FILED

APR 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 304701

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENT WASHINGTON STATE UNIVERSITY

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I. INTRODUCTION

In this APA appeal, the Petitioners Scott Cornelius, Palouse Water Conservation Network, and Sierra Club Palouse Group (hereinafter referred to collectively as "Cornelius") seek reversal of orders entered by the Pollution Control Hearings Board ("PCHB") in *Cornelius et al. v. Washington Department of Ecology, et al.*, PCHB No. 06-099 ("PCHB Appeal").[1] Cornelius seeks to prevent Washington State University ("WSU") from exercising its legitimate and valid water rights now and in the future.

In the PCHB Appeal, the PCHB affirmed changes to six water rights to allow integration and consolidation of the groundwater rights held by WSU for its water system serving its main campus located in the City of Pullman, Washington. Specifically, Ecology allowed WSU to withdraw water under each of six water rights from any of seven wells on the WSU Pullman Campus.

The changes to the WSU water rights do not increase the total amount of water allocated or the maximum pumping rate allowed under the University's water rights. Nor do they alter WSU's actual use of water. They simply enable WSU to operate its Pullman Campus water system efficiently, reliably, and cost-effectively, by concentrating its water withdrawals so that a smaller number of modern, reliable wells can supply the system. In lieu of the well integration approved in the PCHB Appeal, WSU could – albeit at far greater cost – repair or replace individual wells and continue to develop and exercise its water rights to their fullest extent.

Cornelius incorrectly uses the PCHB's decision to attack the 2003 municipal water law, Laws 2003, 1st Spec. Sess., ch. 5 ("MWL"). Cornelius' so-called "as applied" challenge to

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[1] The PCHB's administrative record consists of a four-volume written record (cited herein as "AR" followed by the number assigned in the PCHB Index of Record), the verbatim transcript of the hearing held on January 22-23 and 31, 2008 (cited herein as "Tr."), and two binders of hearing exhibits (cited herein as "Ex.").

specific provisions of the MWL is without merit. Washington State University respectfully urges this Court to affirm the PCHB decisions below.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1A. In *Lummi Indian Nation v. State of Washington*, the Supreme Court upheld the 2003 Municipal Water Law (MWL) against a facial challenge based on separation of powers and due process, holding that RCW 90.03.330(3) – in which the Legislature declared that certain water right certificates issued based on system capacity prior to *Ecology v. Theodoratus* are rights in good standing – did not affect the rights of parties to the court's judgment in *Theodoratus*, interfere with any judicial function, usurp the judicial fact-finding role, or deprive any junior water rights holder of any vested property right as a matter of law. Is the PCHB's application of RCW 90.03.330(3) consistent with separation of powers and due process, where the PCHB determined that water right certificates owned by WSU and used in its Pullman Campus water system are rights in good standing? (Cornelius Issue No. 1)

1B. In *Lummi Indian Nation v. State of Washington*, the Supreme Court upheld RCW 90.03.015(3) and (4) against a facial challenge based on separation of powers and due process, holding that the Legislature's definition of "municipal water supply purposes" and "municipal water supplier" – terms that had previously been statutorily undefined – did not affect the rights of parties to the court's judgment in *Theodoratus*, interfere with any judicial function, usurp the judicial fact-finding role, or deprive any junior water rights holder of any vested property right as a matter of law. Is the PCHB's application of RCW 90.03.015(3) and (4) consistent with separation of powers and due process, where the PCHB determined that water rights owned by WSU and used in its Pullman Campus water system are exempt from relinquishment as rights claimed for municipal water supply purposes? (Cornelius Issue No. 1)

As to the remaining issues, WSU adopts and incorporates the Restatement of Issues set forth in the Department of Ecology's Response Brief ("Ecology's Response").

III. STATEMENT OF THE CASE

A. Factual Background

1. The Washington State University Pullman Campus water system

Washington State University ("WSU"), established in 1890 as the State's land grant institution, is ranked among the nation's top sixty public research institutions. AR 49 at 1-2. WSU is a governmental entity, established under state law as a state university and institution of higher education (RCW 28B.10.016(1) and (4)), and governed by a Board of Regents (RCW 28B.30.095; RCW 28B.30.150). *See generally* RCW chapter 28B.30. As a state university, WSU is subject to the State of Washington's policy that higher education enrollments be increased in increments each biennium. *See* RCW 28B.10.782.

WSU's primary campus is located within the city limits of the City of Pullman.[2] Ex. R-64-A. Although it is located within the City of Pullman, WSU operates its own independent water system serving its Pullman Campus. The campus water system is supplied solely by groundwater wells, with the exception of an emergency intertie with the City of Pullman water system.

Beginning in the 1930's, WSU has drilled and operated eight supply wells within the Pullman Campus water system. AR 22 at 2-3. Water from each well has been pumped into one integrated water system divided into two zones, a high level zone and a low level zone. AR 22 at 2. Well Nos. 1, 3, 4, and 7 are located in the low distribution zone; Well No. 7 is the newest of

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[2] WSU operates several other facilities in Whitman County outside of Pullman, including the Tula Young Hastings Farms, Spillman Farm, Cunningham Farm, Smoot Hill, Wawawai, and the Palouse Conservation Research Station. Ex. R-64-A. Water rights for those other facilities are not at issue here. The only water rights at issue in this appeal are those held for WSU's Pullman Campus. AR 52 at 2-3.

those wells. Well Nos. 5, 6, and 8 are located in the high distribution zone; Well No. 8 is the newest of those wells. AR 52, Ex. 1; AR 23 at 2; AR 37 at 3; AR 1, Reports of Examination at 3.[3] A transfer station pumps water from the low zone to the high zone. AR 22 at 2. The water system's network of distribution lines totals approximately 25 miles in length. *Id.*

Over time, WSU has consolidated its well operations to concentrate pumping in a smaller number of wells, shifting its pumping away from older wells as newer wells were brought on-line. AR 23 at 2, 8; AR 31, Att. 1 at 23; AR 52, Ex. 2. WSU's water withdrawals from individual wells have not historically matched the quantities authorized under its water rights for those wells. AR 23 at 2; AR 52, Ex. 2. WSU did not obtain authorization from Ecology or its predecessor agencies for this system integration, i.e., for additional points of withdrawal (well locations) under its water rights. AR 23 at 2-3. In recent years, only three wells, Nos. 6, 7, and 8, have supplied all the water for the system; the remaining wells are decommissioned, inactive, or used for standby or emergency supply. AR 22 at 2-3.

WSU identified Well Nos. 1 through 7 in its 1994 Water System Plan for the Pullman Campus water system. AR 51, Ex. 2. In its 2002 Water System Plan, WSU identified Well Nos. 4 and 5 as "supplemental" wells, Well Nos. 6 and 7 as "primary" wells, Well Nos. 1 and 3 as "inactive" wells, and Well No. 2 as "abandoned". AR 18, Att. 4 at 37. WSU listed each water right associated with Well Nos. 1 through 7 in its table of "current" water rights in 2002. *Id.* In its table of "forecasted water rights status" in its 2002 Water System Plan, WSU identified Well Nos. 7 and 8 as "primary" wells, Well Nos. 4 and 6 as "supplemental" wells, Well Nos. 1, 3, and 5 as "inactive" and Well No. 2 as "abandoned". AR 18, Att. 4 at 38. WSU listed all the water

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[3] Ecology's Reports of Examination (the decisions appealed to the PCHB in this case) are unnumbered attachments to Cornelius' Notice of Appeal, AR 1. *See also* Exs. R-1, R-2, A-7, A-13, A-19, and A-24.

rights for Well Nos. 1 through 7, as well as a future water right for Well No. 8, in its table of "forecasted" water rights in its 2002 Water System Plan. *Id.*

For decades, WSU has provided on-campus residential housing for students at its Pullman Campus. AR 49 at 2; AR 53. In the fall of 2007, WSU's on-campus housing consisted of residence halls with a capacity of 4,650 residents, and apartment complexes with a capacity of 1,853 bedrooms. AR 53, Exs. 1, 2. In 2007, the WSU Pullman Campus water system had 4,215 service connections, including 3965 residential units in 156 buildings. AR 22 at 2 and Ex. 11.

2. The Palouse Basin and WSU's water conservation program

Groundwater is the primary source of water for WSU, the University of Idaho, the City of Pullman, the City of Moscow, and the surrounding areas of Whitman County, Washington and Latah County, Idaho. Groundwater in the Palouse Basin is pumped from two basalt aquifer systems. The primary municipal drinking water source is the deeper aquifer known as the Grande Ronde. After groundwater development began in the late 1890's, groundwater pumping increased steadily while the basalt aquifers in the Palouse Basin experienced consistent annual water level declines. CP 415 (Palouse Basin Aquifer Committee ("PBAC") 1999 Report at i).[4] Concern over declining groundwater levels led to the formation of the PBAC (formerly called the Pullman-Moscow Water Resources Committee) in 1967. CP 422-23.

In a Groundwater Management Plan for the Palouse Basin adopted in 1992, each of the four major groundwater suppliers (WSU, University of Idaho, City of Pullman, and City of Moscow) committed to individual action plans to reduce the impact of their groundwater

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[4] The PBAC 1999 Report is an exhibit to the Declaration of Sarah E. Mack in Support of Washington State University's Motion for Partial Summary Judgment ("Mack Declaration"), submitted to the PCHB on August 28, 2007. Although not separately numbered in the PCHB's Index of Record, the Mack Declaration was part of the record considered by the PCHB in its summary judgment rulings. AR 85 at 2. The Mack Declaration is included in the Clerk's Papers as an appendix to the Response Brief of Washington State University filed in the Superior Court. CP 412.

pumping on the aquifer. CP 423-24. Each water supplier agreed to voluntary pumping limits, including limits on annual percentage increases and an absolute pumping limit. CP 432. In 2005, WSU pumped far less than its voluntarily-agreed-upon pumping ceiling of 877 million gallons. CP 474 (PBAC 2002-2005 Report). In 2005, WSU's annual pumping, calculated as a five-year moving average, was also well below its voluntarily-agreed-upon annual target of 738 million gallons. CP 473. WSU's water use in 2005 was substantially reduced below the amount it used in 1992, the year the Groundwater Management Plan was adopted. CP 474.

3. Development and use of WSU's wells and water rights on the Pullman Campus

a. Well Nos. 1, 2, and 3 (Claim Nos. 098522, 098523, and 098524)

WSU's Well No. 1 was constructed prior to 1945 (the date of enactment of the state groundwater code, RCW chapter 90.44). This well is covered by Water Right Claim No. 098522, filed by WSU in 1974. Claim No. 098522 asserts a priority date of 1934 for municipal supply, irrigation, and stock, a maximum instantaneous quantity of 500 gallons per minute, and a maximum annual quantity of 720 acre-feet. AR 23 at 3; AR 22, Ex. 1.

