin for the Palouse Basin Aquifer Committee (PBAC). They have also collaborated under contract with PBAC on investigations of groundwater age dating in the Palouse Basin. *Exh. R-67.*

[47]

Dr. Osiensky's analysis was intended to quantify the interference drawdown that can be expected to occur both with and without consolidation of WSU's existing groundwater rights, and to compare the relative effects of various consolidation scenarios with pre-consolidation conditions. Interference drawdown occurs when the pumping of one causes the groundwater level to decline in another well. The amount of interference drawdown varies depending on a number of factors, including the distance between the wells, aquifer properties, pumping rates, and duration of pumping. *Testimony of Osiensky.*

[48]

WSU's campus well system is about three to three and one-half miles north of the well on Mr. Cornelius' property. *Exh. R-64A.* More specifically, the cluster of WSU Wells No. 1, 2, 3, and 4 are approximately 15,887 feet from the Cornelius Well, and WSU Wells No. 6 and 7 are

approximately 15,937 and 15,335 feet away, respectively. WSU Well No. 5 is the farthest from the Cornelius Well at approximately 17,923 feet; and WSU Well No. 8 is the closest, at approximately 14,800 feet. *Testimony of Osiensky, Exh. R-63A, Exh. R-64A.*

[49]

Dr. Osiensky calculated the projected drawdown effects of various well configurations and pumping scenarios using the Cooper-Jacobs approximation method, which is a modified and simplified form of a more complicated theoretical approach known as the Theis Equation. The Theis Equation estimates drawdown using inputs, based on data or assumptions, of static water levels, pumping rates, time, storativity and transmissivity of the aquifer, and the distance between the wells in question. The Cooper-Jacobs method allows investigators to evaluate the impacts of multiple wells by using the principle of super-position and, like the Theis Equation, uses data or assumptions about several variables such as pumping rates, aquifer transmissivity and storativity, and time. *Testimony of Osiensky.*

[50]

Dr. Osiensky's calculations indicate that if WSU were to pump its entire authorized quantities continuously for ten years, the maximum drawdown that would be experienced at the Cornelius well is no more than 1.9 feet by the end of the decade, with the greatest portion of that being experienced in the first year. Additionally, Dr. Osiensky's calculations indicate that the relative difference in the drawdowns that would be caused by withdrawing water from different configurations of pumping wells is approximately one-half inch after 10 years. The scenarios he used compared the relative differences between pumping under the pre-consolidation well

configuration with a variety of post-consolidation scenarios, including pumping WSU's entire authorized quantities from any single well or from only Wells No. 7 and 8. *Testimony of Osiensky.*

[51]

The Cooper-Jacobs method has notable limitations, in that it uses a number of assumptions about aquifer properties, some of which are known not to be true in the Grande Ronde aquifer system. These include the assumptions that the area influenced by the test has a uniform thickness, and that all wells fully penetrate the aquifer. *Testimony of Osiensky, Testimony of Keller.* To compensate for these known limitations, Dr. Osiensky used conservative estimates for each of the different assumptions in order to produce the greatest potential impact. Other, more complicated, methods are available for calculating interference drawdown, but all are based on the Theis Equation and use more complicated methods with more variables and assumptions. In Dr. Osiensky's opinion, no better tool is available for evaluating the anticipated drawdown effects of different pumping scenarios for the WSU Pullman campus well system. *Testimony of Osiensky.*

[52]

In Dr. Keller's opinion, the calculations employing the Cooper-Jacobs method are not reliable in this situation. Dr. Keller notes that Dr. Osiensky assumed the GRA is infinite in size, when in fact, boundaries for the GRA exist. Without the inclusion of boundary assumptions, the resulting calculations will show much smaller drawdown impacts. Additionally, Dr. Osiensky's calculations do not realistically depict what is actually occurring. Data regarding the observed

rate static level drawdown is approximately one foot per year, whereas Dr. Osiensky's calculations show drops in the static water level that are one-twentieth or less than what is normally observed. *Testimony of Keller.*

[53]

Dr. Keller supports the use of both theoretical (Cooper Jacobs method) and observation approaches (use of data from observation wells) as available methods to analyze potential impacts to the GRA from a change in the pumping regime. However, Dr. Keller believes it makes more sense to place a priority on known and existing data from observation wells. Available observation data shows that drawdowns in the GRA are not related to the radial distance between the point of withdrawal and the observation location, nor to the relative depths of the wells, but instead are driven much more by the aggregate rate of pumping from the aquifer system. Given the complexity of the GRA system, additional pump tests involving the WSU wells could not add much to what is already known about the potential drawdowns effects of consolidating WSU's water rights. This is because typical pump tests, lasting from a few hours to as long as two weeks, will not reliably predict affects that might occur over the longer term. *Testimony of Keller.*

