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NO. 304701

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DIVISION III
STATE OF WASHINGTON

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OF THE STATE OF WASHINGTON**

SCOTT CORNELIUS, an individual, PALOUSE WATER
CONSERVATION NETWORK, and SIERRA CLUB PALOUSE
GROUP,

Appellants,

v.

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

Respondents.

DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

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I. INTRODUCTION

This case involves an attempt to eliminate water rights held by Washington State University (WSU) for operation of the public water system that serves its Pullman campus. In order to operate its water system in an efficient and cost-effective manner, WSU applied to the Department of Ecology (Ecology) to change the well locations specified under its seven water rights. Ecology approved six of WSU's applications, and Ecology's approvals were challenged by Scott Cornelius, Palouse Basin Water Network, and Sierra Club Palouse Group (collectively referred to as "Cornelius"). The Pollution Control Hearings Board's (PCHB) decision to uphold these water right change approvals should be affirmed by this Court.

Cornelius's challenge fails because it is based on two false premises. First, Cornelius wrongly contends that the PCHB's application of the Municipal Water Law (MWL) in this case somehow "revives" water rights formerly relinquished by WSU, in derogation of the Washington Supreme Court's decision in *Lummi Indian Nation v. State of Washington*, 170 Wn.2d 247, 241 P.3d 1220 (2010). In *Lummi Nation*, the Supreme Court held that certain provisions of the MWL are constitutional on their face. In the decisions at issue in this case, the PCHB correctly applied those provisions of the MWL, and, contrary to Cornelius's contention, such application did not cause any violation of either separation of powers or the right to due process of law. Water rights for "municipal water supply purposes" are exempt from relinquishment. The MWL defined this term for the first time and confirmed that WSU's water rights have always been for municipal purposes. By passing the MWL, the legislature did not retroactively change the law relating to WSU's water rights in an unconstitutional manner.

Second, Cornelius wrongly contends that the changes in points of withdrawal (well locations) will enable WSU to withdraw more groundwater from the Palouse Basin Aquifer than

it could legally withdraw if the change requests were denied. But the administrative record in this case demonstrates that the water right changes do not increase the quantities of water that WSU can pump under the water rights, and do not enable WSU to use any more water than it would be able to tap if it were limited to the well locations originally specified under its rights.

WSU has acted in a lawful and responsible fashion in managing its water rights to attain its objectives as a state educational institution. This Court should not be persuaded by Cornelius's attempts to distort the Supreme Court's holdings in *Lummi Nation*, and mischaracterize the extensive administrative record compiled in this case, in his effort to invalidate WSU's water rights. Ecology's decisions to approve WSU's six applications to change the points of withdrawal of their water rights to consolidate the wells in its campus water system should be upheld. Ecology respectfully requests the Court to affirm the PCHB's Order on Summary Judgment, issued on January 18, 2008 (SJO),¹ and Findings of Facts, Conclusions of Law and Order, issued on April 17, 2008 (Final Order).²

II. RESTATEMENT OF ISSUES

Cornelius identifies thirteen issues in his opening brief, which are restated as follows:

1. In *Lummi Indian Nation v. State of Washington*, the Supreme Court held that the Municipal Water Law does not facially violate constitutional requirements for separation of powers or due process. Subsequently, the PCHB applied the MWL when it reviewed Ecology's approvals of WSU's water right change applications. Is the MWL, as applied in this case, consistent with constitutional requirements for separation of powers and due process?

¹ The PCHB's Order on Summary Judgment (As Amended on Reconsideration), is listed as document 85 in the PCHB's Index of Record and is attached as an appendix to Cornelius's Opening Brief as Appendix No. 4.

² The PCHB's Findings of Facts, Conclusions of Law and Order is listed as document 89 in the PCHB's Index of Record and is attached as an appendix to Cornelius's Opening Brief as Appendix No. 5.

2. Because perfected municipal water rights are not subject to relinquishment for nonuse of water, Ecology does not make a year-by-year determination of past use when evaluating applications to change municipal water rights. Did the PCHB correctly rule that use of Ecology's policy for evaluation of water right change applications in processing WSU's applications complied with relevant statutes?

3. Did the PCHB correctly rule that the well locations under WSU's partially-perfected water right certificates could be changed under the groundwater amendment statute, RCW 90.44.100?

4. Did the PCHB correctly rule that Ecology complied with the State Environmental Policy Act (SEPA) by using the determination of non-significance issued by WSU for the water right change applications, as allowed in WAC 197-11-600(3), where Ecology properly determined there was no new information indicating probable significant environmental impacts?

5. Did the PCHB correctly rule that the well-established fact of declining water levels in the Grande Ronde Aquifer was not "new information" that required Ecology to prepare a new threshold determination under SEPA before it acted on WSU's applications?

6. Where the PCHB determined that the water right changes approved by Ecology would not enable WSU to use any additional water beyond what WSU was already authorized to use, did the PCHB correctly rule that Cornelius bore the burden to prove harm to other water right holders or detriment to the public welfare from the *actual effect* of WSU's pumping of water from different well locations, as opposed to WSU's general exercise of those water rights?

7. Did the PCHB correctly rule that RCW 90.44.130 does not require curtailment of WSU's water rights in order to address declining water levels in the Grande Ronde Aquifer, where the PCHB determined that exercise of WSU's rights through the new well locations

authorized by the amendments would not affect the aquifer any differently than WSU's full exercise those rights by pumping water at its previously-authorized well locations?

8. Did the PCHB correctly rule that the "safe sustaining yield" provisions of RCW 90.44.130 do not apply in evaluation of applications for changes of groundwater rights under RCW 90.44.100?

9. Did the PCHB correctly rule that WSU's inchoate water rights for its Pullman campus are valid because WSU has exercised reasonable diligence in developing its campus facilities and putting its rights to beneficial use?

10. Did the PCHB correctly rule that WSU's Water Right Claim No. 098523 was not abandoned? (Cornelius Issue No. 10)

11. Did the PCHB correctly apply CR 56 in ruling that there are no issues of material fact and that WSU is entitled to judgment as a matter of law on the issue of whether the changes to WSU's water rights meet the Water Code's "beneficial use" requirement, where the only evidence proffered in response to WSU's summary judgment motion consisted of Mr. Cornelius's non-expert opinion that WSU wasted water during construction of its golf course?

12. Where the PCHB determined that WSU is using its water rights with reasonable efficiency, did the PCHB correctly apply RCW 90.44.100 in granting summary judgment to Ecology on the issue of whether the changes of WSU's water rights were contrary to beneficial use requirements?

13A. Are the PCHB's findings regarding the intended "supplemental" nature of WSU's Permit No. G3-28278P supported by substantial evidence, where Permit No. G3-28278P is a

separate water right with its own priority date that is not additive to quantities allocated under three earlier-established WSU water rights?

13B. Did the PCHB correctly apply the law to the facts concluding that Permit No. G3-28278P was not “enlarged” by amendment of the permit to add new well locations without reducing the instantaneous quantity of water authorized under the permit?

III. STATEMENT OF THE CASE

Ecology adopts and incorporates by reference the Statement of the Case provided in the Brief of Respondent Washington State University (WSU Response Br.).

IV. ARGUMENT

A. Standard of Review

Ecology adopts and incorporates by reference the “Standard of Review” section contained in WSU’s Response Brief, and adds the following discussion related to the application of the Administrative Procedure Act (APA), RCW 34.05, in this case.³

With regard to the “error of law” standard pertaining to challenged conclusions of law under the APA, RCW 34.05.570(3)(d), review by the Court is de novo, but the Court should give substantial weight to an agency’s interpretation of statutes and rules that the agency is charged with implementing. *Pub. Util. Dist. 1 of Pend Oreille Cy. v. Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). This is especially true when the agency has expertise in a certain subject area. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d. 568, 593-94, 90 P.3d 659 (2004). “Because Ecology is the agency designated by the legislature to regulate the State’s water resources, RCW 43.21A.020, [. . .] it is Ecology’s interpretation of relevant statutes and regulations that is entitled to great weight.” *Port of Seattle*, 151 Wn.2d at 593 (citation omitted).

³ This case includes a challenge to Ecology’s “threshold determination” that an environmental impact statement was not required for environmental review of WSU’s water applications under the State Environmental Policy Act (SEPA). The standard of review for the SEPA issues are discussed in Section IV.H, below.

B. Background on Washington Water Rights Law

In 2003, the legislature enacted SESSHB 1338, known as the Municipal Water Law. *Lummi Nation*, 170 Wn.2d at 256-57. The MWL is a landmark multi-section law that provides greater flexibility for public water purveyors, but also imposes new requirements for such purveyors to conserve water and more effectively link water system and land use planning. Cornelius is challenging the constitutionality of two subsections of the MWL in this case: RCW 90.03.015(4) and RCW 90.03.330(3).

Cornelius contends that applying the MWL's definition of the term "municipal water supply purposes" to encompass certain water rights held by WSU immunized those rights from relinquishment and unconstitutionally revived them after they had earlier been lost. The MWL defines the term "municipal water supply purposes" as meaning a beneficial use of water "[f]or residential purposes through fifteen or more service connections," or "for governmental or governmental proprietary purposes." RCW 90.03.015(4)(a), (b). Water rights that qualify as rights for municipal supply purposes under RCW 90.03.015(4) are exempt from loss through relinquishment. RCW 90.14.140(2)(d). Prior to the MWL, the term "municipal water supply purposes" was not defined. *Lummi Nation*, 170 Wn.2d at 255.

RCW 90.03.330, which governs the issuance of water right certificates, was amended to address water right certificates that Ecology had historically issued through proof of appropriation based on system capacity rather than actual beneficial use of water. RCW 90.03.330(3) provides that such water rights are deemed to be rights "in good standing." RCW 90.03.330(2) provides that certificates documenting water rights for municipal supply purposes can only be revoked or diminished in certain circumstances. RCW 90.03.330(4) provides that after September 9, 2003 (the date the MWL became effective) Ecology can issue

water certificates “only for the perfected portion of a water right as demonstrated through actual beneficial use of water.” Cornelius contends that the application of 90.03.330(3) has allowed WSU’s water rights that are documented by certificates to be expanded in an illegal and unconstitutional manner.