WSU's Well No. 2 was also drilled prior to 1945. Water Right Claim No. 098523, filed in 1974, asserts a priority date of 1938 for municipal supply, irrigation, and stock, a maximum instantaneous quantity of 500 gallons per minute, and a maximum annual quantity of 720 acre-feet per year. AR 23 at 3; AR 22, Ex. 2. Well No. 2 is located in close proximity to Well No. 1. AR 51 at 3. Well No. 2 was taken out of service in 1978 because of a misaligned hole and low water level, and was decommissioned in 1995. AR 22 at 4 and Ex. 8; AR 51 at 2-3.

WSU drilled Well No. 3 in 1946, after enactment of the groundwater code, RCW chapter 90.44, apparently without obtaining a permit. Water Right Claim No. 98524, also filed by WSU in 1974, claimed a maximum instantaneous quantity of 1000 gallons per minute and a maximum

annual quantity of 1,440 acre-feet from Well No. 3. AR 22, Ex. 3. The claimed purposes for Well No. 3 are the same purposes claimed for Well Nos. 1 and 2. The claimed instantaneous and annual quantities for Well No. 3 match precisely the combined quantities claimed for Well Nos. 1 and 2. AR 23 at 3-4.

Under the groundwater code, WSU should have applied for a permit for Well No. 3. Ecology tentatively determined that Water Right Claim No. 98524 does not represent a valid water right because Well No. 3 was not established prior to 1945. AR 23 at 4; AR 28, Ex. 1. However, Ecology determined that even though Well No. 3 did not have a separate water right, WSU operated that well as an additional (albeit unauthorized) well under its vested water rights for Well Nos. 1 and 2.[5] AR 23 at 3-4.

b. Well No. 4 (Certificate No. 5070-A)

In 1963, WSU's Well No. 4 was drilled in close proximity to Well Nos. 1, 2, and 3. WSU filed an Application for Permit No. 6405 on August 1, 1962. AR 23, Ex. 3. The application provided all the information required under RCW 90.03.260 for water rights for municipal supply, identifying the use to which water would be applied as "Domestic supply for Washington State University" and its proposed use as "For Municipal Supply: To supply the city, town, or community of Wash. State Univ., in the county of Whitman, having a present enrollment of 7800, and an estimated enrollment of 15,000 in 1980." AR 23 at 4-5 and Ex. 4.

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[5] It is common for water right holders to drill and use additional, auxiliary, or replacement wells without separate permit authorization. When Ecology becomes aware of an unauthorized additional or replacement well used by a water right holder, Ecology's standard practice is to encourage the water right holder to come into voluntary compliance with applicable laws by applying for water right changes that reflect the actual point(s) of withdrawal. Ecology's policy on conducting tentative determinations of water rights (POL 1120) provides: "When evaluating unauthorized changes to water rights, Ecology generally considers beneficial use to be the measure of the right, even if some attributes of the right may not be consistent with the current authorization. . . . Use of water in a manner inconsistent with one's water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful." AR 23 at 4; AR 28, Ex. 3 at 54.

Ground Water Permit No. 6064 was issued for Well No. 4 on December 12, 1962. AR 23 at 5. The permit authorized 1,500 gallons per minute and 2,260 acre-feet per year for "domestic supply (for Washington State University)". AR 31, Att. 3. On February 26, 1965, Certificate of Ground Water Right No. 5070-A was issued for Well No. 4 authorizing "domestic supply (for Washington State University)" in the amount of 1,500 gallons per minute and 2,260 acre-feet per year. AR 23 at 5; AR 22, Ex. 4.

Certificate No. 5070-A was issued under the state's former administrative practice of issuing a certificate based upon system capacity ("pumps and pipes"), once the well was constructed and connected to the water distribution system.[6] AR 23 at 5. The highest annual amount pumped from Well No. 4 was in 1969, when WSU pumped a total of approximately 1,090 acre-feet from Well No. 4. AR 52, Ex. 2.

c. Well No. 5 (Certificate No. 5072-A)

In 1964, WSU's Well No. 5 was drilled. AR 23 at 5. On May 27, 1963, WSU filed an Application for Permit No. 6734 for Well No. 5. The application identified the use to which water would be applied as "community domestic supply and stockwater" and further identified its proposed use as "For Municipal Supply: To supply the city, town, or community of W.S.U., in the county of Whitman, having a present population of 8,000 students, and an estimated population of 11,000 students in 1970." The application disclosed that the water from Well No. 5 would "connect into W.S.U. campus water distribution system." AR 23, Ex. 4.

The Report of Examination for WSU's application stated that "the waters to be appropriated under this application will be for a public water supply." AR 31, Att. 4. Ground Water Permit No. 6373 was issued for Well No. 5 on October 25, 1963, and Certificate of

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[6] *See Lummi Indian Nation v. State*, 170 Wn.2d 247, 254, 241 P.3d 1220 (2011); *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 587, 957 P.2d 1241 (1998).

Ground Water Right No. 5072-A was issued February 26, 1965. AR 23 at 5. Certificate No. 5072-A was issued for "community domestic supply and stock water" in the amount of 500 gallons per minute and 720 acre-feet per year. *Id.*; AR 22, Ex. 5. This certificate was issued under Ecology's former administrative practice of issuing a certificate based upon system capacity. AR 23 at 5. The highest annual amount pumped from Well No. 5 was in 1976, when WSU pumped a total of approximately 228 acre-feet from Well No. 5. AR 52, Ex. 2.

Well No. 5, located near the intersection of Airport Road and NE Terre View Drive, is approximately 300 feet southwest of a buried hazardous waste landfill site. AR 51 at 3-4; AR 22, Ex. 8. Since 1980, Well No. 5 has been regularly monitored for groundwater contamination. AR 51 at 4. Although Well No. 5 has never been contaminated, there is a risk that prolonged use of Well No. 5 would induce flows within the well's cone of depression, thereby exacerbating conditions that might result in its contamination. AR 51 at 3. Well No. 5 is not currently used except as emergency supply. *Id.* at 4.

d. Well No. 6 (Certificate No. G3-22065C)

On November 12, 1973, WSU filed an Application for a Permit to Appropriate Public Ground Waters No. G322065. WSU identified the use to which water would be applied as "Continuous Municipal Supply" and further identified its proposed use as "For Municipal Supply: To supply the city, town or community of WSU Campus, in the county of Whitman, having a present population of 15,000," and "For Irrigation: Number of acres to be irrigated: approximately 97 acres." The application described the distribution system for the water as "WSU Campus Water System". AR 23, Ex. 5.

On April 9, 1974, Ecology issued a Report of Examination for Permit No. G3-22065P approving issuance of a permit for "municipal supply" on the WSU campus. AR 31, Att. 5.

Well No. 6 was drilled in 1977. AR 22 at 3. Certificate of Water Right G3-22065C was issued June 22, 1978. AR 23 at 6; AR 22, Ex. 6. Certificate G3-22065C authorizes WSU to pump 1,500 gallons per minute and 1,600 acre-feet per year for "municipal supply" on the WSU campus. AR 22, Ex. 6. This certificate was issued under Ecology's former administrative practice of issuing a certificate based upon system capacity. AR 23 at 6; *see* AR 31, Att. 5. The highest annual amount pumped from Well No. 6 was in 1999, when WSU pumped a total of approximately 1,102 acre-feet from Well No. 6. At the time of the summary judgment proceeding before the PCHB, WSU had not used the full maximum annual quantity allocated under Certificate No. G3-22065C. AR 27 at 2.

e. Well No. 7 (Permit No. G3-28278P)

In 1987, WSU's Well No. 7 was drilled. WSU filed Application No. G3-28278 on January 28, 1987. Ecology's Report of Examination for the permit stated: "The proposed project site is the WSU campus in Pullman, WA. WSU proposes to develop a new well, well No. 7, as a supplemental source of water for the university campus. Three existing wells, presently on-line, are considered to have a very limited future. It is the expressed intent of WSU to bring the proposed well on-line as a direct substitute for these wells as they eventually decrease in productivity, or fail." AR 23, Ex. 6.

Permit No. G3-28278P was issued February 7, 1989, for "municipal supply" to the WSU campus at a rate of 2500 gallons per minute and an annual quantity of 2260 acre-feet. AR 23 at 7-8; AR 22, Ex. 7. The permit provides that "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."[7] AR 22, Ex. 7. This water right is still in permit status; no certificate has been issued. AR 23 at 7-8.

f. Well No. 8 (additional well for Certificate No. G3-22065C)

In 2006, WSU added another well, Well No. 8, as an additional source well under Certificate No. G3-22065C, the water right originally issued for Well No. 6. AR 22 at 4; AR 23 at 7. Well No. 8 is located in close proximity to Well No. 6. AR 22 at 4 and Ex. 8. *See* RCW 90.44.100(3), (4). WSU filed the form required by Ecology to show compliance with RCW 90.44.100(3) for this well. AR 23 at 7, Exs. 7, 8; AR 22 at 3-4.

4. WSU's applications to change the points of withdrawal of its water rights

As presently operated, the WSU campus water system is integrated or consolidated, in that all the water for the system is withdrawn primarily from two wells. AR 22 at 3; AR 52, Ex. 2. Gary Wells, an engineer employed in the WSU Facilities Operations Division, began working on the WSU water rights change proposal in approximately 2001. AR 51 at 2. At that time, the water system equipment was aging, and the system depended primarily upon one well, Well No. 7. *Id.* Mr. Wells' concern at that time was that if Well No. 7 became inoperable for any reason, WSU would not have been able to pump sufficient water to supply the campus water system from the remaining wells. Id.; AR 33, Att. 5 at 12; AR 15, Att. 9. In order to supply the system in the event of a problem with Well No. 7, Mr. Wells determined that WSU needed another well that could legally deliver 2,500 gallons per minute. AR 51 at 2; AR 33, Att. 5 at 13-14. WSU had developed Well No. 8 as an additional well for Well No. 6, but that water right, under Water Right Certificate No. G3-22065C, was limited to 1,500 gallons per minute. Mr. Wells therefore began to explore whether the University's other water rights could be consolidated and

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[7] Certificate No. 5070-A, Claim No. 098522 and Claim No. 098524 are the rights associated at that time with Well Nos. 4, 1, and 3, respectively.

withdrawn from Well Nos. 6 and 8, with the goal of having at least two substantially adequate wells, either one of which could support the entire Pullman Campus water system in the event that one were to fail. AR 51 at 4; AR 33, Att. 5 at 14.

As an alternative to the well integration approach, each of the inoperable or inactive wells in the WSU Pullman Campus water system could be physically modified or replaced.[8] AR 51 at 4; AR 37 at 2; AR 31, Att. 1 at 21. Replacement or reconstruction of WSU's existing wells would have been very expensive. AR 31, Att. 2. In lieu of modifying or replacing each individual well, the University elected to pursue the well integration proposal as a way of achieving system efficiency, flexibility, and reliability at a lower overall cost. AR 51 at 4-5; AR 37 at 3.