[54]

Although the Cooper-Jacobs method is not a perfect theoretical tool because it is unlikely to give accurate *quantitative* results, Dr. Keller agrees that the method is a reasonable tool to evaluate the *relative* changes that can be expected from different pumping scenarios and well configurations. This is because even if the underlying assumptions are changed to reflect

different views of various aquifer parameters, which would result in different quantitative drawdown results, the Cooper-Jacobs method still reliably calculates the relative changes between various pumping scenarios. *Testimony of Keller.*

[55]

Based on the weight of expert testimony (Keller, Osiensky), the Board finds that it is the aggregate pumping of the aquifer that most directly affects water levels in the aquifer. A change in the point of withdrawal within this particular basalt system will have only minor effects on the water table. The Board also finds that the method used by Dr. Osiensky was sufficient to show that the relative changes to the aquifer would be slight if the WSU wells were consolidated. Furthermore, the Board finds that the use of this method is appropriate because additional pump tests involving the WSU wells could not add much additional information on drawdown impacts.

[56]

The Board also finds, consistent with the weight of expert opinion, that consolidation of WSU's existing water rights will have no appreciable effect on the Cornelius well, or other surrounding wells, and will not change the manner in which Cornelius is able to withdraw water from his well.

[57]

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

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CONCLUSIONS OF LAW

[1]

Enlargement

Appellants contend Ecology improperly used the quantities from an invalid claim (Claim No. 098524) as a basis to award additional quantities at an alternative location. To allow the transfer of any quantity that is based on an invalid claim, Appellants argue, would improperly validate illegal water use and unlawfully enlarge the subsequent right. They seek a reduction in the instantaneous quantity authorized by Permit No. G3-28278P (historically associated with Well No. 7) because they believe the instantaneous quantity contained in that permit is based, in part, on the 500 gpm instantaneous quantity represented by Claim No. 098524.

[2]

The statutory prohibition on enlargement provides: "...where an additional well or wells is constructed, the original well or wells may continue to be used, but the combined total withdrawal from the original and additional well or wells shall not enlarge the right conveyed by the original permit or certificate..." *RCW 90.44.100(2).*

[3]

We conclude that the invalidity of Claim No. 098524 did not require Ecology to subtract the quantities associated with that claim from the quantities authorized under Permit No. G3-28278P. We denied summary judgment on this issue because it involves mixed questions of law and fact; specifically what, in fact, was intended by the "supplemental" nature of the permit, and what is the legal effect of such characterization. The parties disputed the factual relationship between the quantities in the two related water rights, and disagree on the legal effect of Ecology's determination that Claim No. 098524 is not a valid water right.

[4]

We conclude that the language in Permit No. G3-28278P was intended to indicate that Well No. 7 was non-additive to other rights, meaning that the permit did not increase the water available to WSU, and would provide an alternate source of water for WSU. This intent was reflected in the permit condition limiting the maximum instantaneous quantity (Qi) of withdrawal to 2,500 gpm, "*less those amounts appropriated under Ground Water Certificate No. 5070-A and Ground Water Claims No. 098522 and 098524.*" *See, Exh. A-25.* Importantly, this interconnection or interrelationship between the rights is not the same as finding the 2,500 gpm Qi authorized by Permit No. G3-28278P was somehow *calculated from*, or *legally dependent on*, WSU's other pre-existing water rights or claims. Instead, Ecology determined the amounts of Qi and Qa authorized in Permit No. G3-28378P were based on WSU's water system capacity, limitations, and long-range operational plans. This determination, although in some ways related to the quantities of WSU's existing water rights, was not derived or calculated from the specific quantities contained in the invalid claim and the other WSU water rights.

[5]

Additionally, we recognize that Permit G3-28278P is a separate water right, with its own priority date. By seeking a new water right through the Permit, rather than redrilling existing wells, WSU was aware that this water right would be perfected at a much later time than the priority date established for its other water rights. It was important to WSU that it have a reliable source of water to meet the needs of the entire campus. The Permit is limited only to the extent that the maximum quantity of the permit is dependent on how much water is being withdrawn pursuant to the water rights mentioned in the permit itself (Claims No. 098522, 098524, and Certificate No. 5070-A). Based on the analysis above, we conclude Ecology's approval of the change application for Permit No. G3-28278P did not unlawfully enlarge the right represented by that permit.

