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WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 35610-8-III

CROWN WEST REALTY, LLC,

Appellant,

vs.

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

Respondents.

AMICUS CURIAE BRIEF OF
THE CENTER FOR ENVIRONMENTAL LAW & POLICY

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I. INTRODUCTION

The Center for Environmental Law & Policy respectfully offers the following arguments regarding Washington's water resources statutes and cases for the benefit of the Court in evaluating Appellant Crown West Realty's (Crown's) appeal. Crown seeks to abuse the municipal water right exemption from relinquishment and Washington's temporary instream flow trust program to resurrect claims for non-municipal water which it has never used, so that it may sell or lease the water for new out-of-stream uses. Crown's improper strategy would broaden the municipal water right exemption from relinquishment far beyond the Legislature's intent, upset the priority system, greatly increase consumptive water use, and cause harm to other water users.

CELP concurs with Ecology's view that, because Crown is not using its water rights for municipal purposes, they do not qualify for the municipal exemption from relinquishment. But even if Crown's water rights are ultimately determined to be municipal, the transfers proposed would be unlawful. Crown seeks to evade the provisions of RCW 90.42.080, which limits the quantity of water under a municipal water right that can be placed into trust to the quantity that has *actually* been used by the applicant, of RCW 90.03.380, which requires that transfers of

water rights not increase water use¹ and that they be reviewed for detriment to the public interest, and of RCW 90.42.070, (“nothing in [the trust water rights program] authorizes the involuntary impairment of any existing water rights”).

Crown’s attempt to improperly invoke the municipal water law’s protections should be viewed in the context of a broader scheme. Crown actually seeks the unprecedented and unwarranted privilege to convert large inchoate water rights to non-municipal use elsewhere in the state. Crown itself has explicitly stated in its pleadings that “mitigation for future temporary out-of-stream uses”² “will be the subject of future applications.” Appellant’s Memorandum in Support of Summary Judgment at 2. In submitting this brief, CELP seeks to direct the Court’s attention to the implications of Crown’s unlawful strategy. These include increased out-of-stream water use and streamflow depletion at the expense of fish, wildlife, and other instream values, and out-of-priority water use to the detriment of other water right holders.

¹ As explained in Section IV.D, *infra*, the net effect of placing an inchoate water right into trust and then using the trust water as mitigation for new uses would be to increase overall water use.

² Crown asserts in its Reply Brief that it does not intend to “sell” its water rights. Appellant’s Reply Brief at 1. But whether Crown “sells” or “leases” its rights to mitigate future out-of-stream uses, the effect is the same: increased water use for non-municipal purposes, contrary to the Legislature’s intent in enacting the municipal exemption from relinquishment.

II. IDENTITY AND INTERESTS OF THE AMICI

Amici incorporate their statements of interest as set forth in the Motion for Leave to File Brief of Amicus Curiae in Support of the Department of Ecology's Response Brief, filed concurrently with this brief.

III. STATEMENT OF THE CASE

Amici concur with and adopt and incorporate the statement of the case as set forth in the Department of Ecology's Response Brief.

IV. ARGUMENT

A. Relinquishment of unused water rights is a cornerstone of Washington water law.

Washington, like other Western states, follows the "prior appropriations" scheme for allocating water. RCW 90.03.010. The centerpiece of this system is that a user who claims the right to appropriate water must *actually* do so - that is, she must put the water claimed under the right to beneficial use, or the right is relinquished. RCW 90.14.160. This ensures water rights that are not exercised are returned to the state, "so that the water will be available for appropriation by others who will put the water to beneficial use." *R.D. Merrill v. Pollution Cont. Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999). Relinquishment prevents

water hoarding and assures that the state's limited supply of water is most efficiently used.³

As well as being critical to establish the existence of a water right, beneficial use establishes the quantity of that right. A user acquires the right only to the quantity of water that is actually put to use with reasonable diligence: “beneficial use is ‘the basis, the measure, and the limit’” of a water right. *Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997). This is true even if a user constructs facilities for diversion of a much larger quantity of water than is actually used. *Theodoratus v. Ecology*, 135 Wn.2d 582, 593-5, 957 P.2d 1241 (1998) (discussing policy reasons for beneficial use rule). This principle prevents a user from “hoarding” water through claiming rights but not using the water, and it allows the amount of water (if any) available to future appropriators to be known with greater certainty.