WSU applied to Ecology for authorization to change its water rights to allow water to be withdrawn under each right from any of its existing wells. The goal of the change applications was to integrate all the wells under the individual rights to function as the WSU water system is currently designed and operated. AR 1, Reports of Examination at 3; *see also* AR 22 at 5. Because of the historic pattern of water use from the WSU wells, the water right changes approved by Ecology are, in part, after-the-fact authorization of a well integration that had already occurred. AR 23 at 3; AR 31, Att. 1 at 23; AR 28, Ex. 3 at 54.

WSU was the lead agency under the State Environmental Policy Act ("SEPA") for its well integration proposal. The SEPA Responsible Official, Lawrence E. Davis, made a SEPA threshold determination, signing a Determination of Nonsignificance (DNS) for the proposed

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[8] Pursuant to RCW 90.44.100(3) and (4), a replacement well could be drilled at the same location as the original well without obtaining approval from Ecology. Before the PCHB, Cornelius conceded that legally and practically, WSU could modify or reconstruct its existing wells or construct replacement wells to enable full utilization of its existing water rights. AR 35 at 7 ("Ecology has argued that WSU could have deepened or rehabilitated its failing wells or constructed replacement wells . . . . Appellants agree – WSU *could have* done that" (emphasis in original)).

action on June 7, 2004. AR 22 at 5 and Ex. 10. Ecology reviewed WSU's DNS and environmental checklist pertaining to WSU's water right consolidation, and found them adequate for Ecology's action on the WSU applications. AR 36 at 2. Ecology determined that there would not be a probable significant adverse impact on the environment, including the Grande Ronde Aquifer, as a result of the water right consolidation. *Id.* The changes in well locations sought by WSU will not enable any additional water use above and beyond the level of water use that could occur in the future without those changes. *Id.* Ecology found that there was no new information requiring it to make a new SEPA threshold determination. *Id.*

During its evaluation of the WSU water right change applications, Ecology made a tentative determination of the extent and validity of the rights sought to be changed. This tentative determination involved ascertaining the extent to which the rights were perfected through historic beneficial use, and evaluating whether any perfected quantities had been extinguished as a result of abandonment or statutory relinquishment. AR 23 at 3.

Ecology determined that Water Right Claim Nos. 98522 and 98523, Certificate Nos. 5070-A, 5072-A, and C3-22065C, and Permit No. G3-28278P each qualifies as a water right for municipal water supply purposes because the actual use of water under each water right – i.e., in the Pullman Campus water system – meets the definition of "municipal water supply purposes" set forth in RCW 90.03.015(4). AR 23 at 5. Ecology determined that Claim No. 98524 did not represent a valid water right because the well was drilled after 1945, and therefore denied the change to that water right claim. AR 23 at 4. Ecology determined that each of the valid water right claims (for Well Nos. 1 and 2) was fully perfected. AR 27 at 2. Ecology determined that each of the water right certificates includes a quantity that has been perfected through beneficial use and an inchoate water quantity that had not yet been developed through actual use. AR 27 at

2. Ecology determined that WSU's water use is reasonably efficient, and that WSU has employed extensive water conservation measures. AR 27 at 3. Ecology determined that WSU has shown good faith and exercised due diligence in putting its inchoate water rights to beneficial use. *Id.* Ecology concluded that the inchoate quantities remaining under WSU's water rights are rights in good standing. *Id.*

WSU's applications for change are not applications for new water appropriations, and did not request additional quantities of water. AR 23 at 7; AR 37 at 3-4. Ecology evaluated whether impairment of other water rights or detriment to the public welfare would occur as a result of each authorized change, by comparing water use that could be exercised under the existing water rights held by WSU (i.e., through refurbishing or replacing each well) with water use that could be exercised under the change authorization (i.e., through pumping from different well locations). AR 23 at 7-8.

Ecology concluded that integrating WSU's source wells would not cause impairment of other existing water rights or detriment to the public welfare. AR 23 at 8. WSU's wells have been continuously pumped under its water rights for many years with no reported well interference problems. *Id.* Ecology determined that WSU had already integrated its well operations over time so that pumping has been concentrated in a smaller number of wells, also with no reported well interference problems. *Id.* The quantities of water that WSU is authorized to pump have not been increased above the amounts available under its existing water rights. *Id.* Ecology found no evidence that pumping those quantities from any one of the WSU wells, as opposed to pumping those quantities from multiple wells through well integration, would cause different or greater impacts to other water users or to groundwater or surface water resources in the Palouse Basin area. AR 23 at 7-8.

B. Procedural Background

1. Cornelius' appeal to the PCHB

Cornelius appealed Ecology's decisions approving changes to WSU's water rights. AR 1. Cornelius raised eighteen general issues, including impairment to Scott Cornelius' exempt well.[9] AR 10. Cornelius moved for summary judgment on five issues, involving enlargement, abandonment, relinquishment, SEPA compliance, and whether the PCHB had jurisdiction over his so-called "as applied" constitutional challenges to the MWL. AR 16, 17, 19. Collectively, Ecology and WSU moved for summary judgment as to all issues. AR 24, 29, 30.

2. The PCHB's summary judgment rulings

The PCHB granted summary judgment to Ecology and WSU on all but three issues – impairment, detriment to the public welfare, and enlargement of Permit G3-28278P – which were held over for a hearing on the merits. AR 85 at 50. The Board also ruled that it did not have jurisdiction to consider Cornelius' constitutional claims because they are "tantamount to a facial challenge" to the MWL. AR 85 at 9, 50; AR79 at 1.[10]

3. The PCHB's Findings of Fact and Conclusions of Law

The PCHB conducted a two-and-one-half-day hearing on the issues remaining to be decided after its summary judgment ruling. The issues before the Board at the hearing were Issue No. 12 (impairment), Issue No. 14 (detriment to the public welfare); and a portion of Issue No. 7 (whether the change authorization for Water Right Permit G3-28278P would allow a combined total withdrawal from Well 7 and the additional well(s) that would enlarge the right

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[9] Mr. Cornelius' well, located near the South Fork of the Palouse River, was originally drilled in 1993 to a depth of 250 feet. Ex. R-52. In 1997, Mr. Cornelius' well was "reconditioned" and completed at a depth of 245 feet. Ex. R-86. Mr. Cornelius' well is located nearly three miles away from WSU's Well 7 and Well 8. AR 32 at 1; Tr. 273:12-15. WSU's Well 5 and Well 6 are located even farther away from Mr. Cornelius' well. AR 84 at 3.

[10] The Board's summary judgment rulings on specific issues are discussed *infra* in response to Cornelius' arguments.

conveyed by Permit G3-28278P, contrary to RCW 90.44.100(2)). The PCHB determined that "a preponderance of the evidence demonstrates that consolidation of WSU's existing water rights will not impair Mr. Cornelius' well or other existing water right holders." AR 89 at 2. The PCHB also concluded that, in the absence of impairment, "the public welfare will not be harmed by Ecology's approval of these water right changes." *Id.* Finally, the PCHB concluded that Ecology's approval of the change in point of withdrawal for Permit No. G3-28278P did not unlawfully "enlarge" the water right represented by that permit. *Id.*

In its Findings of Fact, Conclusions of Law and Order, the PCHB recognized the multiple ongoing efforts to address the "long-term and troubling trend of declining water levels" in the Grande Ronde aquifer. AR 89 at 3. However, the PCHB explained that "the legal issues in this hearing were not about the declining aquifer or how Ecology should manage groundwater in the Pullman area." *Id.* Nor was this case about whether WSU should be prohibited from pumping in the future more water than it presently does, or about the uses to which WSU applies the water it is authorized to withdraw:

> Instead, this case was focused on the much narrower question of whether WSU is legally entitled to consolidate its existing water rights in order to be able to pump its currently authorized quantities from a different configuration of wells within its integrated campus water system.

AR 89 at 3. The Board concluded that the appellants "failed to meet their burden to establish impairment or any realistic probability of interference or interruption based on changing the location of WSU's pumping." AR 89 at 34. The Board denied Cornelius' petition for reconsideration on June 6, 2008. AR 91, 95.

4. Cornelius' Superior Court appeal

Cornelius initially filed a combined petition for review under the APA and complaint for declaratory and injunctive relief for alleged constitutional violations. CP 001-155. Cornelius

voluntarily withdrew the non-APA claims. CP 353. Thus, the Superior Court decided the APA claims based on the record before the PCHB. CP 711.

IV. ARGUMENT

A. Standard of Review

1. APA appeals from PCHB decisions

The Board's orders are reviewed under the Washington Administrative Procedures Act ("APA"), RCW chapter 34.05. The burden of establishing the invalidity of agency action is on the party asserting invalidity – here, Cornelius. RCW 34.05.570(1)(a); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Under the APA, a Board decision may be overturned based on any of the nine grounds set forth in RCW 34.05.570(3). This Court sits in the same position as the superior court and reviews the Board's decision by applying the APA standards of review directly to the PCHB record. *Fort v. Dep't of Ecology*, 133 Wn. App. 90, 95, 135 P.3d 515 (2006).

2. Legal issues

Under the "error of law" standard, this Court engages in a *de novo* review of the PCHB's legal conclusions. *Port of Seattle v. Pollution Control Hearings Bd.,* 151 Wn.2d 568, 587, 90 P.3d 659 (2004); RCW 34.05.570(3)(c), (d). Issues of statutory construction are reviewed *de novo* as questions of law. *Port of Seattle,* 151 Wn.2d at 587. The court's fundamental objective when interpreting a statute is to discern and implement the intent of the legislature. *Five Corners Family Farmers v. State of Washington, et al.*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). The "surest indication" of the legislature's intent is the plain meaning of the statute, gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4

(2002)). The court should begin its interpretation by looking at the context in which the relevant statutes appear. *Flight Options v. Dep't of Revenue*, 172 Wn.2d 487, 501, 259 P.3d 234 (2011).

3. Review of PCHB summary judgment rulings

Review of an agency's summary judgment decision is *de novo*, using the APA "error of law" standard. *Verizon Northwest, Inc. v. Washington Employment Security Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255 (2008). Reviewing courts overlay this APA standard of review with Civil Rule 56, applying the CR 56 summary judgment standards and engaging in the same inquiry as the Board. *Id.* at 916; *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 624, 13 P.3d 1076 (2000). The Court considers the same evidence that the Board considered on summary judgment. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

If the pleadings, affidavits, depositions, and admissions fail to show a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. CR 56(c); *Baechler v. Beaunaux*, __ Wn. App. __, __ P.3d __ (2012) (Div. III, 29476-5). A defendant may move for summary judgment on the ground that the plaintiff lacks competent evidence to support its claim. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclosing that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert*, 141 Wn.2d at 34.

Cornelius' Issues 1 through 12 involve issues decided by the PCHB on summary judgment. Cornelius Br. at 3-5. Accordingly, this Court's review of Issues 1 through 12 is *de novo*, applying the CR 56 summary judgment standards to the summary judgment record before the Board.