1. Washington water law principles.

To understand the MWL sections and other water law provisions that are at issue in this case, some background on key principles of Washington water resources law is helpful. This is particularly so because Cornelius confuses and jumbles several concepts of Washington water law that are important to this case: the “perfection” of a water right, the nature of an “inchoate” water right, and how a water right may be lost either through statutory “relinquishment” or the common law doctrine of “abandonment” of water rights. *See* Cornelius Br. at 13-18. Cornelius muddles these concepts in his attempt to convince this Court to eliminate WSU’s water rights on grounds that the rights either were previously exercised but later went unused and were relinquished, or have not yet been put to use in the first place but are no longer valid to serve future campus development.

a. Establishing a water right.

The process to establish a water right begins with the water right application process that was established for surface water rights under the 1917 Water Code, and for groundwater rights under the 1945 Groundwater Code, as Cornelius correctly explains.⁴ RCW 90.03.290; RCW 90.44.050, .070. However, Cornelius confuses the law relating to the water right establishment process after an applicant is granted a permit pursuant to RCW 90.03.290. When a permit is granted, the applicant holds an “inchoate” water right, which only becomes a

⁴ In addition, as explained by Cornelius, water rights may also arise from water use that commenced prior to the permitting system established under the 1917 Water Code and 1945 Groundwater Code. Cornelius Br. at 14.

“perfected” (vested) water right when the water is actually put to beneficial use.⁵ Water right permits include development schedules for putting the water to beneficial use, which may be extended if permit holders demonstrate to Ecology that they are developing the project associated with their permit with reasonable diligence. RCW 90.03.320. If permit holders do not fully put the water to beneficial use under their development schedule, and do not request and receive an extension of the schedule from Ecology, permits are subject to “cancellation.” *Id.* However, as long as holders of permitted inchoate water rights act with reasonable diligence to develop their projects and perfect the inchoate water by putting the water to beneficial use, the water rights remain as inchoate rights “in good standing” that are not subject to loss through cancellation. *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 596, 957 P.2d 1241 (1998).

As a general rule, after a permit holder perfects its water right by constructing water works and fully putting the water to use, Ecology issues a “certificate” confirming a water right for the quantity of water that has actually been used. RCW 90.03.330(1), (4). An exception exists for instances where Ecology issued so-called “pumps and pipes” certificates (discussed below).

b. Losing a water right.

After a water right is perfected through actual use, it may be lost if it later is unused for a lengthy period of time, either through statutory “relinquishment” under RCW 90.14, or the common law abandonment doctrine.⁶ The relinquishment statutes provide that a water right that

⁵ The Supreme Court has described an “inchoate” water right as:

[A]n incomplete appropriative right in good standing. It comes into being as the first step provided by law for acquiring an appropriative right is taken. It remains in good standing so long as the requirements of law are being fulfilled. And it matures into an appropriative right on completion of the last step provided by law.

Theodoratus, 135 Wn.2d at 596 (citing 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971)).

⁶ Under the common law, abandonment of a water right requires a showing of a long period of nonuse of the water right accompanied by intent to abandon the right. *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 781, 947 P.2d 732 (1997).

is unused in whole or part for five or more consecutive years, without “sufficient cause” to excuse the nonuse, is relinquished and reverts to the state. RCW 90.14.160-.180. However, there are numerous exceptions that may provide “sufficient cause” to preclude relinquishment when a water right goes unused. RCW 90.14.140. The relinquishment exception that is at issue in this case is the exemption for water rights for municipal purposes, which provides that:

Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there will 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).

Inchoate water rights that have not yet been put to beneficial use are not subject to relinquishment. RCW 90.14.150; *Pub. Util. Dist. 1 of Pend Oreille Cy.*, 146 Wn.2d at 802-03, (“the Legislature has plainly made statutory forfeiture inapplicable to unperfected water rights”).

c. Changing or transferring a water right.

Water rights may be changed, transferred, or amended. The process and requirements for changes of surface water rights are provided in RCW 90.03.380, which requires that a right must be perfected through actual use before its purpose of use, place of use, or point of diversion may be changed. *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 777-78, 947 P.2d 732 (1997). In contrast, under the groundwater right amendment statute, RCW 90.44.100, the place of use and point of withdrawal (well location) of a groundwater right may be amended before the right is perfected through actual beneficial use of the water. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 129-30, 969 P.2d 458 (1999). Thus, Cornelius’s statement that “[i]f a water right has not been perfected, it is not eligible for amendment,” Cornelius Br. at 15, is not correct in all instances because RCW 90.44.100

authorizes the change of an inchoate water right documented by a “permit *or* certificate.” RCW 90.44.100(1) (emphasis added).

In evaluating an application for a change of a water right, Ecology must perform a tentative determination to determine the extent and validity of the water right that is eligible for change. *R.D. Merrill*, 137 Wn.2d at 118.

2. The Municipal Water Law.

As exemplified by some of WSU’s water rights, there is an important exception to the general rule that unused inchoate water rights are documented by water right permits, and perfected water rights are documented by water right certificates. Prior to the 1990s, Ecology and its predecessor agencies engaged in a practice of issuing certificates to certain water suppliers on the basis of system capacity, rather than the actual beneficial use of water. Such certificates are commonly known as “pumps and pipes” certificates. *Lummi Nation*, 170 Wn.2d at 254. These certificates document water rights that may be entirely, or in part, inchoate. Oftentimes, these certificates reflect water rights that have been partially perfected through beneficial use, but include some quantity of inchoate water that has not yet been perfected.

Thus, Cornelius’s statement that a water right certificate can only be maintained “through continuous, beneficial use of the allotted quantity” is inaccurate for three reasons. Cornelius Br. at 14. First, “pumps and pipes” certificates, such as those held by WSU, include inchoate water that has not yet been put to beneficial use, which remains “in good standing” if requirements of law are met to maintain such status. Second, as explained above, inchoate water rights are not subject to relinquishment because that concept only is applicable to water rights that have been put to beneficial use. Thirdly, as also explained above, the nonuse of water rights that were previously used and perfected and are documented by certificates may be

precluded from relinquishment if the right is eligible for an exception to relinquishment under RCW 90.14.140, such as the municipal purposes exception. Cornelius's misstatement here exemplifies how his case is built on distortions of various water rights concepts.

In the 1990s, Ecology decided to change its administrative practice of issuing "pumps and pipes" certificates based on system capacity. In *Theodoratus*, the Supreme Court upheld Ecology's decision to include a condition in a permit extension for a private water purveyor that stated that a certificate would not ultimately be issued based on system capacity, but, rather, could only be based on actual beneficial use. *Theodoratus*, 135 Wn.2d at 597-98. In upholding Ecology's permit extension condition, the Court held that a water right held by a non-municipal supplier would not become perfected, and vest, until the water was put to actual beneficial use. *Id.* at 593-95. However, in *Theodoratus*, the Supreme Court did not consider the legal status of any certificate that had been issued based on system capacity, and the case did not involve a water right for *municipal* purposes. As a result, the *Theodoratus* Court explicitly stated that its decision did not relate to municipal water rights or municipal water suppliers. *Id.* at 594; *Lummi Nation*, 170 Wn.2d at 251.

Notwithstanding the Supreme Court's pronouncement that *Theodoratus* provided no holdings related to municipal water rights, the decision generated legal uncertainty as to the status of existing "pumps and pipes" certificates. This uncertainty led to enactment of the MWL in 2003. *Lummi Nation*, 170 Wn.2d at 256.

The MWL's definition of the term "municipal water supply purposes" states, in relevant part that:

"Municipal water supply purposes" means 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; (b) for

governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district. . . .

RCW 90.03.015(4)(a). Water rights for “municipal water supply purposes” under RCW 90.03.015(4) are exempt from relinquishment. RCW 90.14.140(2)(d); *City of Union Gap v. Dep’t of Ecology*, 148 Wn. App. 519, 531-32, 195 P.3d 580 (2008).

Because RCW 90.03.015(4) states that “[m]unicipal water supply purposes’ means a beneficial use of water [f]or residential purposes through fifteen or more residential service connections,” the MWL requires active compliance by conformance with the definition in RCW 90.03.015(4). RCW 90.03.015(4)(a) (emphasis added); *City of Union Gap*, 148 Wn. App. at 531 (“Municipal water supply purposes’ requires a showing of a specific beneficial use.”); AR 28, Ex. 2.⁷ Conformance with the definition occurs where a water right holder uses water for one or more of the categories of beneficial use included in this definition. In addition, where the water right holder is a public water system, Ecology considers that there is conformance with this definition when water rights are listed in a water system plan or other document developed by the public water system in the water system planning process regulated by the Department of Health. Ecology also considers that there is conformance with the definition when water rights authorized for one or more of the categories of beneficial use included in the definition have been integrated or consolidated through an Ecology action or procedure such that two or more water rights or water sources have alternate, well field, non-additive, or other relationships.⁸

⁷ In referring to the administrative record (AR) compiled by the PCHB in this case, Ecology will refer to documents as they are enumerated in the PCHB’s Index of Record. By way of example, this document (Declaration of Alan M. Reichman in Support of Department of Ecology’s Motion for Partial Summary Judgment, filed August 28, 2007) is listed as document 28 in the Index of Record. Ecology may follow the document number by referring to specific page numbers or exhibit numbers within the document.

⁸ If a water right does not meet the definition of municipal water supply purposes by, for example, serving less than the residential connection or nonresident population thresholds under RCW 90.03.015, or by not identifying the water right in water system planning documents, then the water right does not qualify as a right for municipal purposes. Consequently, the right would not be exempt from relinquishment under RCW 90.14.140(2)(d). Further, if a water right does not meet the municipal definition for five or more years, then the water right would be valid only to the extent it had been beneficially used during that period, with any nonuse

As part of the MWL, RCW 90.03.330, which governs the issuance of water right certificates, was amended to address “pumps and pipes” certificates. The relevant provisions of RCW 90.03.330 provide as follows:

(2) Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015 unless the certificate was issued with ministerial errors or was obtained through misrepresentation. . . .

(3) This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.

RCW 90.03.330(2)-(3).