There are a few narrowly drafted exceptions to the rule that water must be beneficially used to avoid relinquishment. These include temporary reductions in irrigation needs for certain specified reasons, service in the armed forces that is involuntary or in time of military crisis,

³ See RCW 90.14.010(2): “[a] strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state.”

or water claimed for municipal use. RCW 90.14.140. Crown relies solely on the municipal water use exception of RCW 90.14.140(2)(d) to avoid relinquishment. Appellant’s Opening Brief (Op. Br.) at 1. But as discussed in Ecology’s briefing, Crown is simply not a “municipal water supplier,” and is not entitled to be excused from relinquishment of its water rights. *Theodoratus*, at 594. Even if the water rights *were* municipal, however, both legal and policy considerations militate against Crown’s scheme to sell its water rights for non-municipal uses.

B. Municipal water suppliers have been granted an extraordinary exemption from the prior appropriations system’s “use it or lose it” rule.

Water rights “claimed for municipal water supply purposes under chapter 90.03 RCW” are statutorily exempt from relinquishment. RCW 90.14.140(2)(d). The Washington Supreme Court’s decision in *Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) raised concerns about a municipal utility’s ability to retain inchoate water rights (that is, water that had not yet actually been put to beneficial use). In response the Legislature amended the Water Code (the 2003 amendments are generally referred to as the “Municipal Water Law” or “MWL”) to specifically define municipal use. RCW 90.03.015(4); Laws of 2003, 1st Spec. Sess., Ch. 5 Sec. 1. The MWL also excepted most municipalities from beneficial use as the measure of a municipal water right by clarifying that pre-2003

water rights based on system capacity, rather than on actual perfected use, were “rights in good standing.” RCW 90.03.330(3); Laws of 2003, 1st Spec. Sess., Ch. 5 Sec. 6. As noted in Crown’s Reply Brief, the purpose of these amendments was to ensure that municipal purveyors would be able to meet future municipal needs. Reply Br. at 2-3. Such future needs, however, do not include out-of-stream non-municipal uses at remote locations.

Municipal water suppliers were thus granted the extraordinary privilege of a blanket exemption from relinquishment of unused portions of their water rights, which is at odds with the prior appropriations system and the “use it or lose it” rule generally applied to water rights. Municipal water suppliers are also given the freedom to change the place of use within their service area without having to follow the change procedures required of other types of right holders. RCW 90.03.380(1); RCW 90.03.386(2)

Extraordinary privileges come with extraordinary obligations, and municipal water rights are no exception. The exemption from relinquishment granted to municipalities allows them to be assured that

they will be able to meet future demand for municipal water uses⁴, but they accordingly have obligations that other water users do not. Unlike other water right holders, municipalities do not fully control their water use; rather, they are obligated to supply water to any user within their service area so long as they have adequate water rights and certain other conditions apply. RCW 43.20.260. They are also required, unlike most other users, to implement conservation measures and meet certain efficiency requirements. RCW 70.119A.180. These conservation measures must be described before a large municipal supplier may make further use of its inchoate water rights. RCW 90.03.386(3).

C. The Municipal Water Exemption Must be Narrowly Construed.

As with other exceptions to general statutory rules, the municipal water right exemption to relinquishment is to be narrowly construed. *Hall v. Corp. of Catholic Archbishop*, 80 Wn.2d 797, 801, 498 P.2d 844 (1972). The proponent of the exception (here, Crown) has the burden of proving its applicability. *Id.* The Washington Supreme Court has stressed this general principle of statutory construction in the specific context of relinquishment, citing legislative “purpose and policy statements” that

⁴ Crown agrees on this point, stating that the purpose of the MWL is “to provide greater certainty for municipal water providers . . .” Op. Br. at 15. But Crown cannot point to any statute, WAC provision, or any other evidence that this “greater certainty” was intended to allow municipal suppliers to sell water for non-municipal uses.

unused water rights must be returned to the state. *RD Merrill*, 137 Wn.2d at 140 (addressing “determined future development” and “operation of legal proceedings” exceptions to relinquishment).

Rather than an appropriately narrow construction, Crown urges an unprecedented and overbroad interpretation that would allow the municipal exception to swallow the relinquishment rule, undermining our general scheme for water regulation. As the PCHB correctly noted in this case, “expansion of the definition of municipal water right purposes would be contrary to the Legislative intent that water that is not used should be available to other appropriators.” *Crown West Realty v. Ecology*, Pollution Cont. Hrgs. Bd. No. 16-115 (July 25, 2017) (Order on Summary Judgment Motions) at 18.

D. Crown’s scheme would dramatically increase overall water use under inchoate municipal rights, violate the Water Code, and harm instream flows and other water users.