4. Findings of fact

Administrative findings of fact must be upheld on review when supported by substantial evidence. RCW 34.05.570(3)(e). The substantial evidence standard applies only to the PCHB's findings of fact entered after the hearing on the merits; it does not apply to the Board's summary judgment rulings. *City of Union Gap v. Ecology*, 148 Wn. App. 519, 525-26, 195 P.3d 580 (2008). Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

When reviewing challenged findings, the Court views the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). A reviewing court does not reweigh the evidence and substitute its judgment just because it might have resolved the factual conflict differently. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). Unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Cornelius' Issue 13 is the only issue decided by the Board after the hearing on the merits. Cornelius Br. at 5.[11] Accordingly, the substantial evidence standard of review applies to this Court's review of the Board's Findings of Fact 16 through 19 (Assignments of Error 3 through 6, Cornelius Br. at 2).

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[11] Cornelius' Assignment of Error 11 assigns error to Conclusion of Law 12 in the Board's Final Order (on the ground that "[t]he Board's findings of fact are not sufficient to support the conclusion given that appellants were erroneously excluded from presenting evidence on the issue of enlargement"). Cornelius Br. at 3. This claimed error actually involves a ruling made by the Board on summary judgment: "Appellants' claim of error here is not to the 'no well interference due to change of location of pumping' ruling in the Final Order, but to the summary judgment ruling limiting the evidence." Cornelius Br. at 34 n.14.

5. Mixed questions of law and fact

Mixed questions of law and fact are subject to *de novo* review in part, because the court must determine the correct law independent of the agency's decision and then apply the law to the facts as found by the agency. *Port of Seattle,* 151 Wn.2d at 588, 611. The Court reviews challenged conclusions of law to determine whether they are supported by the findings of fact. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007). Cornelius' Issue 13 is the only issue involving a mixed question of law and fact, decided by the Board after the hearing on the merits. Cornelius Br. at 5. This standard applies to the Court's review of the Board's Conclusions of Law 2 through 5 (Assignments of Error 7 through 10, Cornelius Br. at 2).

B. The Municipal Water Law Is Not Unconstitutional as Applied by the PCHB in This Case.

In order to establish an unconstitutional application of the MWL, Cornelius has the burden of proving beyond a reasonable doubt that the MWL caused a violation of Mr. Cornelius' constitutional rights. *See State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008); *State v. Brosius*, 154 Wn. App. 714, 718, 225 P.3d 1040 (2010). Cornelius argues that the PCHB applied the MWL "in an unconstitutional manner" in determining that WSU's rights are for municipal water supply purposes, violating due process and the separation of powers doctrine. Cornelius Br. at 15.

The PCHB granted summary judgment to WSU and Ecology on Issue No. 1, ruling that WSU is a "municipal water supplier" under RCW chapter 90.03. AR 85 at 10-11. The PCHB also ruled that each of WSU's six water rights is a right for municipal water supply purposes, applying the definition in RCW 90.03.015(4) and the requirements of RCW 90.03.560. AR 85 at 11-16. Addressing Cornelius' argument that this ruling "requires a 'retroactive' application of

the 2003 MWL," the PCHB held that it was required to apply "the presumably constitutional language of the statute" to the water rights before it. To the extent that using definitions enacted in 2003 to characterize WSU's pre-existing water rights is viewed as a "retroactive" application, the PCHB noted that it believed "use of the definitions under these circumstances was intended." AR 85 at 16.

The PCHB also explained that Cornelius was wrong about the effect of the MWL, concluding that "the 2003 MWL does not, as a matter of law, excuse consideration and application of any applicable criteria for WSU's change applications to its groundwater rights." AR 85 at 17-18. The PCHB specifically held that the MWL does not alter the four-part test required for a change to a groundwater permit or certificate under RCW 90.44.100. *Id.* Despite this, Cornelius argues that "the PCHB applied the MWL to determine that WSU's rights were still valid" and "erroneously reinstated" rights that Cornelius desires to have relinquished. Cornelius Br. at 15.

Cornelius cannot prove beyond a reasonable doubt that the MWL caused a violation of his constitutional rights, because the *MWL* is not what exempts WSU's water rights from relinquishment. WSU's water rights were and are exempt from relinquishment because they were always claimed for municipal water supply purposes, and rights claimed for municipal water supply purposes have always been exempt from relinquishment under RCW 90.14.140(2)(d).

1. Cornelius' so-called "as applied" challenge to RCW 90.03.015(3) and RCW 90.03.015(4) is without merit.

a. Cornelius' argument is not consistent with the law concerning relinquishment of water rights.

Relinquishment of water rights in Washington did not exist before the 1967 Water Rights Act. Laws 1967, ch. 233 (RCW chapter 90.14). The purpose of the Act was "to cause a return

to the state of any water rights which are no longer exercised by putting said waters to beneficial use." RCW 90.14.010. The act provides for statutory forfeiture of a water right, in whole or in part, based upon the voluntary failure to use water for a period of five consecutive years without sufficient cause after July 1, 1967. RCW 90.14.160-.180.

A challenge to a water right based on non-use of water in the years prior to 1967 must satisfy the common law standard for abandonment. *Dep't of Ecology v. Acquavella*, 131 Wn.2d 746, 757, 935 P.2d 595 (1997). A challenge to a water right based on non-use after 1967 must rely on the statutory standards for relinquishment in RCW chapter 90.14. *Id.* at 758. "[Common law abandonment and statutory forfeiture are quite different concepts, with proof of common law abandonment requiring proof of intent to abandon while statutory forfeiture does not." *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 784, 947 P.2d 732 (1997) (holding relinquishment statute inapplicable to claim of abandonment based on non-use before 1967). RCW 90.14.160 provides for relinquishment of vested water rights established prior to the water code permitting system.[12] RCW 90.14.180 provides for relinquishment of water rights authorized under surface water certificates or groundwater certificates.[13] Under these statutes,

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[12] RCW 90.14.160 provides:

> Any person entitled to divert or withdraw waters of the state through any appropriation authorized by enactments of the legislature prior to enactment of chapter 117, Laws of 1917, or by custom, or by general adjudication, who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to divert or withdraw for any period of five successive years after July 1, 1967, shall relinquish such right or portion thereof, and said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation in accordance with RCW 90.03.250.

[13] RCW 90.14.180 provides:

> Any person hereafter entitled to divert or withdraw waters of the state through an appropriation authorized under RCW 90.03.330, 90.44.080, or 90.44.090 who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to withdraw for any period of five successive years shall relinquish such right or portion thereof, and such right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation in accordance with RCW 90.03.250. All certificates hereafter issued by the department of ecology pursuant to RCW 90.03.330 shall expressly incorporate this section by reference.

forfeiture can be based upon *either* abandonment or the voluntary failure, without sufficient cause, to beneficially use all or any part of a water right for five successive years.

Cornelius asserts that "the right is lost at the time the nonuse occurs." Cornelius Br. at 14. That is incorrect. Relinquishment of a water right cannot occur until after notice and hearing, i.e., due process of law. *Sheep Mountain Cattle Co. v. Ecology*, 45 Wn. App. 427, 430-31, 726 P.2d 55 (1986) (invalidating previous version of RCW 90.14.130 because it "failed to provide any due process prior to a termination order" by Ecology). Under current law, relinquishment of a water right does not become effective until the PCHB holds a hearing and issues its findings, conclusions, and order. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 80, 110 P.3d 812 (2005).[14] In *City of Union Gap v. Ecology*, 148 Wn. App. 519, 526-27, 195 P.3d 580 (2008), the Court explained: "The party asserting statutory relinquishment, here Ecology, must prove nonuse for the five-year period. . . . The burden then shifts to Ahtanum to show a legally sufficient cause for nonuse or an exception to the relinquishment rule." Neither *Motley-Motley* nor *Union Gap* stands for the proposition that "the right is lost at the time the nonuse occurs."[15]

Relinquishment applies only to the extent water rights have been perfected. *Public Utility Dist. No. 1 of Pend Oreille County v. Ecology,* 146 Wn.2d 778, 802-03, 51 P.3d 744 (2002) ("the Legislature has plainly made statutory forfeiture inapplicable to unperfected water rights"); RCW 90.14.150. Cornelius' contention that "[m]ajor portions of [WSU's] rights

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[14] Alternatively, a superior court conducting a general adjudication proceeding under the water code could also determine – after notice and an opportunity to be heard – that a water right is relinquished for nonuse. *See* RCW 90.14.200(2).

[15] *Dept. of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985), also cited by Cornelius (Cornelius Br. at 14), did not involve relinquishment under RCW chapter 90.14. *Abbott* addressed the extinguishment of unexercised riparian rights after enactment of the 1917 water code, holding that fifteen years was a reasonable time for riparian owners to appropriate unused water for beneficial use.

became invalid at the point in time that the university failed to put the authorized amount of water to use" (Cornelius Br. at 15) is not correct. Unperfected water rights are not subject to relinquishment.

Nor does relinquishment apply to water rights that are used by pumping from a different well than authorized. Under RCW chapter 90.14, **non-use of water** is the predicate for relinquishment. RCW 90.14.160, RCW 90.14.180; *see* RCW 90.14.010 (purpose of relinquishment is to return to the state "rights which are no longer exercised by putting said waters to beneficial use"). The relinquishment statute contains no provision equating actual use of water from an unauthorized well with non-use.

Courts in other western states have held that an unauthorized change in the location of pumping does not give rise to relinquishment. *Russell-Smith v. Water Resources* Dept., 952 P.2d 104 (Or. App. 1998) ("the predominant weight of authority from other western states is that an unauthorized change in [point of diversion] does not effect a forfeiture"); *Eskelsen v. Town of Perry*, 819 P.2d 770, 776 (Utah 1991); *Graham v. Leek*, 144 P.2d 475, 482 (Idaho 1943); *Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 54 P.2d 906, 910 (Wyo.), *cert. den.* 299 U.S. 574, 57 S.Ct. 38, 81 L.Ed. 423 (1936); *but see State v. Fanning*, 361 P.2d 721 (N.M. 1961) (holding that unauthorized drilling of new well after the Roswell Artesian Basin was closed to further appropriation was an illegal withdrawal that could not be linked to a pre-existing water right). Citing caselaw from other western states, Ecology has adopted an administrative policy providing that **actual beneficial use** of water, even if inconsistent with a water right authorization, precludes a finding of non-use. Accordingly, such use cannot give rise to relinquishment. AR 23, Ex. 2 at 5-6.

RCW 90.14.140 sets forth a list of "sufficient causes" for nonuse of water, and a list of outright exemptions from relinquishment. In particular, there is an absolute exemption from relinquishment for nonuse "[i]f such right is claimed for municipal water supply purposes under chapter 90.03 RCW." RCW 90.14.140(2)(d). At the time the relinquishment statute – including this exemption from relinquishment – was enacted in 1967, there was no definition of "municipal water supply purposes" under RCW chapter 90.03. The Legislature did not define "municipal water supply purposes" until 2003 in the Municipal Water Law. *See* RCW 90.03.015(4).

b. Cornelius' challenge to RCW 90.03.015(4) rests on a false premise: that the 2003 MWL made WSU's water rights "municipal".