RCW 90.03.330(2) provides that Ecology may not revoke or diminish certificated water rights for municipal water supply purposes, including those documented by “pumps and pipes” certificates covered under RCW 90.03.330(3) except when the agency: (1) issues certificates under RCW 90.03.240 at the conclusion of general water rights adjudications; (2) issues certificates following changes, transfers, or amendments under RCW 90.03.380 or 90.44.100; or (3) determines that a certificate was issued with ministerial errors or obtained through misrepresentation. Apart from these exceptions, Ecology cannot revoke or diminish a certificate for municipal water supply purposes. AR 28, Ex. 2. Accordingly, under certain circumstances, when processing an application for change or transfer of a groundwater right documented by a “pumps and pipes” certificate governed by RCW 90.03.330(3), Ecology may revoke the certificate, or issue a decision approving a change of the water right for a quantity less than

resulting in relinquishment of the right unless the nonuse is excused by one of the other exemptions to relinquishment provided in RCW 90.14.140.

provided on the original certificate. Revocation or diminishment may occur based on the tentative determination of validity and extent of the water right, to prevent impairment of other existing water rights, or to prevent detriment to the public welfare. *Id.*

RCW 90.03.330(3) provides that water rights for municipal water supply purposes documented by “pumps and pipes” certificates issued prior to September 9, 2003, are “rights in good standing.” These water rights include inchoate quantities that have not yet been exercised. *See Theodoratus*, 135 Wn.2d at 582. Such rights may continue to be exercised to serve new growth, and Ecology is not authorized to revoke or diminish water rights for municipal supply purposes documented by such “pumps and pipes” certificates, except under the limited circumstances set forth in RCW 90.03.330(2), discussed above. AR 28, Ex. 2; *Lummi Nation*, 170 Wn.2d at 269 (RCW 90.03.330(2) “limits the power of [Ecology] to invalidate water rights certificates.”)

RCW 90.44.100 authorizes changes of points of withdrawal and places of use for inchoate groundwater rights. *R.D. Merrill*, 137 Wn.2d at 129-30. Under one of the exceptions from diminishment or revocation of municipal water certificates provided under RCW 90.03.330(2), when Ecology evaluates an application for change or transfer of a water right documented by a “pumps and pipes” certificate, it must perform a tentative determination of the validity and extent of the water right. An assessment must be performed to determine whether any of the inchoate quantity specified in the certificate remains valid. This requirement is based on the proposition that by including the term “in good standing” for such certificates, the legislature intended that Ecology’s premature issuance of certificates based on system capacity did not take the water rights *out of* good standing, but that holders of such rights would still have

to meet other water law principles, such as reasonable diligence in project development, to keep these rights in good standing.⁹ AR 28, Ex. 2.

3. The Supreme Court’s decision in *Lummi Nation v. State of Washington*.

Appellant Scott Cornelius and several other parties filed lawsuits to facially challenge the constitutionality of eight sections of the MWL, including the sections discussed above. The cases were consolidated, and ultimately were resolved by the Supreme Court. *Lummi Nation*, 170 Wn.2d at 257. In *Lummi Nation*, the Supreme Court held that all the challenged sections of the MWL, including the provisions at issue in this case, are constitutional on their face.

The Court held that the new definitions of the terms “municipal water supplier” and “municipal water supply purposes” in RCW 90.03.015(3) and (4), and the amendments to RCW 90.03.330, relating to the issuance of water right certificates, do not violate the separation of powers:

The legislature made no attempt to apply the law to an existing set of facts, affect the rights of parties to the court’s judgment [in *Theodoratus*], or interfere with the judicial function. Instead the legislature allowed those who had planned their property development to rely upon the water rights previously approved by the statutorily authorized administrating agency.

Lummi Nation, 170 Wn.2d at 263. Further, the Court held that RCW 90.03.015(3) and (4) and the amendments to RCW 90.03.330 all facially comport with the right to due process:

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

Lummi Nation, 170 Wn.2d at 266-67.

⁹ By way of illustration, if Ecology issued a “pumps and pipes” certificate that contained a large amount of inchoate water that the water right holder never truly intended to use, or was never needed to fully complete the project associated with the appropriation, or clearly will never be needed to complete the project, Ecology could revoke or diminish that unused quantity of water upon application to transfer the water right. This could be based upon a determination that there has not been reasonable diligence in development of the right and that the remaining inchoate water quantity is no longer in good standing.

While the Supreme Court held that all of the challenged sections of the MWL are constitutional on their face, *Lummi Nation* did not involve any “as applied” constitutional claims. *Lummi Nation*, 170 Wn.2d at 258. In this case, Cornelius is asserting that RCW 90.03.015(4) and RCW 90.03.330(3) are unconstitutional as applied by Ecology and the PCHB in the context of the decisions on WSU’s applications.

C. The PCHB Correctly Ruled That WSU’s Certificates 5070-A And 5072-A Qualify As Being For Municipal Purposes And Are, Therefore, Exempt From Relinquishment (Issues Nos. 1, 2, and 3)¹⁰

Cornelius contends that two of WSU’s water rights do not qualify as water rights for municipal purposes” because Certificate 5070-A states its purpose as being “domestic supply for WSU,” and Certificate 5072-A states that it is for “community domestic supply and stock water.” From this false premise—which unsoundly elevates form over substance—Cornelius reasons that he should prevail on several issues. But the PCHB correctly applied the MWL to determine that these water rights meet the definition of “municipal water supply purposes.”

The MWL states in relevant part that “[m]unicipal water supply purposes’ means a beneficial use of water . . . [f]or 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.” RCW 90.03.015(4)(a). This statutory provision applies retroactively to water rights issued prior to the effective date of the MWL in 2003. *Lummi Nation*, 170 Wn.2d at 255-66. Regardless of the purpose of use stated on a water right document, the water right qualifies as being for municipal purposes if it meets the statutory definition established by the MWL under RCW 90.03.015(4). This approach is consistent with another provision of the MWL, RCW 90.03.560, which allows municipal water

¹⁰ In this brief, the issues stated by Ecology in the “Restatement of Issues” section above are titled as “Issues,” and issues that were identified and decided in the PCHB proceeding are titled as “PCHB Issues.”

suppliers to request Ecology to amend water right documents to identify that they are for municipal supply purposes under RCW 90.03.015 in instances where such rights are stated on the documents as being for other purposes of use.

The PCHB analyzed each of the six water rights WSU sought to change to determine if they met the definition of “municipal water supply purposes.” The PCHB correctly ruled that “each of WSU’s water rights [including Certificates 5070-A and 5072-A] individually discloses its intended and actual purpose for municipal water supply under the definition.” SJO at 14.

Certificate 5070-A was issued for domestic supply of the WSU campus. The PCHB correctly applied the definition and concluded that the right documented by Certificate 5070-A meets the definition as being for “municipal supply purposes” because it is presently being used to supply more than 15 service connections on the WSU campus.¹¹ AR 23 at 2-3. In addition, WSU has listed this water right in its water system planning documents as part of its portfolio of water rights to serve its campus. AR 15, Att. 6 at 39-40 (Tables 4.4 and 4.5); AR 18, Att. 4 at 37-38.

Certificate 5072-A was issued for “community domestic supply and stock water.” AR 29 at 3. The PCHB correctly concluded that the right documented by Certificate 5072-A qualifies as being for municipal purposes because it is presently being used to supply more than 15 service connections “in support of WSU’s institutional activities.” SJO at 14-15.

The record amply supports these conclusions. WSU has continued to exercise these water rights to serve several thousand students who reside on its Pullman campus in dormitories, as well as thousands of additional students, faculty, and staff. *See* AR 22; AR 23 at 2-3; AR 51.

¹¹ Certain water rights were exercised by pumping wells at locations other than those specified for the rights on their documents. Notwithstanding, WSU continued to beneficially use the water, and the pumping of different wells did not cause relinquishment or abandonment of those rights. *See* WSU Response Br., §§ III.A, IV.B.1, IV.G.

WSU has also listed these rights in its water system planning documents. AR 15, Att. 6 at 39-40 (Tables 4.4 and 4.5); AR 18, Att. 4 at 37-38.

The PCHB reasoned correctly that it is immaterial that the purpose of use stated on these certificates is for “domestic water supply” rather than “municipal,” and that both of the water rights qualify as being for municipal purposes because they meet the statutory definition.

D. The PCHB’s Application Of The Municipal Water Law In Review Of WSU’s Water Right Applications Did Not Violate The Constitutional Separation Of Powers Or Due Process (Issue No. 1)

Underlying both Cornelius’s separation of powers and due process claims is his argument that the challenged sections of the MWL were applied retroactively to change the law such that water rights that WSU previously lost due to relinquishment were revived by the PCHB’s application of the law. This argument fails. The MWL could not alter any prior “legal conclusions” because the term “municipal water supply purposes” had not even been defined before enactment of the MWL.

WSU has continued to exercise its water rights to meet campus needs that have evolved over time and the MWL has not caused any “revival” of relinquished water rights. Further, even assuming *arguendo* that WSU failed to continue to exercise any of its water rights after they perfected them through actual beneficial use, the MWL did not “change” the law because WSU’s water rights always qualified as being for municipal supply purposes. Indeed, many of WSU’s water rights documents state that the rights are for municipal purposes. Enactment of the MWL and its new definitions did not alter the status of WSU’s water rights.

Further, even if the Court deems that there was uncertainty as to whether WSU’s water rights qualified as being for municipal purposes prior to the MWL, the MWL did not change the law, but, rather, clarified law that previously had been ambiguous with regard to who could hold

municipal water rights, and what rights could qualify for the municipal exemption to relinquishment. The enactment of the definitions could not change the law because, at most, they clarified past ambiguity over who could qualify to hold municipal water rights, and what rights could qualify for the municipal exemption to relinquishment.

A statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). An amendment is curative if it clarifies or technically corrects an ambiguous statute. Ambiguity exists when a law can be reasonably interpreted in more than one way. *McGee Guest Home, Inc. v. Dep't of Soc. & Health Serv.*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000).

As the Supreme Court notes in *Lummi Nation*, the terms “municipal water supplier” and “municipal water supply purposes” were not defined prior to the MWL. As a result of the lack of statutory definitions, these terms were construed differently by different stakeholders at different points in time. Ecology had even deemed some private water supply companies as being municipal suppliers. *Lummi Nation*, 170 Wn.2d at 255-56. Thus, there was longstanding ambiguity and uncertainty over what types of entities could be municipal water suppliers, and what water rights qualified as being for municipal purposes.

To provide certainty with respect to municipal water rights, the MWL clarified the law by providing definitions for these undefined terms. Legislative intent that the provisions are curative and are intended to operate retroactively to clarify ambiguity in the Water Code is demonstrated by the introductory language of the bill, which reads “AN ACT Relating to certainty and flexibility of municipal water rights and efficient use of water. . . .” Laws of 2003, 1st Spec. Sess. ch. 5, p. 2341.