The narrow question that is currently before this Court⁵ involves whether Crown’s water rights are in fact municipal in nature. The case can and should be decided against Crown on that basis alone. But CELP notes

⁵ Because the Board granted summary judgment to Ecology on the issue of whether the rights involved were municipal, it never reached other aspects of the appeal including whether the proposed change would impair other water rights (Issues 6 and 6.a), increase consumptive use of water (Issues 4.b and 4.c), or be detrimental to the public interest (Issues 8 and 8.a). However, should Crown prevail in this appeal or make similar applications in future, these aspects of the case would likely arise at the Board or trial court level.

that several other issues presented to the PCHB, which are likely to arise after any remand, raise important policy implications. Crown argues for municipal status so that it may resurrect portions of its claimed water rights that have never been perfected, have not been put to municipal use (or any other beneficial use), and have been relinquished through non-use. Next, Crown seeks to use the trust water rights statute as a back-door method to sell or lease this allegedly “municipal” water for out of stream uses or as mitigation for out-of-stream uses. This scheme is contrary to law and to good public policy.

1. Crown’s scheme would result in increased water use at the expense of streamflows and junior water right holders

Conforming Crown’s rights as municipal and allowing the inchoate portions to be temporarily placed in trust for instream flows would ultimately lead to the water being used either out-of-stream or as mitigation for new out-of-stream uses. Indeed, this is the very reason for the proposed changes: to apply water claimed by Crown to downstream irrigation. Crown’s statement in its Motion for Summary Judgment before the PCHB that no new out-of-stream uses are proposed “within the scope of this appeal” is disingenuous at best; in fact, the *same pleading* states that “[s]aid out of stream uses will be the subject of subsequent applications.” Appellant’s Motion for Summary Judgment, filed April 27,

2017 at 6, *Id.* at 2. Further, even Crown’s careful attempt to wall off this appeal from the question of out-of-stream uses fails, as each of the change applications Crown filed with the CCWCB describes an additional purpose and place of use for “landscape irrigation” at a site in Chelan County. *Crown West Realty v. Ecology*, Pollution Cont. Hrgs. Bd. No. 16-115 (July 25, 2017) (Order on Summary Judgment Motions) at 6.

The new uses would be in addition to, not in lieu of, the water that Crown currently uses. Crown proposes to retain 3400 AFY for the current uses at the Industrial Park.⁶ Placing the remaining 5874 AFY claimed by Crown into trust would not immediately increase (or even change) consumptive use.⁷ However, either withdrawing this water for downstream use or applying it as mitigation credit for new uses, as Crown proposes to do, will result in an increase in overall consumptive water use, perhaps by as much as the full 5874 AFY claimed by Crown that is not currently in use. Such an overall increase in consumptive use under the

⁶There is no citation to or discussion of any new water conservation measures to be initiated, or of any uses to be discontinued, at the Industrial Park. This indicates that beneficial use at the industrial park is, in fact, not more than the 3400 acre-feet Crown proposes to retain, further demonstrating that any quantity claimed in excess of 3400 AFY has been relinquished.

⁷ As discussed in Section IV, *infra*, placing water that has never been used into trust does nothing to enhance streamflows.

water right is forbidden by RCW 90.03.380(1), which governs changes in water rights.

2. Crown's scheme would harm instream flows and other water right holders.

The increased water use would come at the expense of streamflows as water is removed from the river system for consumptive uses. The impact of Crown's scheme to supply new users (initially in Chelan County) would be felt at points in the Columbia River downstream of the ultimate point(s) of withdrawal. As well as harming fish and wildlife that depend on healthy streamflows, other water right holders could also be harmed. To the extent that Crown's scheme contributes to impairment of instream flows, any water right holder junior to the instream flow would be at increased risk of curtailment, while the new purchasers of Crown's water (with an alleged priority date senior to the instream flow) would continue to enjoy its use. This violates the clear statutory commands that transfers to the trust water program, or changes in water rights generally, may not cause harm to existing rights. RCW 90.42.070 (placing water rights into trust may not cause "involuntary impairment" of existing rights).

This harm would be exacerbated by the fact that the effect on streamflows would likely be larger than the effect of simply increasing

municipal water use. A large portion of water distributed through a municipal system is generally returned to the river through wastewater treatment plants, contributing to flows downstream, while water withdrawn for irrigation and applied to cropland is generally not returned to the river or stream. By way of example, the City of Spokane supplies up to 180 million gallons of water per day (MGD) to its users.⁸ 8 million gallons per day is treated and returned to the Spokane River at the County's new Regional Water Treatment Facility⁹, and an average of 34 million gallons/day is treated and returned at the City of Spokane's Riverside Park Water Treatment Facility.¹⁰

3. Inchoate municipal water rights may not be donated or leased into trust.

A large portion of the water that Crown claims has already been forfeited; even if it were saved from forfeiture through a finding that it was municipal in character, most of the claimed water rights would be inchoate. And the law does not allow transfer of such inchoate rights into trust.