Cornelius argues that he is harmed by the PCHB's failure to relinquish WSU's Water Right Certificate Nos. 5070-A and 5072-A, because at some point in the future Mr. Cornelius' junior groundwater right could theoretically be curtailed in favor of WSU's senior rights. Cornelius Br. at 20. Cornelius mistakenly assumes that the result here would have been different but for the enactment of the 2003 MWL.

Cornelius implies that the 2003 MWL somehow altered a pre-existing definition of "municipal water supply purposes" for purposes of the exemption from relinquishment in RCW 90.14.140(2)(d), and argues that WSU's rights were not "municipal" under the law as it existed prior to 2003. Cornelius does not cite a single statutory provision, judicial opinion, or decision by the PCHB containing a pre-2003 definition of "municipal water supply purposes" that might have excluded WSU's water rights.

Cornelius disregards the specific language of the exemption in RCW 90.14.140(2)(d) ("if such right is claimed for municipal water supply purposes under chapter 90.03 RCW"), asserting that RCW 90.14.140(2)(d) "exempts from relinquishment only water rights **exercised** for 'municipal water supply purposes.'" Cornelius Br. at 23 (emphasis added). Cornelius also

asserts that WSU's Certificates 5070-A and 5072-A "were not used for municipal water supply purposes before the 2003 MWL became effective." Cornelius Br. at 24. Cornelius' argument is premised solely on the fact that Certificate Nos. 5070-A and 5072-A were issued for "domestic" and "community domestic" supply. In effect, Cornelius interprets the statutory relinquishment exemption as if it reads "[i]f such right is **issued** for municipal water supply purposes" – but that is not the language used by the Legislature in RCW 90.14.140(2)(d). Cornelius' interpretation in effect adds words to the statute that are not there. It raises separation of powers concerns for a court to add words to a statute where the Legislature has not included them. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011) (inserting or removing statutory language "is decidedly the province of the legislature").

c. WSU's water rights were municipal before 2003 and are still municipal.

All of WSU's water rights were applied for and developed in order to provide public water supply for the WSU Pullman Campus. The water pumped from each WSU well goes into a single integrated water system, which is used to supply the entire Pullman Campus. Each of the wells at issue in this appeal has always been connected to the WSU Pullman Campus water system, and has not provided water supply for any other purpose.

In November 1973, WSU explicitly identified its use of water within the Pullman campus water system as "municipal" in its application for a permit for Well No. 6. In March 1974, WSU again explicitly identified its use of water as "municipal" by filing claim forms for Well Nos. 1, 2, and 3. In April 1974, Ecology explicitly recognized the WSU water system as a municipal water supply system when it approved the permit for Well No. 6. In 1978, Ecology recognized the WSU campus water system as municipal when it issued Certificate No. G3-22065C. In 1987, WSU again identified the campus water system as municipal when it applied for a permit

for Well No. 7. In 1989, Ecology again recognized the WSU campus water system as municipal when it issued Permit No. G3-28278P. WSU identified each of its wells and each of its water rights in its Water System Plan for the Pullman campus water system. *See* Part III.A.3, *supra*.

There is no difference between Well Nos. 1, 2, 3, 4, 5, 6, 7, and 8 in terms of how the water from each well has been used. Water pumped from Well Nos. 1, 2, 3, 4 and 5 was used in exactly the same municipal water system as the explicitly-identified "municipal supply" water pumped from Well Nos. 6 and 7 under Certificate G3-22065C and Permit G3-28278P. *See* Part III.A.1 *supra*. Regardless of the specific purpose of use listed on Certificate Nos. 5070-A and 5072-A, each right was actually used in one integrated water system that WSU explicitly identified as "municipal" (and that Ecology recognized as "municipal") from 1973 onward. Each water right held by WSU had already been used for municipal water supply purposes in the Pullman Campus water system long before enactment of the MWL. The 2003 MWL definitions did not alter the status of WSU's water rights.

d. WSU's Water Right Certificate Nos. 5070-A and 5072-A are exempt from relinquishment as rights claimed for municipal water supply purposes.

Water rights claimed for municipal water supply purposes under RCW chapter 90.03 have been exempt from relinquishment since 1967. RCW 90.14.140(2)(d).[16] The 2003 definition of "municipal water supply purposes" did not amend RCW 90.14.140(2)(d). Nor did it change anything with respect to WSU's water rights. WSU is the owner of each water right at

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[16] The relinquishment statute provides in pertinent part:

> Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right:
>
> . . .
>
> (d) If such right is claimed for municipal water supply purposes under chapter 90.03 RCW; . . .

RCW 90.14.140(2).

issue here, entitling WSU to claim those rights for municipal water supply purposes. *City of Union Gap v. Ecology*, 148 Wn. App. 519, 531-32, 195 P.3d 580 (2008). WSU also asserted its rights for municipal water supply purposes, from at least 1973 onward. *Id.* *See* Part IV.B.1.c *supra*.

Thus, prior to 2003, all of WSU's water rights for the Pullman campus water system were claimed for municipal water supply purposes, and were therefore already exempt from relinquishment under RCW 90.14.140(2)(d). Cornelius' attack on the application of the 2003 MWL is misplaced; it was not the MWL that made WSU's water rights municipal and exempted them from relinquishment. WSU's water rights were claimed for municipal water supply purposes and exempt from relinquishment well before 2003. Application of the MWL changed nothing.

e. As a matter of law, because WSU's water rights are exempt from relinquishment, past non-use is irrelevant to a tentative determination of the extent and validity of those water rights.

WSU adopts and incorporates the arguments in Part VI.E of Ecology's Response.

f. The PCHB did not "revive" any relinquished rights.

Focusing solely on the pumping record (AR 52, Ex. 2), Cornelius argues that two of WSU's water rights (for Well Nos. 4 and 5) were relinquished simply because WSU shifted its pumping away from those older wells. Cornelius Br. at 9, 19. Cornelius ignores the facts. WSU stopped pumping from Well No. 5 because of its proximity to a contaminated site. *See* Part III.A.3.c *supra*. WSU stopped pumping from Well No. 4 because it developed Well No. 7 as a substitute for its older wells in the low distribution zone. *See* Part III.A.3.e *supra*. Under the terms of its water right for Well No. 7, WSU's pumping from Well Nos. 7 and 4 **combined** cannot exceed a rate of 2,500 gallons per minute. *Id.* WSU could not have pumped Well No. 7 at 2,500 gallons per minute – which it needed to do to supply the campus water system – and

pumped from Well No. 4 at the same time. *See* Parts III.A.3.e and III.A.4 *supra*. WSU continued to use water under its water rights by consolidating its pumping in newer, more reliable wells. *See* Parts III.A.1 and III.A.4 *supra*.

Cornelius ignores these facts, and dismisses the legal significance of WSU's historic operation of its water system as an integrated wellfield (albeit without permission to do so until 2006, when Ecology approved the changes to WSU's water rights at issue here). Cornelius Br. at 10. WSU did not fail to use water under any of its water rights; to the contrary, it continued to use water from other wells. No Washington court has ever held that use of water from a different diversion point – even where unpermitted – gives rise to relinquishment of a water right. *See* Part IV.B.1.a *supra*. The PCHB correctly ruled that WSU's water rights continued to be beneficially used in WSU's Pullman campus water system. AR 85 at 11-16.

This Court can affirm the PCHB's ruling on any basis established by the pleadings and supported by the record. *Pacific Land Partners, LLC v. Dep't. of Ecology*, 150 Wn. App. 740, 753, 208 P.3d 586 (2009). Here, the Court should affirm the PCHB because WSU's water rights were "claimed for municipal water supply purposes" during all periods of alleged non-use, and are therefore exempt from relinquishment. *See* Part IV.B.1.b-d *supra*. It was and is unnecessary to "apply" the 2003 MWL in order to determine as a matter of law that WSU's water rights were not relinquished. Thus, application of the "municipal water supply purposes" definition to WSU does not "revive" relinquished rights because WSU's water rights were exempt from relinquishment before enactment of the MWL in 2003, and they are still exempt from relinquishment. Nothing in the MWL alters the status of WSU's water rights.

2. Cornelius' so-called "as applied" challenge to RCW 90.03.330(3) is without merit.

As one of his "municipal water law primary claims" Cornelius argues that the PCHB's application of RCW 90.03.330(3) to WSU's Water Right Certificate Nos. 5070-A and 5072-A was unconstitutional. Cornelius Br. at 28-30; *see id.* at 19 ("PCHB should have found that WSU water right certificates 5070-A and 5072-A had been partially relinquished due to lack of perfection and lapsed usage for a period greater than five years").

Cornelius argues the PCHB "erred in ruling that WSU had perfected and beneficially used all of its water rights" (Cornelius Br. at 28). However, the PCHB did **not** rule that WSU had perfected all of its water rights. The PCHB ruled that RCW 90.03.330(3) applies to WSU's water right certificates, making them rights "in good standing" even though the certificates were issued before those rights were fully perfected. AR 85 at 18-21. The PCHB then rejected Cornelius' argument that the unperfected ("inchoate") portions of those certificates could not be changed under RCW 90.44.100. AR 85 at 21-27.

a. Cornelius misstates the law concerning inchoate water rights and reasonable diligence in perfecting a water right.

Before this Court, Cornelius now argues that "revocation of never-used water" was required in this case. Cornelius Br. at 28. "Revocation of never-used water" is not required and has never been required under the water code. Instead, the code requires "reasonable diligence" in putting water rights to beneficial use.

Under the prior appropriation doctrine, the validity of an appropriative right, as against intervening rights, depends upon its being completed within a reasonable time with the exercise of diligence. Wells A. Hutchins, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, Vol. I (1971) ("1 Hutchins") at 373. "What the law requires is reasonable diligence, with a fixed

purpose on the part of the intending appropriator to carry through his project."[17] *Id.* at 374. The 1917 water code incorporates the principle of reasonable diligence in RCW 90.03.460, which protects pre-code inchoate rights (i.e., appropriations commenced before enactment of the water right permitting system but not yet put to beneficial use) as long as they are pursued with reasonable diligence. RCW 90.03.460. *See also Dep't. of Ecology v. Abbott*, 103 Wn.2d 686, 694 P.2d 1071 (1985) (addressing "reasonable time" for riparian rights to be put to beneficial use after 1917). The principle of reasonable diligence is also codified in RCW 90.03.320, which governs development of appropriations under the water right permitting system established in RCW chapters 90.03 and 90.44.[18]

When it issues a water right permit, Ecology specifies a time within which actual construction on the project must commence, and the time within which water must be put to beneficial use. RCW 90.03.320. The Supreme Court has noted that the water code requires "that a reasonable time be allowed in which to actually apply water to beneficial use." *Ecology v. Theodoratus*, 135 Wn.2d 582, 596, 957 P.2d 1241 (1998).