1. Separation of powers was not violated.

Where the constitutionality of a statute is challenged, the statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000). Cornelius cannot meet his burden to prove that the PCHB's application of the MWL resulted in a legislative adjudication of facts that usurped the judicial sphere of government and violated the separation of powers.

The doctrine of separation of powers stems from the constitutional distribution of government's authority into three branches: the legislative authority, executive power, and judicial power. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Separation of powers issues arise when the legislature attempts to perform judicial functions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 143, 744 P.2d 1032 (1987), *amended by* 750 P.2d 254 (1988).

Cornelius argues that the PCHB interpreted "relevant provisions of the MWL in a manner the Supreme Court posited would run afoul of the separation of powers doctrine," and that "the PCHB effectively altered the past consequences of WSU's failure to use its allotted water." Cornelius Br. at 18. He asserts that the legislature usurped the judiciary's role because the PCHB's application of RCW 90.03.015(4) (the definition of "municipal water supply purposes") to purportedly trigger the municipal exemption from relinquishment in a retroactive manner, along with its application of RCW 90.03.330(4) (the "good standing" provision), caused the "legislative adjudication of facts" related to WSU's water rights.

This argument fails for two reasons. First, as explained immediately above, the PCHB did not "alter past aspects of WSU's water rights" by shielding them from earlier loss through

statutory relinquishment. The passage of legislation that operates retroactively to clarify law that previously was ambiguous does not violate the constitutional separation of powers. *Kitsap Alliance of Prop. Owners v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 261, 255 P.3d 696 (2011). Second, the legislature's enactment of the MWL could not have caused the adjudication of facts in this dispute because WSU did not file its applications with Ecology until after the MWL was enacted in 2003, and Ecology's decisions and Cornelius's appeals to the PCHB did not occur until after the law had gone into effect.

With regard to the alleged "legislative determination of adjudicative facts," Cornelius's reliance on the Supreme Court's decision in *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975), is misplaced. In *O'Brien*, the legislature had determined that specific public works projects were economically impossible to perform and passed a statute that operated retroactively to relieve the contractors from having to carry out the contracts. *O'Brien*, 85 Wn.2d at 267-68. The *O'Brien* Court held the statute violated separation of powers because the legislature, in effect, made determinations that certain specific existing contracts that were the subjects of disputes were impossible to perform because of increases in the cost of petroleum. *O'Brien*, 85 Wn.2d at 269-70.

In contrast, in this case, the legislature did not make any determinations on WSU's specific water rights through passage of the MWL. In fact, WSU did not even file the applications for changes of its water rights until October 28, 2004, after the enactment of the MWL in 2003. AR 29 at 3. And prior to the time that WSU filed its applications, there had been no administrative proceeding or judicial case that determined the validity and extent of WSU's water rights. In contrast to the scenario in *O'Brien*, by passing the MWL, the legislature did not

step into the role of the judiciary to adjudicate and “apply the law to an existing set of facts” in any dispute concerning WSU’s rights. *Lummi Nation*, 170 Wn.2d at 263.

Cornelius’s argument that “the PCHB erred by applying [the MWL] to conclude that the originally authorized quantities [under Certificates Nos. 5070-A and 5072-A] remained intact” is in essence a rehash of the facial separation of powers challenge that was rejected by the Supreme Court in *Lummi Nation*. The *Lummi Nation* Court pronounced that in enacting the MWL “the legislature made no attempt to apply the law to an existing set of facts, affect the rights of parties to the court’s judgment, or interfere with any judicial function.” *Id.* at 262-63. “Confirming existing rights was a legislative policy decision, not a judicial adjudication.” *Id.* at 264. In this case, the PCHB applied RCW 90.03.015(4) and 90.03.330(3) just as the legislature intended. There was no separation of powers violation in applying existing law to past facts as contemplated under the MWL (i.e., to water right certificates issued before 2003 when the law became effective).¹² If there was, the Supreme Court would have found these statutes to be facially unconstitutional—which it did not.

2. The right to due process was not violated.

Cornelius contends that that the definition of municipal purposes has been applied in a manner that violated due process because “[t]he PCHB’s application of the MWL to revive WSU’s relinquished water rights effectively moved the Cornelius right further down the line.” Cornelius Br. at 20. This argument fails because, as explained above, the MWL did not cause

¹² The MWL has not altered the process that must be followed to determine if water rights are eligible for change, and the legislature did not violate separation of powers by interfering with the judicial function of factual adjudication. Through RCW 90.03.330(2), the legislature maintained Ecology’s requirement to perform tentative determinations of the validity of water rights, including the requirement to ascertain whether an inchoate right documented by a “pumps and pipes” certificate under RCW 90.03.330(3) remains “in good standing” through good faith and reasonable diligence in development. That is exactly what occurred in this case. WSU’s water rights have been subject to review with respect to their validity and eligibility for amendment. In evaluating WSU’s applications, Ecology performed tentative determinations of the validity of the water rights, which were subject to de novo review by the PCHB, and then judicial review by Whitman County Superior Court, and, now, this Court.

any revival of relinquished water rights that could interfere with Mr. Cornelius's ability to pump water from his well.

The MWL clarified earlier ambiguity related to the question of what water rights qualified as being for municipal purposes, and did not change the law to put Mr. Cornelius in any different position in the water right priority system. Ironically, while the MWL did not elevate the status of WSU's water rights, it is evident that, through this case, Mr. Cornelius is seeking to elevate the status of his own water right that has a junior priority date in relation to WSU's rights.

Moreover, Cornelius wrongly asserts that the PCHB's application of the MWL violated his right to procedural due process because of the PCHB's alleged limitation of the evidence that could be presented on the impairment and public welfare issue during the evidentiary hearing. For the reasons explained in Section IV.D of WSU's Response Brief, this assertion lacks merit. The PCHB's ruling about the legally-required components of a successful impairment claim had nothing to do with the MWL. Therefore, the PCHB did not "apply the MWL" in a way that violated Cornelius's right to procedural due process.¹³

Further, Cornelius erroneously asserts that due process was violated because "pursuant to RCW 90.44.100, Ecology is required, pursuant to the MWL, to determine what quantities have been perfected, and to 'revoke or diminish' those rights that do not meet perfection criteria or are otherwise subject to loss for nonuse," but failed to do so in its review of WSU's applications. Cornelius Br. at 21. This assertion fails because it mischaracterizes RCW 90.03.330(2) as requiring the revocation of any quantity of water that has not been used under a water certificate.

¹³ Moreover, the PCHB conducted a full evidentiary hearing on the impairment issue, which included the testimony of witnesses and the admission of evidence. Cornelius received notice and was provided with the opportunity to demonstrate through a hearing that the proposed changes would interfere with his ability to pump water from his well. However, he could not meet his burden of proof to show that impairment of the water right associated with his permit-exempt well would be caused by the changes in WSU's well locations. See Final Order.

This is incorrect because, as explained in Section IV.F, below, RCW 90.44.100 allows the amendment of inchoate water rights that are documented by certificates. Due process was not violated because Ecology, and the PCHB through its de novo review authority, evaluated the extent and validity of WSU's rights and correctly deemed that they were valid. The water rights were not "revoked or diminished" under RCW 90.03.330(2) because, as discussed in Section IV.K, below, WSU demonstrated that it is developing into its rights with reasonable diligence.

E. The PCHB Correctly Ruled That Application Of Ecology's Policy For Evaluation Of Water Right Changes In Processing WSU's Applications Complied With Relevant Statutes (Issue No. 2)

Relying on his root contention that WSU's water rights are not actually for municipal supply purposes, Cornelius contests the PCHB's summary judgment ruling on PCHB Issue No. 3 that WSU's applications could be evaluated by using the "streamlined process" Ecology has developed for municipal rights. Cornelius Br. at 25-28. This argument fails for two reasons. First, this argument challenges an Ecology policy document and requests this Court to declare it *ultra vires*, but this case does not involve any rule challenge pursuant to the APA. Secondly, a simplified tentative determination process is appropriate when evaluating municipal water rights because such rights are exempt from relinquishment. Thus, since WSU's water rights qualify as being for municipal purposes, the PCHB correctly ruled that application of this streamlined process in evaluation of WSU's applications was appropriate and lawful.

Cornelius is challenging a guidance document that Ecology relied on in reviewing WSU's applications: the Water Resources Program Policy for Conducting Tentative Determinations of Water Rights (POL 1120). AR 23, Ex. 2. Ecology adopted POL 1120 to provide guidance for agency staff in conducting tentative determinations during their review of water right change applications. Under this policy, in evaluation of applications to change

municipal water rights, Ecology staff are directed not to perform year-by-year analysis to determine if previously used and perfected water rights have gone unused, since, under RCW 90.14.140(2)(d), municipal rights are not subject to loss through relinquishment.

At the threshold, Cornelius's argument fails because Ecology's issuance of that guidance document has not been appealed and is not the subject of this case. This case involves judicial review of the PCHB's decision, and is not a rulemaking challenge to POL 1120 under the APA. *See* RCW 34.05.570(2). The issue here is whether the PCHB correctly evaluated WSU's applications in its de novo review of Ecology's application decisions, and not whether Ecology acted outside its statutory authority to issue the policy document.

And, irrespective of the guidance document, Cornelius's argument attacking the "simplified tentative determination" process that was employed in evaluation of WSU's water right change applications fails because its use did not violate RCW 90.03.330(2), RCW 90.44.100, or any other statutory provisions. Cornelius correctly asserts that when evaluating applications for changes to water rights under RCW 90.44.100, Ecology must conduct a tentative determination of the extent and validity of the rights proposed to be changed. And he is also correct that RCW 90.03.330(2) authorizes the revocation or diminishment of municipal water rights certificates during the change application process. However, Cornelius veers off course by asserting that "[t]his analysis requires a review of the historic use of the water right to determine how much water was actually beneficially used, which in turn governs the quantity available for transfer." Cornelius Br. at 25-26. This assertion is inaccurate because, with respect to RCW 90.44.100, it fails to recognize the difference between determining the extent and validity of a perfected right to determine whether any previously used water has been relinquished or

abandoned due to later nonuse, and determining the extent and validity of an inchoate right that has not yet been perfected.

WSU's water rights qualify as being for municipal supply purposes, *see* Section IV.C, above, and are therefore exempt from relinquishment. Therefore, with respect to possible loss of perfected rights, it was not necessary for the PCHB to conduct a "year by year" analysis of historical beneficial use under WSU's water rights. After all, if later nonuse of a previously used and perfected right is excused under an exception to relinquishment, it would be a wasted effort to examine the water use history at that level of detail.¹⁴ That is precisely the logic behind the "simplified tentative determination" suggested in POL 1120.