[6]

Impairment

The Ground Water Code allows the approval of a change application only on the condition that "other rights shall not be impaired." *RCW 90.44.100(2).* The impairment analysis involved in a change application is the same as an original application for a new right. *Id., RCW 90.03.290(3).*[10] In the absence of a statutory definition of "impairment," Ecology has established, by rule, a two-part test for determining impairment in the groundwater context. The impairment test is set forth at WAC 173-150-060 as follows:

> For the purposes of this chapter, a ground water right which pertains to qualifying withdrawal facilities, shall be deemed to be impaired whenever:
>
> (1) There is an *interruption or an interference in the availability of water* to said facilities, or a contamination of such water, caused by the withdrawal of ground water by a junior water right holder or holders; *and*
>
> (2) *Significant modification is required* to be made to said facilities in order to allow the senior ground water right to be exercised. *WAC 173-150-060* (emphasis added).[11]

[7]

This two-part rule reflects the Ground Water Code's correlative objectives of protecting prior rights and at the same time promoting full utilization of the public resource. Like the code it implements, the rule seeks to harmonize the priority system established by RCW 90.44.130 and the "reasonable or feasible pump lift" concept of RCW 90.44.070 which qualifies that

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[10] RCW 90.03.290(3) directs Ecology to issue the permit "if it shall find ... the proposed application will not impair existing rights or be detrimental to the public welfare..."

[11] Although the test is stated in terms of analyzing the impact of new, junior rights on senior rights, Ecology applies the same standard to its evaluation of change applications in which all existing rights (both junior and senior) must be protected. See *WAC 173-150-120.*

system.[12] Thus, "impairment" will not be found to require denial of a new or amended water right application unless any identified interference or interruption cannot be remedied by withdrawing from a deeper level that is within the "reasonable or feasible pump lift" standard. See *Graves v. Ecology and City of Okanogan*, PCHB Nos. 88-140, 141 & 144, at COL III-IV (1989) (citing *Shinn v. Ecology*, PCHB Nos. 75-613 (1975)).

[8]

This Board previously explained in its Amended Order on Summary Judgment in this case, that where a proposed change will, beyond speculation, have a detrimental effect upon a lawful existing well or a substantial cumulative increase in pumping lift, then a remand to Ecology would be appropriate for determination of the reasonable or feasible pumping lift that it will protect in existing lawful wells. *Amended Order on Summary Judgment*, (January 18, 2008), at fn 23 (citing *Pair v. Ecology & Lehn Ranches*, PCHB 77-189 (1978)). Where the evidence does not establish a realistic probability of interference or interruption in the availability of water that is attributable to the requested change application, however, Ecology is not required to undertake a reasonable or feasible pump lift determination. *Id.*

[9]

Where interference or interruption may be expected to occur as a result of approving an application for a new or amended water right, a further evaluation is then required of what sort of modifications to the existing facilities may remedy the expected interference or interruption. *WAC 173-150-060(2). Heer Brothers v. Ecology & Schell*, PCHB Nos. 894 & 894A (1976), at 8.

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[12] RCW 90.44.070 provides, in part: "No permit shall be granted for the development or withdrawal of public ground waters beyond the capacity of the underground bed or formation in the given basin, district, or locality to yield such water within a reasonable or feasible pumping lift in case of pumping developments..."

[10]

The first prong of the impairment test requires some analysis of the probability and extent of any potential interference or interruption, as well as consideration of causation. In an ideal world, Ecology and the interested parties would have a full and complete picture of whether, how, and to what extent the proposed right would impact the exercise of existing rights. But in the context of a complicated or poorly understood aquifer system such as the GRA, where there continues to be imperfect information about how the system works despite considerable scientific investigations, a qualitative analysis may suffice. In such situations, relevant factors include the amount of water involved in the proposed change, the relative distances among the original and proposed changes in points of withdrawal and the facilities of the existing right holders, and the available information about aquifer properties.

[11]

We conclude the Appellants did not meet their burden to establish impairment or any realistic probability of interference or interruption based on changing the location of WSU's pumping. At the time Ecology issued the ROEs in this case, it had as much information as reasonably could be expected under the circumstances to consider the impairment issue and reach a correct "no impairment" conclusion. Our de novo review of the additional information and expert analysis developed for the hearing confirms that approval of the change applications will not cause impairment of exiting water rights. In the absence of impairment, we also therefore conclude that the public welfare will not be harmed by Ecology's approval of these water right changes.