When Ecology sets development schedules for rights for municipal water supply, it must take into account various factors affecting application of water to beneficial use for municipal water supply purposes, including "delays that may result from planned and existing conservation and water use efficiency measures implemented by the public water system." RCW 90.03.320. This requirement for special consideration of factors affecting perfection of water rights for municipal water supply pre-dated the 2003 MWL. *See* Laws 1997, ch. 445, § 3.

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[17] The standard of reasonable diligence has been part of Washington water law for over a century. *See* Wash. Laws 1891, ch. CXLII, §§ 3, 8 (Washington's 1891 water appropriation statute requiring a would-be irrigator to commence construction of diversion works within six months after posting notice, and to "diligently and continuously" complete the works "unless temporarily interrupted by the elements").

[18] RCW 90.44.060 makes the provisions of RCW 90.03.250 through 90.03.340 applicable to groundwater rights.

A water right that has not yet been applied to a beneficial use is sometimes referred to as an "inchoate" right to water. The Supreme Court has described an inchoate right as

> an 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.

Ecology v. Theodoratus, 135 Wn.2d 582, 596, 957 P.2d 1241 (1998) (citing 1 Hutchins at 226). As the Court explained in *Theodoratus*, inchoate rights are recognized under the water code, which since 1917 has protected an 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, including the magnitude of the project . . .". *Id.* (citing RCW 90.03.460).

For many decades prior to the mid-1990's, Ecology and its predecessor agencies issued water right certificates based upon the capacity of a constructed water delivery system, rather than the actual beneficial use of water under a water right permit. This practice resulted in the issuance of thousands of certificates for water rights that were inchoate, i.e., unperfected or only partially perfected. Ecology's abrupt discontinuance of this practice created the dispute addressed by the Supreme Court in *Theodoratus*. The *Theodoratus* decision, in turn, led to the Legislature's amendment of the water code in 2003 via the MWL.[19] *Lummi Indian Nation v. State*, 170 Wn.2d 247, 254-57, 241 P.3d 1220 (2010).[20] The MWL "declared that 'water right

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[19] Laws 2003, 1st Spec. Sess., ch. 5 (SESSHB 1338).

[20] The Supreme Court explained:

> Our *Theodoratus* decision caused concern among existing water users about the vitality of their existing water rights based on capacity. Apparently some water users were further unnerved by a draft policy floated by the Department of Ecology, but never adopted, which would have required all water rights based on capacity to comply with the actual beneficial use requirement. The legislature responded to these uncertainties in 2003 by significantly amending the water law act.

Lummi, 170 Wn.2d at 256.

certificate[s] issued prior to [September 9, 2003] for municipal water supply purposes as defined in RCW 90.03.015' based on system capacity were rights in good standing." *Id.* at 257 (citing RCW 90.03.330(3)). The Court explained: "The legislation essentially put the legislature's imprimatur on our holding in *Theodoratus* prospectively while confirming the good standing of water certificates issued under the former system." *Id.*

In *Lummi*, the Supreme Court rejected facial constitutional challenges to RCW 90.03.330(3) based upon separation of powers, substantive due process, and procedural due process. *Id.* at 262-63. In particular, the Court disagreed with the trial court's finding that RCW 90.03.330(3) violates the doctrine of separation of powers as a "legislative determination of adjudicative facts concerning the 'good standing' of particular water rights." *Id.* at 263-64. The Court held that RCW 90.03.330(3) did not adjudicate any facts: "Rather, the relevant 2003 amendments simply confirmed that the right represented by a water right certificate issued before *Theodoratus* continued to be 'a right in good standing' . . . . . Confirming existing rights was a legislative policy decision, not a factual adjudication." *Id.* at 264. The Court construed the statute to mean "that such water rights will be treated like any other vested right represented by a water right certificate." *Id.* at 265.

The Court also rejected the facial due process challenge:

> Nothing in these amendments changes the legal status of the group the challengers attempt to represent: junior water rights 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 rights in good standing) and statutorily define something that had previously been statutorily undefined (the meaning of municipal water supplier). . . . Of themselves, these changes to the law do not violate due process.

Lummi, 170 Wn.2d at 266-67 (citations omitted). In *Lummi*, the challengers contended that the 2003 amendments to RCW 90.03.330 retroactively expanded the water rights of municipal water suppliers "by 'resurrecting' water rights certificates issued before *Theodoratus* based on

capacity." The Court disagreed with this characterization of the effect of *Theodoratus* and the operation of the 2003 amendments, explaining that *Theodoratus* "did not automatically divest or invalidate any vested or perfected rights" and that "we had no occasion to consider whether an erroneously perfected right would be invalidated by the department's mistaken practice of issuing certificates based on capacity" rather than actual beneficial use. *Id.* at 268.

Addressing the specific amendments to RCW 90.03.330, the Court held:

> Nor do the amendments by themselves resurrect any relinquished rights. RCW 90.03.330(3) merely declares that water rights certificates issued prior to *Theodoratus* based on capacity are certificates in good standing. RCW 90.03.330(2) merely limits the power of the department to invalidate water rights certificates. RCW 90.03.015 is merely definitional. None of these statutes deprive junior water rights holders of vested property rights.

Lummi, 170 Wn.2d at 268-69. Cornelius misconstrues this portion of the Court's opinion, asserting that "the court explained" that RCW 90.03.330(2) "identifies the groundwater amendment process as the point at which inchoate certificates may be revoked or diminished to protect junior right holders." Cornelius Br. at 20. Cornelius then argues that "under the court's reasoning, . . . Ecology is required, <u>pursuant to the MWL</u>, to determine what quantities have been perfected, and to 'revoke or diminish' those water rights that do not meet perfection criteria or are otherwise subject to loss for nonuse." Cornelius Br. at 21 (emphasis in original). Cornelius' citation to *Lummi*, 170 Wn.2d at 268, for this "reasoning" about the effect of RCW 90.03.330(2) is inexplicable; such "reasoning" does not appear in the Court's opinion. At page 268, stating that RCW 90.03.330(2) "merely limits the power of the department to invalidate water rights certificates," the Court quoted RCW 90.03.330(2) in a footnote. *Lummi*, 170 Wn.2d at 268. Cornelius' argument that RCW 90.03.330(2) **requires** revocation or diminishment of partially-perfected certificates, such as WSU's Certificate Nos. 5070-A and 5072-A, is not supported by the statute or by *Lummi*.

b. WSU's partially perfected water right certificates were and are valid water rights; they are not subject to "revocation of never-used water".

WSU's certificated rights were already rights "in good standing" – even though portions of those rights were inchoate – before the 2003 MWL was enacted. As the Supreme Court explained, *Theodoratus* did not invalidate WSU's (or anyone else's) "pumps and pipes" certificates. *Lummi*, 170 Wn.2d at 268. In RCW 90.03.330(3), the Legislature "merely declares that water rights certificates issued prior to *Theodoratus* based on capacity are certificates in good standing." *Id.* As discussed above, Cornelius' notion of mandatory "revocation of never-used water" is not supported by RCW 90.03.330(2) or by *Lummi*. Under the water code, WSU's water right certificates are valid and subject only to the requirement of reasonable diligence in developing those rights and putting water to beneficial use.

c. WSU's Certificate Nos. 5070-A, 5072-A, and G3-22065C are eligible for amendment under RCW 90.44.100.

WSU adopts and incorporates the arguments in Part IV.F of Ecology's Response.

3. The PCHB's application of the MWL was consistent with legislative intent and did not violate the separation of powers doctrine.

WSU adopts and incorporates the arguments in Part IV.D.1of Ecology's Response.

4. Cornelius has failed to establish any infringement of his vested rights.

Cornelius bases his due process challenge to the application of the MWL on "Scott Cornelius' place in line in the overall scheme of water rights" from the Grande Ronde Aquifer. Cornelius Br. at 20. Cornelius fails to explain how the authorized changes to WSU's water rights alter any water right held by Mr. Cornelius. Mr. Cornelius' desire to curtail WSU's water rights is not a vested right; he does not have a vested interest in the legal status of WSU's water rights. As the Supreme Court recognized, the fact that a senior water right holder's status may be

improved is insufficient to establish an infringement of the vested right of a junior water right holder. *Lummi, supra*, 170 Wn.2d at 266-67.

Indeed, Mr. Cornelius cannot even show that he is one of the junior water right holders that the Supreme Court recognized might be detrimentally affected by the application of the MWL, i.e., "junior water rights holders whose rights vested between *Theodoratus* and the 2003 amendments and whose enjoyment of their water rights will be detrimentally affected by these amendments." *Lummi, supra*, 170 Wn.2d at 266. Mr. Cornelius' well was drilled and first put to use in 1993. AR 32 at 2. Mr. Cornelius' water right vested **before** *Theodoratus* was decided, and well **after** WSU's water rights were already identified, recognized, exercised, and claimed as rights for municipal water supply purposes within the Pullman Campus water system. *See* AR 32. Mr. Cornelius did not establish his water right in reliance on *Theodoratus,* and he cannot now claim harm by virtue of the fact that WSU's "pumps and pipes" certificates are rights in good standing pursuant to RCW 90.03.330(3). Nor can Mr. Cornelius show that he is harmed by WSU holding water rights for municipal water supply purposes as defined in RCW 90.03.015(4), in view of the facts that WSU owned and asserted all of its water rights for municipal water supply within the Pullman Campus water system, WSU's use of water has been explicitly identified as "municipal" by Ecology since at least 1974, and WSU's rights have always been exercised in one integrated water system serving the Pullman Campus.

After the PCHB entered its summary judgment ruling (at the instance of Cornelius) that it did not have jurisdiction to consider Cornelius' constitutional challenge to the MWL because it was "tantamount to a facial challenge" (AR 85 at 9; AR 79 at 1-2), Cornelius was on notice that if he actually had an "as applied" – as opposed to facial – constitutional challenge, he would

have to present evidence to support it. AR 74 at 2; AR 76 at 4-5; AR 79; AR 85 at 50.[21] Despite this, Cornelius acquiesced in the PCHB's characterization of his constitutional claims as facial rather than "as applied", and failed to put on evidence showing that the MWL is unconstitutional as applied here.[22] The PCHB record does not establish that Mr. Cornelius' "reasonable expectation of the enjoyment of water rights has actually been impaired or deprived in violation of due process of law." *Lummi*, 170 Wn.2d at 267.

C. Ecology Complied With the State Environmental Policy Act (SEPA) in Relying on WSU's Determination of Nonsignificance.

WSU adopts and incorporates the arguments in Part IV.H of Ecology's Response.