Cornelius then proceeds to muddle the distinction between determining whether perfected water has been relinquished or abandoned and determining whether any yet non-perfected inchoate water still remains valid. He wrongly asserts that "[r]elying on Ecology's informal process which was premised on a misrepresentation of the MWL, the PCHB failed to investigate WSU's lack of perfection and diligence" To the contrary, with regard to the inchoate portions of WSU's water rights, as explained in Section IV.K, below, the PCHB ascertained that the remaining inchoate quantities under WSU's water rights remained "in good standing" through continued reasonable diligence in developing the educational facilities at WSU. The PCHB's analysis regarding whether WSU has exercised reasonable diligence with respect to its inchoate rights shows the fallacy of Cornelius's contention that WSU's rights were somehow "immunized" from review and automatically deemed valid and eligible for change.

¹⁴ Even if such a "year-by-year" analysis were required, the PCHB had precisely that information and considered it in the summary judgment proceedings. AR 52, Ex. 2. Any gaps in Ecology's analysis were cured by the PCHB's de novo review of annual beneficial use from the 1930s onward.

In sum, the PCHB was not required to do a detailed year-by-year analysis of historical water use since WSU's rights qualify as being for municipal purposes. The PCHB did not err in following the approach outlined in POL 1120 and ruling that the detailed evaluation of historic nonuse is irrelevant with respect to application of the municipal supply exception to relinquishment. The PCHB correctly applied the law in making tentative determinations of WSU's water rights to determine if they were eligible for changes of well locations under RCW 90.44.100.¹⁵

F. The PCHB Correctly Ruled That The Well Locations Under WSU's Partially Perfected Water Right Certificates Could Be Changed Under The Groundwater Amendment Statute, RCW 90.44.100 (Issue No. 3)

The PCHB ruled on summary judgment that the full quantities of WSU's water rights documented by certificates, including inchoate portions, may be amended to add well locations (points of withdrawal) pursuant to the groundwater amendment statute, RCW 90.44.100. (PCHB Issue No. 5, discussed in SJO at 21-27.) Cornelius challenges this ruling, claiming that, under RCW 90.44.100, only inchoate water rights documented by permits—and not certificates—may be amended. This argument fails for two reasons.

First, as discussed in Section IV.C, above, the PCHB correctly ruled that WSU's three water certificates all qualify as rights for municipal supply purposes.¹⁶ Second, since these certificates document municipal water rights, the PCHB correctly decided that the inchoate portions of water under the certificates may be amended under RCW 90.44.100, if the criteria of

¹⁵ Cornelius concludes his argument on this issue by asserting that the PCHB's acceptance of the "simplified determination process" was "predicated on the constitutional error of retroactively re-defining all of WSU's water rights as being for 'municipal supply purposes.'" This argument is rebutted in Section IV.D, above.

¹⁶ Cornelius contends that Certificates Nos. 5070-A and 5072-A do not qualify as rights for municipal supply purposes. See § IV.C, above. However, Cornelius does not contest Certificate No. G3-22065C's status as a municipal water right.

that statute are met.¹⁷ These certificates are subject to RCW 90.03.330(3) because they were issued based on system capacity rather than actual use of water. The PCHB's ruling correctly interprets the interplay among RCW 90.03.330(3), which provides that certificates for municipal rights that were issued based on system capacity are "rights in good standing," RCW 90.03.330(2), providing that water rights certificates for municipal purposes may be subject to diminishment through the water right change process, and RCW 90.44.100 itself.

Cornelius's position on this issue is contrary to the express language of RCW 90.44.100, which provides, in relevant part, that:

After an application to, and upon the issuance by the department of an amendment to the appropriate *permit or certificate* of ground water right, the holder of a valid right to withdraw public groundwaters may, without losing the holder's priority of right, construct wells or other means of withdrawal at a new location in substitution for or in addition to those at the original location, or the holder may change the manner or the place of use of the water.

RCW 90.44.100(1) (emphasis added). The statute authorizes changes of both permits and certificates, and provides no distinction as to the eligibility of water rights documented by permits and certificates for different types of changes. Thus, under the express language of the statute, certificates are eligible for change to the same extent as permits.

Contrary to Cornelius's argument, the Supreme Court's holding in *R.D. Merrill*, 137 Wn.2d 118, does not counter this interpretation. In *R.D. Merrill*, the Supreme Court held that RCW 90.44.100 allows the amendment of an inchoate groundwater right. The *R.D. Merrill* Supreme Court concluded that RCW 90.44.100 authorizes changes of points of withdrawal and places of use (but not purposes of use) of inchoate groundwater rights based on the inclusion of the word "permit" in the statute. *R.D. Merrill*, 137 Wn.2d at 129-30. However, Cornelius

¹⁷ Moreover, with regard to the *perfected* portions of these water rights, Cornelius's contention in the context of this argument that "the PCHB first erred in holding that the MWL converted WSU's previously lost rights into municipal purposes, thus shielding them from loss for prior nonuse [i.e., relinquishment]" is rebutted in Sections IV.C-D of this brief, above.

misconstrues *R.D. Merrill* in contending that the Court held that such authority is limited to permits. There is no pronouncement in *R.D. Merrill* that changes of inchoate water rights documented by certificates are not authorized under RCW 90.44.100.

Cornelius errs in contending that the PCHB “misinterpreted perfection requirements” and “[stood] the essence of *RD* [sic] *Merrill* on its head” when it concluded that RCW 90.44.100 authorizes Ecology to approve changes and transfers of unperfected groundwater rights that are documented by *both* permits and certificates. Cornelius Br. at 29. Cornelius misconstrues the “essence” of the *R.D. Merrill* decision. The essence of *R.D. Merrill* is that RCW 90.03.380’s requirement for prior beneficial use of water does not apply to applications for changes of points of withdrawal and places of use under groundwater rights. And RCW 90.44.100 draws no distinction between permits and certificates with respect to eligibility for changes.

Cornelius is also mistaken in asserting that the PCHB wrongly relied on two appellate decisions that were issued subsequent to *R.D. Merrill*. In *Public Utility District No. 1 of Pend Oreille County*, the Supreme Court pronounced that “[u]nlike the surface water change statute [RCW 90.03.380], the ground water change statute does authorize a change in the place of withdrawal under an unperfected right.” *Pub. Util. Dist. 1 of Pend Oreille Cy.*, 146 Wn.2d at 791-92. This holding does not differentiate between “unperfected rights” documented by permits or certificates; it applies to all unperfected, inchoate groundwater rights. The applicability of the *R.D. Merrill* holding to certificates with inchoate quantities is also supported by the Court of Appeals’ decision in *West Richland v. Department of Ecology*, 124 Wn. App. 683, 103 P.3d 818 (2004). In *West Richland*, the Court held that inchoate groundwater rights can be changed pursuant to RCW 90.44.100, so long as the applicant does not seek to change the purpose of use of the water right. The *West Richland* Court interpreted RCW 90.44.100 and held

that the statute does not authorize changes in purpose of use of inchoate *water rights*. *West Richland*, 124 Wn. App. at 693. *West Richland's* holding related to eligibility for amendments under RCW 90.44.100 is not limited only to permits.

Cornelius wrongly asserts that the PCHB interpreted “in good standing” language in RCW 90.03.330(3) for “pumps and pipes” certificates “to bar revocation of unused water in the change process.” Cornelius Br. at 28-30. To the contrary, the PCHB correctly concluded that Ecology must ascertain whether the inchoate water right remains “in good standing” through good faith and reasonable diligence to develop the project associated with the water right. This is consistent with RCW 90.03.330(2), which provides that, in reviewing an application to change a municipal water right certificate, Ecology may “revoke or diminish” a municipal water right through its tentative determination of the extent and validity of the water right.

RCW 90.03.330 bolsters Ecology’s position that changes can be made to inchoate certificates. RCW 90.03.330(2) provides that Ecology can only “revoke or diminish” municipal water right certificates in certain limited situations, including in the context of amendment applications under RCW 90.44.100. This demonstrates legislative intent that groundwater certificates that authorize inchoate water quantities, which are recognized as being in “good standing” under RCW 90.03.330(3), may be changed pursuant to RCW 90.44.100. RCW 90.03.330(3) acknowledges that, in the past, Ecology erroneously issued water right certificates based on “system capacity” rather than actual beneficial use (when such rights should have remained in the form of permits). It would be nonsensical to limit a water right holder’s ability to change or transfer their right merely because Ecology prematurely issued a certificate to document the right.

In sum, the PCHB correctly concluded that “Ecology has the authority to change the point of withdrawal of the unperfected or inchoate quantities of water rights documented by certificates.” SJO at 23. Cornelius’s argument that RCW 90.44.100 does not authorize changes and transfers of inchoate groundwater rights that are documented by certificates should be rejected. This Court should conclude that this statute authorizes changes of inchoate groundwater rights irrespective of whether they are documented by permits or certificates.

G. The PCHB Correctly Found That Allowing WSU To Change The Well Locations Under Its Water Rights Would Not Allow WSU To Use Any More Water Than It Could Use Without the Changes (Issues Nos. 4, 5, 6, and 7)

Another false premise underlying Cornelius’s arguments on many issues is the notion that allowing WSU to change the points of withdrawal of its water rights will enable it to use more water than if it had to continue exercising its rights without its requested changes. This premise is not supported by the record.

WSU seeks to change the points of withdrawal of six of its water rights, to allow water to be withdrawn under each water right from any or all of WSU’s wells located on its campus.¹⁸ The proposed well consolidation is not necessary for WSU to be able to legally pump its full quantity of water rights. The purpose of the consolidation is to integrate the water rights in WSU’s campus water system. WSU’s applications requested integration of its wells to provide greater efficiency of operation and greater reliability of water service to the campus. AR 22 at 5; AR 23 at 2.