⁸ City of Spokane (2018) *Public Works and Utilities*, available at <https://my.spokanecity.org/publicworks/water/> (last visited May 3, 2018).

⁹ Washington Department of Ecology (2011), *Fact Sheet for NPDES Permit WA-009317*, available at <https://www.spokanecounty.org/1159/Water-Reclamation-Facility> (last visited May 3, 2018)

¹⁰ City of Spokane (2018), *Riverside Park Water Reclamation Facility*, <https://my.spokanecity.org/publicworks/wastewater/treatment-plant/> (last visited May 3, 2018)

Municipal users were given the extraordinary ability to protect inchoate water rights from forfeiture so that they could serve expanded future municipal needs. A municipal supplier may “grow into” its inchoate rights, but water that has never actually been used cannot be placed in trust. Under RCW 90.42.080(11), the amount of a municipal water right (a right for which exemption from relinquishment is claimed for municipal purposes under RCW 90.14.140(2)(d)) that can be acquired for trust purposes is limited to historical beneficial use, not the full amount that was claimed for municipal use.

The legislature specifically considered this issue in 2009, when adopting a bill amending RCW 90.42.080 to encourage widespread use of water banking. The bill as originally introduced lacked the “historical beneficial use” language¹¹:

(10) For water rights donated or leased [for instream flow trust purposes] where nonuse of the water right is excused for sufficient cause under RCW 90.14.140, and where the nonuse occurred in the five years preceding the donation or lease, the department shall calculate the amount of water to be acquired by looking at the extent to which the right was

¹¹ At the February 3, 2009 hearing before the Senate Environment, Water, and Energy Committee, a representative from the Muckleshoot Indian Tribe testified as to concerns that the bill did not specify how the amount of a water right exempt from relinquishment (such as municipal water rights) that could be placed into trust would be defined. *See* Improving the Effectiveness of Water Bank and Exchange Provisions: Hearing on SB 5583 Before the Senate Environment, Water & Energy Comm., 2009 Leg., (Wa. 2009) (statement of Richard Reich, representing the Muckleshoot Indian Tribe). Available at: <https://www.tvw.org/watch/?eventID=2009021456> at 12:11- 13:49 (last viewed May 2, 2018).

exercised during the most recent five-year period preceding the date where sufficient cause for nonuse under RCW 90.14.140 was established.

SB 5583 Sec 5(10) (2009).

As ultimately passed and codified at RCW 90.42.080(11), the bill contained additional language clarifying that the measure of a municipal or hydropower water right that could be placed in trust was limited to “historical beneficial use:”

(11) For water rights donated or leased [for instream flow trust purposes] where nonuse of the water right is exempt under RCW 90.14.140(2) (a) or (d):

- (a) The amount of water eligible to be acquired shall be based on historical beneficial use; and
- (b) The total of the donated or leased portion of the water right and the portion of the water right the water right holder continues to use *shall not exceed the historical beneficial use of that right* during the duration of the trust.

Trust Water Rights Program – Water Banking, Laws of 2009 Ch. 283 Sec. 5(11) (codified at RCW 90.42.080(11) (emphasis added).

The Legislature’s intent that transfer of municipal rights into trust would not increase overall water use is clear. But Crown’s proposed use of inchoate water as mitigation for new out-of-stream uses would do exactly that: increase overall water use.

E. The inchoate water Crown proposes to transfer to the temporary instream flow trust will not provide real mitigation.

Mitigation of new uses requires that the water provided for mitigation actually adds to streamflow, so that the net effect of the new use and the mitigation water is neutral with respect to quantity.¹² By definition, water that is claimed under an inchoate right has not been put to use, so that it remains in the stream or aquifer in question. Simply designating this unused water as “mitigation” does not actually increase streamflow or provide any mitigation for new out-of-stream uses.