D. 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.

Cornelius challenges the Board's summary judgment ruling that "impairment" or "detriment to the public welfare" could be established at the hearing on the merits only by showing that changing the location of WSU's pumping would cause greater or more detrimental impacts than could otherwise occur if WSU continued to exercise its water rights at the currently authorized locations. The PCHB decided on summary judgment that impairment is not established by showing that the water right consolidation allows WSU to pump more water under its authorized rights from a declining aquifer than is presently possible from its existing wells. AR 85 at 42, AR 79 at 2; *see also* AR 89 at 3.

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[21] The appellants requested a continuance of the hearing in order to (among other things) marshal evidence for their "as applied" challenge. AR 61, 62. The PCHB granted that request. AR 68.

[22] Cornelius did not seek to put on such evidence before the Superior Court. CP 200, Petitioners' Opening Brief at 9 ("Petitioners do not seek to supplement the record.")

1. The PCHB made a legal ruling – not an evidentiary ruling.

Cornelius challenges the Board's ruling on summary judgment as to the "impairment" and "detriment to the public welfare" issues, not the Board's decision in favor of Ecology and WSU after the hearing on the merits. Cornelius Br. at 34 n.14. The PCHB made a legal ruling on a question of statutory interpretation, not a ruling on the admissibility of evidence. The standard of review of this challenge is *de novo*.

2. As a matter of law, a showing of impairment or detriment to the public welfare must be linked to the *change* in the water right – not the exercise of the water right.

The PCHB correctly applied the law here. The only existing right for which Cornelius asserts impairment is Mr. Cornelius' exempt domestic well. The only basis for this claim of impairment is that WSU will eventually use the water to which it is already entitled under its existing water rights. Cornelius' concept of "impairment" has nothing to do with the actual change in the well locations authorized by Ecology. The PCHB's ruling – that a claim of "impairment" based upon the **exercise** of a water right, rather than upon the **change** of the right, is not cognizable in an appeal from a change authorization – is consistent with longstanding PCHB precedent. *Andrews v. Ecology*, PCHB No. 97-20 (1997) ("Impairment does not arise where the effect of the changed right upon other rights is the same as the original right"); *Kile v. Ecology*, PCHB No. 96-131 (1997) ("A change in point of diversion which would affect other rights no differently than if the diversion were made in the certificated amount at the original point of diversion is not impairment").

Before the PCHB, Cornelius acknowledged that his impairment claim relates to "the impact of the aggregate water rights held by WSU in total." AR 35 at 38. Cornelius conceded that it is not the well consolidation, but the pumping itself – i.e., the exercise of WSU's water rights, regardless of the well configuration – that will affect Mr. Cornelius' well in the future.

AR 35 at 40 ("As the state of water use and conservation currently stand, increased pumping from WSU's wells will affect the Cornelius well although the time-scale is at present unknown"). The PCHB did not decide Cornelius' claims of impairment and detriment to the public welfare on summary judgment; both issues were heard on the merits. AR 85 at 41, 45. The PCHB did not err in its summary judgment ruling by recognizing applicable law. As a matter of law, impairment and detriment to the public welfare cannot be demonstrated if WSU's consolidation of its pumping in one or two wells would affect other rights no differently than if WSU continued to pump from its existing well locations.

E. The PCHB Correctly Interpreted and Applied the "Safe Sustaining Yield" Provisions of RCW 90.44.130.

WSU adopts and incorporates the arguments in Part IV.J of Ecology's Response.

F. The PCHB Correctly Applied the Law Requiring Reasonable Diligence in Putting Water to Beneficial Use.

WSU adopts and incorporates the arguments in Part IV.K of Ecology's Response.

G. The PCHB Correctly Ruled That WSU's Water Right Claim No. 98523 Was Not Abandoned.

Before the PCHB, all parties moved for summary judgment on the issue of whether WSU's Water Right Claim No. 98523 had been abandoned. AR 19, 24, 38. Cornelius assigns error to the PCHB's ruling that WSU did not abandon Claim No. 98523 (AR 85 at 34-38). Cornelius Br. at 5, 40-45. The Court's review of this issue is *de novo*, based on the PCHB summary judgment record.

Abandonment is "the **intentional** relinquishment of a water right." *Public Utility Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 799, 51 P.3d 744 (2002) (emphasis added). Intent is determined according to the conduct of the water right holder, and the burden

of proof is on the party alleging abandonment. *Id.* Non-use alone does not constitute abandonment. *Id.* The PCHB correctly granted summary judgment to WSU and Ecology.

1. Material facts are not in dispute.

The material facts are not in dispute. WSU filed Claim No. 98523 in 1974, identifying WSU's Well No. 2 as the point of withdrawal. AR 22, Ex. 2. Claim Nos. 98522 and 98524, also filed in 1974, identified Well Nos. 1 and 3, respectively, as the points of withdrawal for two additional water rights. AR 22, Exs. 1, 3. Well Nos. 1 and 2 were drilled prior to 1945, when the groundwater permit statute went into effect. AR 22, Exs. 1, 2. Well No. 3 was first used in 1946. AR 22, Ex. 3. In 2006, Ecology decided that Well No. 3 did not have a separate water right associated with it because it was drilled after 1945. AR 23 at 3-4. Beginning in the late 1950's, WSU pumped significant quantities from Well No. 3 and relatively smaller quantities from Well Nos. 1 and 2. AR 52, Ex. 2. By the early 1960's, WSU's combined pumping from Well Nos. 1, 2, and 3 exceeded the combined annual quantity (1440 acre-feet) claimed on Water Right Claim Nos. 98522 and 98523. AR 52, Ex. 2. The quantities claimed by WSU on the claim form filed for Well No. 3 equal the aggregate quantities claimed for Well Nos. 1 and 2. AR 23 at 3-4; AR 22, Exs. 1-3.

Well No. 2 is only 213 or 214 feet deep. AR 51, Ex. 2. Well No. 2 became inoperable during the late 1970's as a result of hydrologic difficulties; it was taken out of service in 1978 because of a misaligned hole and low water level. AR 51 at 2. WSU identified Well No. 2 as "not operable" in its 1994 Water System Plan. AR 51, Ex. 2. Well No. 2 was decommissioned in 1995. AR 22 at 4. In its 2002 Water System Plan, WSU identified Well No. 2 as "abandoned." AR 15, Att. 6 at 39-40; AR 18, Att. 4 at 37-38. However, WSU's 2002 Water System Plan identified Claim No. 98523 as an existing water right, listing the instantaneous and

annual quantities under Claim No. 98523 (500 gpm and 720 acre-feet per year) in its "current water right status" and "forecasted water right status – 20 year" tables. *Id.*

When WSU employee Gary Wells wrote letters to Ecology in January and March 2004 regarding WSU's desire to consolidate its WSU's water rights, he did not identify any water right associated with Well No. 2. AR 18, Att. 5. In June 2004, Mr. Wells called Ecology staff with questions regarding his preparation of the WSU change applications. AR 18, Att. 7. An Ecology telephone record reflects these questions from Mr. Wells:

- ?, re some WR labeled as Claim, GW Cert, Cert, Permit, what is the difference between these?
- Trying to consolidate all documents into one = 5000 gpm.
  - Can they integrate all wells into one system? Yes.
  - Well @ power plant = abandoned, **500 gpm WR, is it lost?**
    - Explained relinquishment & chg. Process.
      *need to ask/confirm w/Gene.

AR 18, Att. 7 (emphasis added). In a declaration submitted in response to Cornelius' motion for summary judgment, Mr. Wells stated:

> When I began working on WSU's water rights change applications, I incorrectly assumed that as a result of abandoning Well No. 2, WSU had also abandoned Water Right Claim No. 098523, the water right that had been originally associated [with] Well No. 2. This misunderstanding on my part was not based on any official University position or policy to abandon this water right. I have no reason to believe that there has ever been such a University position or policy. As a result of my coordination with the Department of Ecology on the water rights change applications, I came to understand that the University's abandonment of a well did not automatically result in the legal abandonment of a water right.

AR 51 at 2-3. On October 28, 2004, WSU submitted its water right change applications to Ecology, including an application to change Water Right Claim No. 98523 which stated: "The purpose of this application is to consolidate the water right for well #2 with the water rights for wells 1, 3, 4, 5, 6, 7 and newly constructed well #8." AR 1.[23]

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[23] Ecology's decisions and WSU's applications for change are attached to AR 1, the Notice of Appeal to the PCHB.

2. WSU abandoned a *well*, not a water right.

Cornelius misunderstands the distinction between abandoning a **well** and abandoning a **water right**. Cornelius mischaracterizes an initial – and brief – misunderstanding of the law by Gary Wells, a civil engineer who prepared WSU's water rights change applications. Mr. Wells incorrectly assumed that as a result of abandoning Well No. 2, WSU had also abandoned Water Right Claim No. 98523. This misunderstanding on Mr. Wells' part was not based on any official University decision to abandon this water right. Mr. Wells subsequently asked Ecology staff whether the 500 gpm water right was lost because the well was abandoned. This evidences lack of intent to abandon the water right. As a result of his discussions with Ecology, Mr. Wells came to understand that the abandonment of Well No. 2 did not automatically result in abandonment of the water right represented by Claim No. 98523.[24] AR 51 at 2-3. The 2002 Water System Plan documents relied on by Cornelius (Cornelius Br. at 40-41) reflect only that WSU had abandoned Well No. 2 – not the water right associated with it. WSU continued to identify Claim No. 98523 as part of its current and forecasted water rights portfolio in its 2002 Water System Plan. AR 18, Att. 4 at 37-38; AR 15, Att. 6 at 39-40. This belies any intent to abandon Claim No. 98523.

3. As a matter of law, pumping water from a different well is not evidence of abandonment of a water right.

It is undisputed that WSU established vested rights to withdraw groundwater from two wells (Well Nos. 1 and 2), which pre-dated the enactment of the groundwater code, RCW chapter 90.44. It is also undisputed that WSU installed and utilized – without permission – a third well after enactment of the groundwater code. AR 85 at 33 n.18. The three claim forms

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[24] The facts in this case are very different from those in *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997), where the town stopped diverting surface water from the Twisp River sometime between 1939 and 1948, and then forgot entirely about its surface water right until 1993, when an Ecology employee discovered the old certificate in Ecology records. *Id.* at 772-73.

submitted by WSU in 1974 for Well Nos. 1, 2, and 3 clearly identified all the relevant information. There is no material dispute that, from the 1950's onward, WSU had used Well Nos. 1, 2, and 3 interchangeably as an integrated wellfield to supply the Pullman Campus. AR 52, Ex. 2. Nor is there any material dispute that between 1978 (when Well No. 2 stopped producing) and 1999, WSU pumped significant volumes of water from Well No. 3 – a well which had no separate, independent water right. *Id.* How, then, are we to characterize WSU's withdrawal from Well No. 3? Applying the doctrine of substantial compliance, WSU's three claim forms represent two vested water rights sharing three wells and a maximum combined annual quantity of 1440 acre-feet. *See Ecology v. Adsit*, 103 Wn.2d 698, 703-704, 694 P.2d 1065 (1985).