The consolidation involves changing WSU’s six water rights to allow water to be withdrawn under each water right from any or all of WSU’s wells located on its campus. The

¹⁸ WSU historically has withdrawn water from its wells under seven water right documents. At this juncture, six of those water rights are involved in the proposed well consolidation because Ecology denied WSU’s application to change Water Right Claim No. 98524, which is associated with WSU’s Well No. 3. AR 23 at 4, Ex. 1.

consolidation does not increase the amount of water allocated under WSU's water rights and does not increase the maximum pumping rate allowed under each of the rights. It does enable WSU to use its water more efficiently so that a smaller number of modern, reliable wells can supply the water system. AR 23; AR 22. Since 1938, seven wells have been used in WSU's water system. The campus water system is divided into high and low distribution systems to meet pressure control and operational needs. WSU's Wells Nos. 5, 6, and 8 serve the high system. Wells Nos. 5 and 6 are older wells and Well No. 8 is a new well. WSU Wells Nos. 1, 3, 4, and 7 serve the low system. Wells Nos. 1, 3, and 4 are older wells and Well No. 7 is a newer well. WSU proposed to have the newest well on each system (Wells Nos. 7 and 8) become the primary source well for that system, and to have some of the older wells available for backup supply. Presently, if one of the older wells goes out of service the system might not be able to meet the demands imposed upon the system. AR 23 at 2-3.

WSU could pump the full amounts allocated under its water rights without the subject water rights changes if it reconstructs, repairs, or deepens its preexisting wells at their original points of withdrawal, or if it constructs replacement or additional wells at those locations pursuant to RCW 90.44.100(3). AR 23 at 2; AR 51 at 4-5. RCW 90.44.100(3) provides that WSU could construct replacement or new additional wells at the location of its existing wells without submitting an application to Ecology.¹⁹ Thus, while it would be much less efficient and much more expensive to do so than relying on Wells Nos. 7 and 8, WSU could either reconstruct, repair, and deepen each of the wells, or drill replacement wells, at the preexisting point of withdrawal for each water right in order to satisfy future demands on the campus water system. Pumping Wells Nos. 7 and 8 will be more efficient and cost-effective than pumping up

¹⁹ Pursuant to RCW 90.44.100(3), Well No. 8 was constructed as an additional point of withdrawal under Certificate G3-22065C.

to seven wells located at the preexisting points of withdrawal, but WSU could do that if the changes in points of withdrawal are not allowed. AR 51 at 4-5. Thus, Cornelius's contention that WSU's ability to pump its allocated water rights would be limited if the requested changes of points of withdrawal are not allowed is erroneous. Indeed, before the PCHB, Cornelius actually conceded that WSU could fully exercise its water rights without the amendments, by retrofitting or replacing its existing wells. SJO at 44; AR 35 at 7.

For these reasons, Cornelius is mistaken in his view that the consolidation will allow WSU to "pump more water, and that pumping will exacerbate groundwater declines." Cornelius Br. at 33. Indeed, WSU's actual water use has been reduced as a result of its conservation efforts, and not because it needs the changes in point of withdrawal to be enabled to pump its authorized quantities. AR 27 at 3. The reason WSU applied for the consolidation is to attain more flexibility and reliability in operating its water system. AR 22 at 5; AR 51 at 4-5. The record amply demonstrates that the amount of water WSU is allocated to use, and the amount of water WSU will be enabled to use, will not increase as a result of the changes in well locations. AR 23 at 7-8.

H. The PCHB Correctly Ruled That Ecology Complied With The State Environmental Policy Act In Its Review of WSU's Applications (Issues Nos. 4 and 5)

Cornelius contends that Ecology did not comply with the requirements of the State Environmental Policy Act (SEPA), RCW 43.21C, when it relied on the analysis contained in a determination of non-significance (DNS) on the water right applications that was earlier issued by WSU. (PCHB Issue No. 17.) Cornelius maintains that Ecology violated SEPA by not supplementing WSU's earlier SEPA review based on "new information" pertaining to declines of groundwater levels in the Grande Ronde Aquifer. Further, Cornelius contends that the PCHB erred in concluding that no significant environmental impacts could be caused by WSU's

requested changes, based on what Cornelius claims is an underlying erroneous determination that WSU was not enlarging its water rights through the requested changes. Contrary to Cornelius's position, Ecology was not required to supplement WSU's SEPA environmental review documents for two reasons. First, there was no "new information" on the status of the Grand Ronde Aquifer that required Ecology to supplement WSU's SEPA review. Second, WSU's proposed changes in points of withdrawal could not cause any "probable adverse significant environmental impacts" because it cannot enlarge its rights through the changes to pump any more water than it was already authorized to use under its water rights. SJO at 46-49.

Under SEPA, WSU, as the "lead agency," was required to conduct a "threshold determination" to ascertain whether preparation of an environmental impact statement (EIS) was required. WSU issued a DNS indicating that an EIS was not required because, if approved, the water right changes would not cause any significant environmental impacts. AR 22 at 5, Ex. 10. Subsequently, Ecology relied on WSU's DNS and accompanying Environmental Checklist when Ecology evaluated the applications. Reports of Examination (ROE).²⁰

Under SEPA, an agency's threshold determination is entitled to "substantial weight." RCW 43.21C.090; *Kettle Range Conservation Group v. Dep't of Natural Res.*, 120 Wn. App. 434, 455, 85 P.3d 894 (2003). A threshold determination is subject to judicial review under the "clearly erroneous" standard of review. Under this standard, an agency's threshold determination only can be overturned when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *King Cy. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 661-62, 860 P.2d 1024 (1993) (quoting *Norway Hill Pres. & Prot. Ass'n v. King Cy. Coun.*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976); *Chuckanut*

²⁰ The Reports of Examination document Ecology's decisions on WSU's water right change applications. They are attached to the Notice of Appeal, which is listed as document 1 in the PCHB's Index of Record.

Conservancy v. Dep't of Natural Res., 156 Wn. App. 274, 286, 232 P.3d 1145 (2010). In reviewing a SEPA decision under the “clearly erroneous” standard, the reviewing court recognizes and defers to the expertise of the administrative agency. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

SEPA sets out procedural obligations for public entities to analyze and consider environmental values and determine the impacts that proposed governmental actions may have upon those values. A lead agency reviewing a proposal must make a threshold determination by reviewing the environmental checklist and associated documents to determine if the proposal is likely to have a probable significant adverse environmental impact. WAC 197-11-330. “Significant” is defined as “a reasonable likelihood of more than a moderate adverse impact on environmental quality.” WAC 197-11-794. If it is determined that the proposed action will have no probable significant, adverse environmental impacts, a DNS is issued. WAC 197-11-340.

WAC 197-11-600(3) prescribes that “[a]ny agency acting on the same proposal shall use an environmental document unchanged,” except in specified circumstances. Under WAC 197-11-600(3)(b)(ii), the availability of new information indicating that a proposal will have probable significant adverse environmental impacts will, under certain circumstances, require that a new threshold determination be prepared.

WAC 197-11-600(3)(b)(ii) provides that:

(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.

Under this rule, Cornelius alleges that the DNS and Environmental Checklist suffer from a “lack of material disclosure” because they contain no discussion about impacts Cornelius

mistakenly believes the well consolidation would cause to groundwater in the Grand Ronde Aquifer. It is uncontested that the aquifer has been in a state of decline, and that WSU and Ecology were aware that the aquifer level is declining. Nonetheless, Cornelius asserts that “the undisclosed ‘new information’ was the exacerbation of those declines WSU’s increased pumping capacity would cause.” Cornelius Br. at 33.

This contention is meritless. As Cornelius acknowledged, WSU and Ecology had been working with the Palouse Basin Aquifer Committee, and were aware of the decline in water levels in the aquifer.²¹ AR 17 at 12. There was no “material non-disclosure” by WSU in that regard. Further, nothing had changed factually between the time when the DNS was issued by WSU and when Ecology prepared the decisions on the change applications that could have caused Ecology to determine that there was new information requiring it to make a new threshold determination. Since no “new information” was disclosed, WAC 197-11-600(3)(b)(ii) was not triggered and Ecology did not need to make a new threshold determination. AR 36.

Cornelius also wrongly contends that Ecology did not adequately consider how the environment would be impacted by the amendments, and that “whether quantities to be withdrawn were authorized by WSU’s original water rights is irrelevant to consideration of environmental impacts of proposed agency action.” Cornelius Br. at 33. In fact, Ecology properly determined that there would be no impact in comparison to the status quo prior to the changes, and, thus, that the water right changes would not cause any probable significant environmental impacts on the aquifer. AR 36 at 2. That is because the water rights changes do not allow any more water to be withdrawn on an instantaneous or annual basis than is presently allowed under the subject water rights. AR 23 at 8. Moreover, as explained in Section IV.G,

²¹ The Palouse Basin Aquifer Committee is an organization that was formed to address the decline of water levels in the Grand Ronde Aquifer.

above, the changes will not enable WSU to use more water than they would use without the requested changes of points of withdrawal. For these reasons, Cornelius is mistaken in his view that the consolidation will allow WSU to “pump more water, and that pumping will exacerbate groundwater declines.” Cornelius Br. at 33.

As such, Ecology properly complied with SEPA when it relied on WSU’s DNS and Environmental Checklist. Ecology reviewed those documents, found them adequate under SEPA, and found no “new information” under WAC 197-11-600(3)(b)(ii) that indicated that any “probable significant adverse environmental impact” to the environment had surfaced after WSU had prepared its SEPA documents. This summary judgment ruling by the PCHB should be affirmed because Cornelius cannot meet his burden to show it was “clearly erroneous.”

I. The PCHB Correctly Interpreted And Applied Water Code Provisions Requiring Consideration Of Impairment And Detriment To The Public Welfare In The Context Of The Changes To WSU’s Water Rights (Issue No. 6)

Ecology adopts and incorporates by reference WSU’s argument on this issue. WSU Response Br., § IV.D.

J. The PCHB Correctly Interpreted And Applied The “Safe Sustaining Yield” Provisions Of RCW 90.44.130 (Issues Nos. 7 and 8)

Cornelius challenges the PCHB’s ruling on PCHB Issue No. 13, which asked whether the water right change approvals would unlawfully deplete the Grande Ronde Aquifer. The PCHB ruled in favor of WSU on summary judgment on this issue based on its correct determination that Ecology was not required to perform an analysis to ascertain the “safe sustaining yield” of the aquifer under RCW 90.44.130. SJO at 43-45.

Cornelius asserts that the PCHB erred when it ruled that RCW 90.44.130 can apply in evaluation of applications for new groundwater permits, but not during evaluations of applications for changes of preexisting groundwater rights. Cornelius argues that, under the

terms of RCW 90.44.130, Ecology should have used the opportunity created by the review of the change applications to limit WSU's withdrawals from the Grand Ronde Aquifer in order to enforce the maintenance of a "safe sustaining yield" of groundwater. Cornelius Br. at 35-37. These arguments fail.