In this case, Crown’s agreement to not use water in the future that it is not using now logically cannot have any positive net effect on streamflow. Crown apparently seeks to avoid this fact by arguing that its ‘historical beneficial use’ includes the full amount of water that was ever claimed under all of its claims and rights, for a total of 9274 acre-feet/year. Crown then hopes to transfer 5874 AFY to trust, while retaining 3400 AFY for its own use. But the record does not support this level of use. The initial claims numbered 001087, 001088, and 001089 totaled 5080 acre-feet/year. Op. Br. at 4. As long ago as 1970, when applying for

¹² In the classic water banking scenario, a senior water right is purchased or leased and then retired, so that diversions under the right are halted. This produces a net increase in streamflow, which is then credited against new out-of-stream uses.

water certificates from these same wells, Crown conceded that two of the three had never been operated at full capacity, and requested certificates for only 3388 AFY (one-half of the quantities originally claimed).¹³ *Id.* at 5-6. Because Crown has not produced evidence that it ever beneficially used the full quantities of water claimed¹⁴, it is not entitled to place 5874 acre-feet in trust, let alone to do so while retaining an additional 3400 acre-feet for its own use.¹⁵ RCW 90.42.080(11).

F. Crown’s scheme has broad implications for water use in Washington.

Allowing “laundering” of inchoate municipal rights through such temporary trust donations has broad implications for overall water use. Cities in Washington hold large inchoate water rights. For example, the City of Seattle holds rights totaling more than 500,000 acre-feet/year or 450 million gallons/day (MGD)¹⁶, more than three times the amount of

¹³ This concession also demonstrates that Crown’s 1971 certificates are not the type of “pumps and pipes” certificates that the Muni Water Law specifically states are “rights in good standing,” but certificates based on actual use.

¹⁴ See Ecology Resp. Br. at 12.

¹⁵ Crown’s argument that the full amount of the water claimed under the 1942 claims has been beneficially used essentially boils down to “if these wells were not being used at capacity, why would we have applied for an additional right in 1973?” Appellant’s Memorandum in Response to Respondent’s Motion for Summary Judgment at 6. But by the same logic, if the full amount of water claimed was being produced from these wells and beneficially used, why would Crown have applied in 1970 for water right certificates for *less* than the full amounts claimed?

¹⁶ Seattle Public Utilities, 2013 Water System Plan at Appendix A-3. Available at <http://www.seattle.gov/util/Documents/Plans/Water/WaterSystemPlan/index.htm> (last visited May 3, 2018).

water (~125 MGD) that it actually uses¹⁷. While the law protects these rights from relinquishment, it is unlikely that they will be exercised in the foreseeable future. The city forecasts demand of less than 140 MGD even as far out as 2060¹⁸. Because the bulk of the city's inchoate rights are not currently being used, and are unlikely to be fully used in future, the corresponding quantities of water remain in-stream and contribute to instream flows.

In contrast, if municipal inchoate rights were available for transfer to trust and then for changes to other uses, most or all of a municipality's inchoate rights could be put to consumptive use (for example, Crown proposes to put a portion of its inchoate water rights to use as mitigation for irrigation in Chelan County). Effectively, Crown would be allowed to hoard substantial quantities of water under the fiction that its right was "municipal," and then sell or lease the improperly hoarded water as mitigation for other uses in other areas of the state. As a result, new non-municipal users would avoid the priority scheme by benefiting from the early priority dates of Crown's claims. Widespread use of this strategy would cause large increases in overall water use, and corresponding depletions in streamflow. This is precisely what the Water Code forbids.

¹⁷ *Id.* at 2-27.

¹⁸ *Id.*

A strict reading of what constitutes “municipal” use, as well as of the bar on using the trust water rights program to increase water use, would protect instream resources by preventing this type of water hoarding.

G. This Court should reject Crown West’s contention that simply establishing an intertie creates a municipal water right

Crown relies in the alternative on the presence of an emergency intertie with a public water system to support its contention that its rights are “municipal.” Op. Br. at 23-4. Crown concedes that this intertie has never been used for other than testing and maintenance. *Id.* Were the mere presence of such an intertie sufficient to confer “municipal” status, any water user could immunize its water rights against relinquishment simply by negotiating a sham intertie agreement and constructing the necessary connection. This too represents a great enlargement of the definition of a municipal right, contrary to the narrow interpretation of “municipal” that the Legislature intended, and would tend to allow water hoarding in derogation of public policy. As such it would threaten the relinquishment element of Washington’s regulatory scheme.

V. CONCLUSION

Crown proposes to circumvent law, legislative intent, and good water policy through an elaborate scheme to abuse trust water rights and the municipal exemption from relinquishment. The trust water right

program was designed to reduce consumptive water use and improve streamflows by incentivizing conservation. The scheme offered up by Crown would do exactly the opposite, leading to greater overall water use. Were this type of manipulation allowed to be widely used, the impacts on streamflows and other water rights holders could be devastating. For the reasons stated here, CELP urges this Court to uphold the Pollution Control Hearings Board's decision.

Respectfully submitted this 4th day of May, 2018.

Center for Environmental Law & Policy

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