Cornelius would have this Court ignore entirely the undisputed fact that WSU continued to pump water from Well No. 3 after Well No. 2 became inoperable. Cornelius argues that pumping "from a point of extraction not authorized under the permit is an illegal withdrawal." Cornelius Br. at 41. Cornelius' argument regarding an "illegal" withdrawal misapprehends the significance of WSU's use of water from its other wells, including Well No. 3, after Well No. 2 declined in productivity. When water is unavailable from the authorized source, a water right holder's efforts to avail itself of another source are evidence of lack of intent to abandon the water right. As Hutchins explains:

> In the course of development of the rule authorizing and restricting the right to make a change in point of diversion, attempts were made to obtain rulings that the making of such a change effected either an abandonment or a statutory forfeiture of the appropriation in question. So far as abandonment is concerned, such advocated concept overlooks the essential requirement of this way of losing an appropriative right—an *intention* to abandon it, that is, to forsake it completely. Here, of course, on the contrary, intent is to continue full exercise of the right after taking the water from the stream at a different place.

1 Hutchins at 630 (emphasis in original).

Consistent with the rule that beneficial use is the measure of a water right, Ecology's administrative practice is to recognize that *de facto* or unauthorized changes in the diversion or use of water do not equate to abandonment of the water right. Ecology's Policy 1120 provides that "[u]se of water in a manner inconsistent with one's water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful." AR 23 at 4; AR 23, Ex. 2 at 5.

Cornelius' allegation of "30 years of nonuse" of Well No. 2 (Cornelius Br. at 40) is alone insufficient to establish abandonment of WSU's vested right represented by Claim No. 98523. WSU's use of Well No. 3 from 1978 onward is evidence of intent to continue its beneficial use of water, and rebuts any presumption that WSU intended to abandon its water right when water became unavailable from Well No. 2.[25] The undisputed material facts, including unavailability of water in Well No. 2, WSU's continued pumping from Well No. 3 after Well No. 2 became inoperable, and WSU's identification of Claim No. 98523 as part of its current and forecasted rights in its water system plan, negate any presumption that WSU intended to give up its water right. The PCHB did not err in ruling that the undisputed evidence of lack of intent to abandon WSU's water rights entitles WSU to summary judgment as a matter of law.

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[25] In *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 133 n.7, 969 P.2d 458 (1999), the Supreme Court noted that where a well "runs dry," beneficial use under a water right is prevented by "unavailability of water". The Court's observation was in the context of relinquishment, but non-use due to water unavailability presents a similar obstacle to a finding that a water right was intentionally abandoned. Moreover, taking steps to continue to use one's water right – even where such steps are unauthorized – has been recognized by the PCHB as a reasonable response to an inoperable diversion. *See Ege v. Ecology*, PCHB No. 05-033 (Order Denying Summary Judgment) (2006). Put another way, it is the opposite of evidence of intent to abandon.

H. The PCHB Correctly Interpreted and Applied the Law Regarding Beneficial Use.

1. Cornelius mischaracterizes the PCHB's summary judgment ruling on beneficial use.

Cornelius argued to the PCHB that Ecology's water right change approvals are "contrary to beneficial use requirements." AR 85 at 27. Ecology moved for summary judgment based on the water code's recognition of municipal water supply as a beneficial use, and the undisputed fact that Ecology's water right change decisions did not authorize WSU to waste water. AR 29 at 15-17. Cornelius argued to the PCHB that "WSU's water rights violate beneficial use requirements" under *Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993), because WSU was using water to irrigate a new golf course "in a wasteful fashion." AR 35 at 28-30. In response to Ecology's summary judgment motion, Cornelius submitted a declaration by Mr. Cornelius, consisting of his observations of water use during construction of the WSU golf course in the summer of 2007. AR 32.[26]

The PCHB determined that Cornelius could not prevail on this issue as a matter of law, because WSU's use of water is a beneficial use under RCW 90.54.020(1) and RCW 90.14.031(2). AR 85 at 27. Addressing Cornelius' contention that WSU's golf course irrigation

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[26] The sum total of Mr. Cornelius' "evidence" regarding waste of water was as follows:

> 3.1 WSU is constructing a new golf course. I drive or ride my bicycle by the golf course site almost every day. I have observed that irrigation of the golf course commenced this summer, and includes many sprinklers that operate during the day, even when local temperatures are in the 90s.
>
> 3.2 I photographed the golf course on August 17, 2007. It was approximately 95 degrees (F) when I took these photographs. Attachment 5 shows three of the photos I took on that day.
>
> 3.3 WSU's over-watering has caused run-off and erosion on the hillsides adjacent to the golf course. The attached photographs reveal rills and other erosive impacts that indicate water is running off the irrigated areas rather than soaking into the soil for uptake by seeded grass.
>
> 3.4 WSU officials frequently claim that the golf course irrigation system is "state of the art" in terms of water efficiency. Although I am not an expert on golf course irrigation, my own observations lead me to conclude just the opposite – that the golf course was been wasting water from day one.

AR 32 at 4. Cornelius' quotation of the purported "evidence" from AR 35 (Cornelius Br. at 45-46) is actually from Cornelius' memorandum in response to WSU's motion for summary judgment.

was not reasonably efficient, the PCHB ruled that Cornelius had "the burden to show that a triable issue exists regarding whether WSU's water use is reasonably efficient," and that without more, Mr. Cornelius' observations and opinions fail to meet that burden. AR 85 at 28. The PCHB went on to observe that Cornelius' allegations of waste "may be more properly evaluated in the context of an enforcement action, which is beyond the purview of this appeal." *Id.*

Cornelius contends the PCHB ruled that "expert testimony was required" to defeat summary judgment and that "Ecology lacked authority to evaluate reasonable efficiency in the groundwater amendment process." Cornelius Br. at 45. Cornelius mischaracterizes the PCHB's ruling. The PCHB did **not** rule that "reasonable efficiency" could not be evaluated in connection with amendment of a groundwater right; to the contrary, the PCHB implicitly recognized such authority. AR 85 at 27-28. The PCHB did not "refus[e] to consider efficiency" (Cornelius Br. at 47); Cornelius simply failed to meet his burden to present a disputed issue of material fact for the PCHB to consider.[27] AR 85 at 27-28.

2. The amendments to WSU's water rights meet the "beneficial use" prong of the four-part test.

The undisputed material facts before the PCHB include the fact that WSU has significantly **reduced** its groundwater pumping since the 1980's. AR 52, Ex. 2; *see* Part III.A.2

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[27] Although the PCHB did not rule that Ecology lacks authority to evaluate "reasonable efficiency" in the groundwater right amendment process (*see* AR 85 at 27-28), Cornelius sets up and attacks this straw person in a way that turns the prior appropriation doctrine on its head. Cornelius argues that "Ecology must re-determine the reasonable efficiency during the amendment process," citing RCW 90.44.100(2). Cornelius Br. at 47. RCW 90.44.100(2) requires "findings as prescribed in the case of an original application" when a new or additional well is authorized. This requirement "means that findings must be made **that water is available for a beneficial use,** that the appropriation will not impair existing rights, and that appropriation will not be detrimental to the public welfare." *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 131-32, 969 P.2d 458 (1999) (emphasis added). In *Merrill,* the Supreme Court held that "the time for determining the availability of water subject to appropriation is the time a permit is applied for." *Id.* at 132. Under the reasoning in *Merrill*, the time for determining whether a particular use of water is a beneficial use is the time a permit is applied for, not when a change in well location is sought. Where, as here, no new uses are proposed or authorized, nothing in RCW 90.44.100 requires Ecology to "re-determine" reasonable efficiency when it approves a different well location. *Merrill,* 137 Wn.2d at 132. In any event, Ecology **did** evaluate WSU's water use efficiency in connection with the change decisions, and determined that WSU's water use is reasonably efficient. AR 27 at 3.

supra. Ecology considered WSU's use of water to be reasonably efficient. AR 27 at 3. As a municipal water supplier, WSU is subject to the conservation and water use efficiency standards mandated by the 2003 MWL. AR 15, Att. 7.[28] Cornelius did not controvert any of these facts.

3. Cornelius' proffered evidence regarding "reasonable efficiency" of WSU's golf course irrigation during August 2007 did not create a disputed issue of material fact regarding beneficial use.

Even if true, Cornelius' allegations regarding WSU's use of water on its golf course during the summer of 2007 when the golf course was under construction, do not alter the extent and validity of WSU's water rights. Allegations of waste, of the type addressed in *Grimes*, are appropriate in the context of an adjudication of water rights in Superior Court. *See Rettkowski v. Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993). In such an adjudication, the superior court is making a final determination of the validity and extent of water rights, and the issue of whether a particular use of water constitutes beneficial use (as opposed to waste) would be a relevant and appropriate inquiry, as the Supreme Court recognized in *Grimes*. In approving the change applications to allow WSU's well integration, Ecology did not authorize WSU to waste water, and neither did the PCHB. WSU has not asserted and does not assert any right to waste water, now or in the future. The PCHB did not err in granting summary judgment to Ecology on the issue of beneficial use.

I. The PCHB Correctly Affirmed the Amendment of WSU's Water Right Permit No. G3-28278P.

Cornelius argues that the Board erred in failing to find that Permit No. G3-28278P had been "enlarged" because Ecology did not reduce the amount of water authorized under the

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[28] AR 15, Att. 7, submitted by Cornelius, consists of two pages from WSU's draft 2008 Water System Plan describing WSU's conservation program. It describes WSU's compliance with the new Water Use Efficiency Rule promulgated by the Washington Department of Health, and identifies various conservation measures including increased water efficiency on the new 18-hole golf course "due to a more efficient irrigation system, course design, turf choices, and maintenance practices." AR 15, Att. 7 at 5-11.

permit. Cornelius Br. at 48-49. The Board decided this issue after considering the evidence and testimony at the hearing on the merits. Accordingly, the Court must apply the law to the facts as found by the PCHB. In reviewing the findings to which Appellants have assigned error, the Court must view the evidence and all reasonable inferences in the light most favorable to the prevailing parties – here, WSU and Ecology. *See* Parts IV.A.4 and IV.A.5, *supra*. WSU adopts and incorporates the arguments in Part IV.N of Ecology's Response, and urges the Court to affirm the PCHB because substantial evidence supports the PCHB's decision that Permit No. G3-28278P was not enlarged.

J. The Appellants Are Not Entitled to Attorneys' Fees.

Because Cornelius cannot prevail in this appeal, this Court should deny the appellants' request for attorneys' fees.

V. CONCLUSION

For the foregoing reasons, Washington State University respectfully urges this Court to affirm the decisions of the PCHB.

RESPECTFULLY SUBMITTED this 12th day of April, 2012.

ROBERT M. MCKENNA
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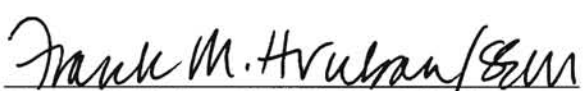

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4846-1855-1567, v. 1