Cornelius first contends that the PCHB erred on this issue by ruling in the context of other issues that WSU still retains its original water rights, and that the change approvals would not cause "enlargement" of those rights in a manner that would cause adverse physical impacts. Cornelius Br. at 35-37. These contentions are rebutted above.²²

Moreover, Cornelius misreads the statute. RCW 90.44.130 operates to carry out three objectives. In the first sentence, the statute reiterates the principle of prior appropriation by mandating that a prior appropriator of water will have priority over any subsequent appropriator. The second sentence affords Ecology the jurisdiction to administer groundwater rights under the principle in the first sentence, by assuring a "safe sustaining yield" so that senior appropriators will be able to satisfactorily exercise their water rights. The rest of the statute, beginning with the third sentence, authorizes Ecology to establish groundwater areas or sub-areas in different parts of the state, in order to accomplish the objectives of the first two sentences.

Cornelius misinterprets the operation of the first two sentences of RCW 90.44.130 to support his argument that RCW 90.44.130 applies to both applications for new water right permits and changes of existing water rights, and not just to decisions pertaining to new permits.

The first sentence of RCW 90.44.130 provides:

As between appropriators of public groundwater, the prior appropriator shall as against subsequent appropriators from the same groundwater body be entitled to

²² Essentially, Cornelius claims that the changes for WSU's water rights will cause a greater decline to water levels in the Grand Ronde Aquifer than could occur without the changes, and that, therefore, Ecology is required to evaluate the "safe sustaining yield." Cornelius is mistaken because, even if, *arguendo*, RCW 90.44.130 applied to a change evaluation, WSU could fully exercise its water rights without the well consolidation authorized through the changes. See § IV.G, above.

the preferred use of such groundwater to the extent of his appropriation and beneficial use, and shall enjoy the right to have any withdrawals by a subsequent appropriator of groundwater limited to an amount that will maintain and provide a safe sustaining yield in the amount of the prior appropriation.

The PCHB correctly inferred that the first sentence applies only to the establishment of new water rights. This sentence mandates that prior appropriators are preferred over subsequent appropriators, obviously referring to the decision-making process where Ecology must determine if the allocation of additional water will interfere with the water rights held by “prior appropriators” (i.e., senior water right holders). That is the process relating to applications for new water right permits.

Applications for new water permits are governed by RCW 90.03.290, which is made applicable to groundwater permit applications through RCW 90.44.060. RCW 90.03.290 requires Ecology to make four determinations before it may issue a new water permit: (1) whether water is available; (2) whether there would be beneficial use; (3) whether the appropriation will impair existing water rights; and (4) whether the appropriation will detrimentally affect the public welfare. The “safe sustaining yield” mandate in RCW 90.44.130 may affect Ecology’s analysis with respect to determinations (1) and (3), whether water is available for a new appropriation, and whether a new appropriation would impair other existing water rights.²³

The second sentence of RCW 90.44.130 provides:

The department shall have jurisdiction over the withdrawals of groundwater and shall administer the groundwater rights under the principle just set forth, and it shall have the jurisdiction to limit withdrawals by appropriators of groundwater so as to enforce the maintenance of a safe sustaining yield from the groundwater body.

²³ For instance, the groundwater areas or subareas established under the third sentence of the statute may be affected by conditions that would state that water for new permits is either unavailable or limited.

Cornelius erroneously argues that this sentence mandates Ecology to evaluate safe sustaining yield at all times, including when evaluating an application for change of an existing water right. Cornelius Br. at 44. But evaluating availability of water in the context of changes to existing water rights is subject to a different test than the test for evaluating applications for new rights.

Water rights changes are governed by RCW 90.03.380, and in this case are more specifically governed by the change provision of the Groundwater Code, RCW 90.44.100. RCW 90.44.100(2) requires “findings as prescribed in the case of an original application,” which triggers the requirement to meet the four-part test under RCW 90.03.290, discussed above. *R.D. Merrill*, 137 Wn.2d at 132. However, the availability test pertaining to changes to water rights differs from the availability test used when evaluating a new water right. In the context of changes, the availability determination is based on the time the holder of the water right applied for the water right, not the time at which the change is sought. *R.D. Merrill*, 137 Wn.2d at 132. As such, RCW 90.44.130 is not applicable with respect to the availability analysis under RCW 90.44.100. Further, RCW 90.44.130 is not applicable to the impairment analysis in the context of groundwater right changes under RCW 90.44.100 because RCW 90.44.130 operates to protect existing appropriators from “subsequent appropriators,” an analysis which, by its nature, is only germane to evaluation of new applications that could establish rights for “subsequent appropriators” (i.e., junior water users).

Cornelius asserts that RCW 90.44.130 can apply during evaluation of water right change applications because “the statute can apply only after water rights are issued.” Cornelius Br. at 36. This argument is flawed because the “subsequent appropriators” that RCW 90.44.130 is designed to protect could only be those who seek new appropriations of water, i.e., applicants for new water permits. However, even if Cornelius is correct that the statute can apply “only after

new rights are issued,” his argument would still fail. If the statute provides a basis for enforcement between existing water rights, to ensure that a senior appropriator can get his or her full share of water, such enforcement would occur when Ecology determines that use of water by a junior water right holder would cause impairment of the senior. RCW 90.44.100 already requires that Ecology deny or condition a groundwater right amendment if it would cause impairment of other existing water rights, and RCW 90.44.130 does not add to or subtract from that requirement.

Cornelius also wrongly contends that RCW 90.44.130 must be applied during review of WSU’s applications because “the MWL did not amend RCW 90.44.130 to exempt municipal water rights.” Cornelius Br. at 37. By the same token, no provision of the MWL expressly requires that RCW 90.44.130 must be applied during evaluation of applications to change water rights that are for municipal supply. Applications for changes of municipal groundwater rights are subject to the requirements of RCW 90.44.100, just like all other groundwater right change applications. RCW 90.44.100 expressly does not include any requirement for Ecology to apply RCW 90.44.130 when evaluating applications for change, and the language of both RCW 90.44.100 and .130 do not support any such requirement by implication. Cornelius has cited no authority requiring that Ecology must apply RCW 90.44.130 when reviewing change requests. This is because there is none.

In summary, the PCHB correctly ruled on summary judgment that the WSU water rights changes will not unlawfully deplete the Grande Ronde Aquifer and that RCW 90.44.130 only applies when Ecology is evaluating applications for new groundwater rights.

K. WSU's Inchoate Water Rights Are Valid Because WSU Has Exercised Reasonable Diligence In Developing Its Campus Facilities And Putting Its Rights To Beneficial Use (Issue No. 9)

Cornelius challenges the PCHB's summary judgment ruling on PCHB Issue No. 5 and contends that the inchoate portions of WSU's water rights are invalid and not eligible for change. Contrary to Cornelius's argument, the PCHB correctly ruled that the inchoate portions of WSU's water rights remain in good standing, and are valid for change, because WSU has exercised good faith and reasonable diligence in growing into its inchoate rights through the ongoing development of its campus facilities. SJO at 21-27.

In this case, three of the seven water rights WSU sought to change are documented by certificates, and one is documented by a permit. The three water right certificates are Certificate Nos. 5070-A, 5072-A, and G3-22065C. While all three of these certificates include some water quantity that has been perfected through actual beneficial use, they each also contain some inchoate water quantity that has not yet been developed through actual use. AR 27 at 2. For Certificate No. 5070-A, Well No. 4 has been pumped to provide water for municipal supply purposes, although the annual water use has not historically reached the maximum annual quantity specified on the certificate, which is 2,260 acre-feet per year. *Id.* For Certificate No. 5072-A, Well No. 5 has been pumped to provide water for municipal supply purposes, although the annual water use has not historically reached the maximum quantity specified on the certificate, 720 acre-feet per year. *Id.* For Certificate No. G3-22065C, Wells Nos. 6 and 8 have been pumped to provide water for municipal supply purposes, although the annual water use has not historically reached 1,600 acre-feet per year, the maximum quantity specified on the certificate. *Id.* Thus, these are "pumps and pipes" certificates that include portions of water that remain inchoate.

Because these three water rights are documented by “pumps and pipes” certificates, applications for change of these rights are evaluated pursuant to RCW 90.44.100 by applying RCW 90.03.330(2)-(3). As explained above, RCW 90.44.100 requires a determination of whether a groundwater right is valid when a change is sought, and RCW 90.03.330(2) authorizes Ecology to determine whether a “pumps and pipes” groundwater certificate with inchoate water quantity is valid for change when it evaluates a change application.

Moreover, under Permit No. G3-28278, Well No. 7 has been pumped to provide water for municipal supply purposes, although the annual water use has not historically reached the maximum quantity specified on the permit. AR 27 at 2-3.²⁴ As a result, Ecology was also required to determine whether there is valid inchoate water quantity remaining that is eligible for change under that permit by ascertaining whether conditions in the permit are being met, including whether there is time remaining in its development schedule.²⁵

Thus, in performing tentative determinations of the extent and validity of WSU’s rights, Ecology was required to ascertain whether the remaining inchoate quantities of water under WSU’s water rights that are documented by the three certificates and one permit are valid and, thus, eligible for change.

RCW 90.03.460 provides that “[n]othing [in the Water Code] shall operate to effect an impairment of any inchoate right to divert and use water *while the application of the water in question to a beneficial use is being prosecuted with reasonable diligence*, having due regard to the circumstances surrounding the enterprise. . . .” (Emphasis added). RCW 90.03.320 provides the “reasonable diligence” standard for inchoate water rights documented by permits, and also

²⁴ Under RCW 90.03.330(4), a certificate cannot be issued for this water right until such time as proof of appropriation is provided by WSU to Ecology based on actual beneficial use of water.

²⁵ With respect to WSU’s water rights that are documented by statements of claims, for Claim Nos. 098522 and 098523, the maximum annual water use historically exceeded the maximum quantity specified on both statements of claim. Thus, there is no inchoate water quantity remaining under either of these claims. AR 27 at 2.

applies to prematurely issued “pumps and pipes” certificates. This statute provides, in relevant part, as follows:

Actual construction work shall be commenced on any project for which permit has been granted within such reasonable time as shall be prescribed by the department, and shall thereafter be prosecuted with diligence and completed within the time prescribed by the department. The department, in fixing the time for the commencement of the work, or for the completion thereof and the application of the water to the beneficial use prescribed in the permit, shall take into consideration the cost and magnitude of the project and the engineering and physical features to be encountered, *and shall allow such time as shall be reasonable and just under the conditions then existing, having due regard for the public welfare and public interests affected.* For good cause shown, the department shall extend the time or times fixed as aforesaid, and shall grant such further period or periods as may be reasonably necessary, having due regard to the good faith of the applicant and the public interests affected. . . . *In fixing construction schedules and the time, or extension of time, for application of water to beneficial use for municipal water supply purposes, the department shall also take into consideration . . . delays that may result from planned and existing conservation and water use efficiency measures implemented by the public water system. . . .*

RCW 90.03.320 (emphasis added).