[12]

Appellants' case focused primarily the declining trend of the aquifer and how WSU's withdrawal of more of its authorized quantity of water will contribute to, or further accelerate,

that decline to the detriment of all water users in the area. However, Appellants failed to show that changing the points of withdrawal for WSU's existing water rights or re-configuring the withdrawals among its existing wells would have any appreciably different impact on Mr. Cornelius or other water right holders than if WSU continued to exercise its rights as it has in the past. In a case involving whether a change in the place of use of a surface water right would adversely impact existing rights, this Board has previously recognized that, to the extent existing valid rights were at issue, the fact water was over-appropriated in the Methow River system was not in and of itself relevant to the impairment question. *Knight, et al. v. Ecology and R.D. Merrill Co.*, PCHB Nos. 94-61, 94-77, & 94-80, (Final Findings of Fact, Conclusions of Law and Order) (1995), at 13. The Board stated: "[t]he issue is whether the specific transfer and, in this case, consolidation of rights, will have an increased impact on the river." *Id.*

Neither of Appellants' expert witnesses in this case performed their own analysis of the changes in spatial distribution of the WSU wells relative to Mr. Cornelius' well. Appellant's expert, Dr. Brackney, who opined that well construction had an effect on drawdowns, was effectively contradicted by Appellant's second expert, Dr. Keller, who opined that well depths do not appreciably affect aggregate drawdown rates, and that drawdown rates in the GRA do not differ horizontally versus vertically. The experts of both sides agreed that the Cooper-Jacobs approximation method used by Dr. Osiensky is a reasonable tool to evaluate the relative changes between pumping configurations. We conclude this method was appropriately applied in the Grande Ronde aquifer under these circumstances, and when combined with observation data, identifies no material differences between WSU's pre-consolidation and post-consolidation pumping authorized by the water right changes. Accordingly, we conclude that the Appellants failed to meet their burden of demonstrating impairment such that RCW 90.44.100(2) would preclude approval of the change applications.

[13]

The second prong of the impairment test involves analysis of what modifications to existing facilities, such as deepening a well or otherwise increasing its pumping ability, might be necessary to remedy any expected interference or interruption. Appellants urge the Board to conclude that Ecology erred by not establishing a "reasonable or feasible pump lift" in this case. They contend determination of a reasonable or feasible pump lift is necessary to protect Mr. Cornelius and other existing water right holders from the declining water levels in the Grande Ronde aquifer. What they failed to do, however, is establish that consolidation of WSU's water rights will cause any interference or interruption in the availability of water in the domestic well of Mr. Cornelius or other existing water right holders. In the absence of any realistic probability of interference, or a causal connection with the change in location of WSU's withdrawals, we conclude Ecology is not required to establish a reasonable or feasible pump lift.

[14]

Appellants urge the Board to direct Ecology to establish a reasonable or feasible pumping lift in the GRA, even in the absence of finding impairment. They point to a previous Board decision to argue Ecology has a statutory duty to set a reasonable and feasible pumping lift in order to protect existing water right holders even if a change/transfer is found lawful. *Graves v. Ecology and City of Okanogan*, PCHB Nos. 88-140, 141 & 144 (1989). In *Graves*, the Board conditioned the approval of a water right transfer by requiring the permittee to submit evidence sufficient for Ecology to determine reasonable or feasible pumping lifts for existing domestic and irrigation rights. It did so even though it concluded the transfer did not impair existing water rights. *Id*, at COL V. Of significance to the Board in that case was that, although the Board could not conclude the transfer would impair existing water rights, it found the transfer of the City's water rights had, in fact, caused other nearby wells to go dry (by drawing water levels

down in the range of 2-4 feet), and that modest measures to deepen the existing wells had, in fact, restored existing appropriators' access to water. *Id.*, at FOF VIII. The significant interference caused by approval of the City's water rights justified the further investigation into establishing "with necessary clarity the line between the rights of senior and junior appropriators in the locality in question." *Id.*, at COL VI. We find *Graves* distinguishable because the present case offers no similar evidence of interference.

[15]

Finally, we note that Ecology is working within its existing authorities to manage groundwater resources in the area. Many others, including Appellants and WSU, are participating in those efforts. In the event water levels continue to decline as a result of aggregate withdrawals from the GRA, to the point of interfering with appropriators' exercise of their water rights, both Ecology and existing water right holders have a variety of tools available to them, including procedures for filing and responding to notifications of claims of impairment such as those provided in WAC 173-150-070 and 080.

[16]

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

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Based on the foregoing analysis, the Board hereby enters the following:

ORDER

Ecology's decisions approving changes to six groundwater rights held by WSU to serve its Pullman campus are each AFFIRMED.[13]

DATED this 17th day of April, 2008.

POLLUTION CONTROL HEARINGS BOARD

ANDREA MCNAMARA DOYLE, Presiding

KATHLEEN D. MIX, Chair

see separate concurrence and dissent
WILLIAM H. LYNCH, Member

[13] The change decisions are those related to the following six water rights: Permit No. G3-28278P, Claims No. 098522 and 098523, and Certificates No. 5070-A, 5072-A, and G3-22065C.