The PCHB correctly recognized that reasonable diligence must depend to a large extent upon the circumstances, should be based on a flexible standard because “[j]urisdictions grow at uneven rates and need to be able to serve their growing populations,” and that “water conservation by governmental entities might be discouraged by the imposition of rigid timelines for putting water to beneficial use.” SJO at 26. This reasoning is supported by the directive that “in fixing construction schedules and the time, or extension of time, for application of water to beneficial use for municipal water supply purposes, the department shall also take into consideration . . . delays that may result from planned and existing conservation and water use efficiency measures implemented by the public water system. . . .” RCW 90.03.320. Cornelius’s assertion that the PCHB erroneously based its ruling on the concept that “municipal water suppliers are entitled to flexibility” fails. Cornelius Br. at 39.

Cornelius also wrongly contends “there is no evidence indicating WSU met the legal requirements for reasonable diligence.” Cornelius Br. at 37. With respect to Certificates Nos. 5070-A, 5072-A, and G3-22065C, the record amply supports the PCHB’s determination that all three of the water rights are “rights in good standing” under RCW 90.03.330(3), and that WSU can lawfully exercise its remaining inchoate annual quantities in the future.²⁶ WSU has continued to grow over time by increasing the number of students it serves and developing additional campus facilities. Notwithstanding this growth, WSU’s water use has actually declined over the recent past because it has employed water conservation measures. AR 27 at 3; ROE. However, conservation does not justify the diminution of WSU’s water rights, because it has continued to show reasonable diligence by developing its facilities and providing educational opportunities for more students. *See* AR 28, Ex. 3.

Cornelius’s emphasis that the “reasonable diligence” standard stems from the anti-speculation policy that “is driven by the tension between water availability and ever-increasing demand for water” is inapposite. Cornelius Br. at 39. The record demonstrates that WSU has not engaged in any speculation with these water rights because it has exclusively exercised them to serve its campus in Pullman, has not marketed them for use elsewhere, and has no plans to market them for use by other entities on different property. AR 27 at 3; AR 28, Ex. 3. WSU only wants to retain its remaining inchoate water quantities to be able to serve further campus development should the legislature prescribe such activity in the future.

The PCHB properly deferred to “Ecology’s judgment that WSU is exercising good faith and due diligence in exercising its inchoate water rights by developing facilities and increasing

²⁶ As the appellant before the PCHB, Cornelius bore the burden of establishing that WSU had not exercised reasonable diligence in developing its water rights. WSU moved for summary judgment arguing that Cornelius could not establish lack of reasonable diligence. Cornelius failed to rebut that motion by raising any disputed issue of material fact with respect to WSU’s diligence. The PCHB correctly granted summary judgment to WSU on this issue in accordance with CR 56.

the enrollment of students.” SJO at 25. Cornelius erroneously argues that under *Port of Seattle*, 151 Wn.2d 568, deference should not be afforded to Ecology here because its “interpretations conflict with the plain language of a statute.” Cornelius errs in contending that unique circumstances facing an institution like WSU cannot be considered in assessing the public interests and determining whether inchoate rights are being developed in good faith.

RCW 90.03.320 provides that inchoate water rights may be developed within “such time as shall be reasonable and just under the conditions then existing, having due regard for the public welfare and public interests affected” so long as the water right holder acts “in good faith.” The record reflects that WSU has exercised good faith in exercising its inchoate water rights, and that public interests support WSU’s retention of inchoate water quantities to be used in the future should the legislature decide to increase enrollment or expand programs at WSU. The circumstances affecting WSU’s potential growth are unique because the potential future need for WSU to exercise inchoate water rights are determined by the legislature through its decisions on how much funding to appropriate to WSU based on state tax revenues, higher education policies, and other factors. Thus, the PCHB correctly upheld Ecology’s determination not to diminish any of the maximum water quantities authorized under Certificates Nos. 5070-A, 5072-A, and G3-22065C, and Permit No. G3-28278P.

L. The PCHB Correctly Ruled That WSU’s Water Right Claim No. 098523 Was Not Abandoned (Issue No. 10)

Ecology adopts and incorporates by reference WSU’s argument on this issue. WSU Response Br., § IV.G.

M. The PCHB Correctly Interpreted And Applied The Law Regarding Beneficial Use In Rejecting Cornelius's "Reasonable Efficiency" Claim Related To WSU's Irrigation Of Its Golf Course (Issues Nos. 11 and 12)

Ecology adopts and incorporates by reference WSU's argument on this issue. WSU Response Br., § IV.H.

N. The PCHB Correctly Affirmed The Amendment Of WSU's Water Right Permit No. G3-28278P (Issue No. 13)

Cornelius asks this Court to reverse the PCHB's ruling on PCHB Issue No. 7, based on the evidentiary hearing record, that WSU's Permit No. G3-28278P was valid for change notwithstanding that it is "supplemental" to Claim No. 98524, which Ecology determined was invalid. *See* Final Order at 30-31. Cornelius wrongly asserts that a portion of the instantaneous water quantity authorized under Permit No. G3-28278P must be subtracted as a result of the invalidity of Claim No. 98524. This argument fails because Cornelius misreads the actual language contained in Permit No. G3-28278P.

On this issue, the PCHB correctly determined the maximum instantaneous quantity attributed to this water right based on the provisions in the original permit. Permit No. G3-28278P includes the following specifications:

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

AR 22, Ex. 7. Cornelius's argument that the maximum instantaneous quantity authorized under this permit should be reduced from 2,500 gallons per minute (gpm) to 2,000 gpm fails because there is no provision in the original permit issued in 1989 that mandates such a result.

Permit No. G3-28278P includes the following provision:

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.

AR 22, Ex. 7 (emphasis added).

Cornelius erroneously asserts that 500 gpm should be reduced from the maximum instantaneous quantity authorized under this permit because Ecology denied WSU's application to change Claim No. 98524 on the ground that it was not valid for change. Cornelius contends that the permit is "legally dependent on three pre-existing rights [including Claim No. 98524] as a basis for its existence and authorized quantities." Cornelius Br. at 48. This argument must be rejected because it ignores the plain language of the controlling provision within Permit No. G3-28278P. In effect, the above-quoted provision states that the *total* combined quantity for Permit No. G3-28278P, Certificate No. 5070-A, Claim No. 98522, and Claim No. 98524 *shall not exceed* 2,500 gpm and 2,260 acre-feet per year. 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. 98522, or Claim No. 98524 become invalid. The provision simply imposes an aggregate cap on the maximum amount of water that can be withdrawn under the four water rights, but does not require that any quantities be reduced should Certificate No. 5070-A, Claim No. 98522, or Claim No. 98524 become invalid.

Cornelius's argument is based on language in the original ROE for Permit No. G3-28278P stating that the permit is "supplemental" to the other three water rights:

The applicant is advised that, consistent with the expressed intent, any authorization made pursuant to this application will be for supplemental supply

only. The waters to be appropriated from Well No. 7 will serve to replace, as necessary, those waters originally authorized or claimed for appropriation from Wells Nos. 1, 3 and 4.

AR 18, Att. 9. The term “supplemental” in the context of this ROE indicates that the permit is intended to provide an alternate source to tap the water quantities “authorized or claimed” under the three other water rights. There is no indication of any intent that the authorized quantity would be reduced should any of the underlying three water rights become invalid.²⁷

Much confusion has been generated over the use of the term “supplemental” in the context of water rights management. This has caused Ecology to determine that the “term supplemental should no longer be used, because of its historic ambiguity.” AR 37, Ex. 1. In some situations, the term “supplemental” has been used to indicate that a water right cannot be exercised when the primary right is not valid. These situations are when the term has been used to mean that a water right is “supplemental” or is “standby/reserve” to a “primary” water right. *See id.* at 3. However, in other situations, the term “supplemental” has been used in a manner that does not require that a water right cannot be exercised when another referenced water right is not valid. These situations are when the term has been used to mean that a water right is “non-additive” to the quantities authorized under earlier-issued associated water rights, or is an “alternate” to other associated rights. *Id.* at 3.

The PCHB’s conclusions on this issue are amply supported by the hearing record. The PCHB correctly concluded that the inclusion of the term “supplemental” in Permit No. G3-28278P was intended to indicate that Well No. 7 provides an “alternate” source of water

²⁷ The ROE acknowledges that Ecology lacked authority when it processed the original application for Permit No. G3-28278P to make any determinations as to the validity of the claimed water rights, including Claim No. 98524, and there is no language in the ROE stating that the total combined withdrawal under Permit No. G3-28278P and the other referenced water rights would be reduced in the event that a determination is ultimately made that one of those other rights is invalid: “[i]t is noted that although the preponderance of the evidence appears to support the integrity of the claims, the final determination of their validity can only be determined by the Whitman County Superior Court. . . .” AR 18, Ex. 9.

for WSU for up to 2,500 gpm less any instantaneous quantity withdrawn under the other three water rights. The term “supplemental” was included to communicate that the instantaneous quantity of 2,500 gpm is not “additive” to the instantaneous quantities authorized under the other three water rights. Thus, for Permit No. G3-28278P, the term “supplemental” indicates that 2,500 gpm cannot be added to the instantaneous quantities specified under the other three rights, but it does not mandate that the quantity must be reduced from 2,500 gpm should it become impossible to exercise one or more of those rights. Further, the PCHB correctly concluded that Permit No. G3-28278P is a separate water right with its own priority date, to ensure a reliable source of supply for WSU’s campus, and, as a result, its validity was not dependent upon the continued validity of WSU’s earlier established rights.

V. CONCLUSION

Based on the foregoing, Ecology respectfully requests the Court to uphold the approvals of WSU’s water right change applications by affirming the PCHB’s Order on Summary Judgment, and Findings of Facts, Conclusions of Law and Order. Moreover, the Court should deny Cornelius’s request for attorneys’ fees.

RESPECTFULLY SUBMITTED this 12th day of April, 2012.

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