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No. 35610-8-III

**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

CROWN WEST REALTY, LLC,

Appellant,

v.

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

Respondents.

**BRIEF OF AMICI CURIAE
WASHINGTON PUBLIC UTILITY DISTRICTS ASSOCIATION
AND
WASHINGTON ASSOCIATION OF SEWER & WATER
DISTRICTS**

LAW OFFICE OF THOMAS D.
MORTIMER
Thomas D. Mortimer, Jr.
WSBA No. 12244
1325 4th Ave., Suite 940
Seattle, WA 98101-2509
(206) 447-9036

TUPPER MACK WELLS PLLC
Sarah E. Mack
WSBA No. 12731
Lynne M. Cohee
WSBA No. 18496
2025 First Avenue, Suite 1100
Seattle, WA 98121
(206) 493-2300

*Attorneys for Washington Public Utility Districts Association
and Washington Association of Sewer & Water Districts*

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I. INTRODUCTION

In its Order on Summary Judgment Motions below, the Pollution Control Hearings Board (“PCHB”) held that the statutory definition of “municipal water supply purposes” requires **actual use** of water for at least one of the enumerated categories in RCW 90.03.015. *See* CP 17-21. *Amici Curiae* Washington Public Utility Districts Association and Washington Association of Sewer & Water Districts ask this Court to reject the “active compliance” interpretation set out in the PCHB’s Order and in Policy 2030, an administrative policy of the Department of Ecology (“Ecology”). The “active compliance” interpretation is inconsistent with the Washington Supreme Court’s decision in *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015). Contrary to Ecology’s argument, “active compliance” is not necessary to avoid revival of “ghost town” water rights, because the common law doctrine of abandonment would prevent such revival. Finally, interpreting the definition to require “active compliance” disregards the legislative intent underlying the 2003 Municipal Water Law and the 1967 relinquishment exemption for water rights claimed for municipal water supply purposes.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington Public Utility Districts Association (“WPUA”) is a statewide trade association representing 27 non-profit, community-owned public utility districts that provide electricity, water and wastewater services,

and wholesale telecommunications service to more than 1.7 million people in Washington. Eighteen Washington PUDs are municipal water suppliers, providing water on a retail and wholesale basis to more than 360,000 people and businesses in 23 counties. Collectively, Washington PUDs own and operate more than 560 individual water systems supplying water to more than 144,000 service connections. The Washington Association of Sewer & Water Districts (“WASWD”) is a statewide trade association representing 182 publicly-owned districts that provide 19% of the state’s population with clean, affordable drinking water and 14% of the state’s population with sewer transmission and/or treatment services. Members of WASWD collectively operate a \$595 million annual enterprise.

The water systems operated by WPUDA and WASWD members depend on a large and varied portfolio of municipal purpose water rights, which gives WPUDA and WASWD members a strong interest in the legal interpretation and application of the state’s municipal water law, including the definition of “municipal water supply purposes” in RCW 90.03.015. WPUDA’s and WASWD’s Motion for Leave to File Amicus Curiae Brief sets forth more fully the identities and interests of WPUDA and WASWD and is incorporated by reference.

III. ISSUES ADDRESSED BY AMICI CURIAE

This *amicus* brief addresses only a component of Issue No. 1: whether actual beneficial use of water (“active compliance”) is categorically required

for any water right to meet the definition of “municipal water supply purposes” under RCW 90.03.015(4). See Brief of Petitioner at 3 (“Did the Board err in determining that Crown’s water rights fail to comply with the definition of ‘municipal water supply purposes’ under RCW 90.03.015(4)?”); Department of Ecology’s Response Brief (“Resp. Br.”) at 3 (“Did the Hearings Board rule correctly that Crown West failed to demonstrate that each of the four water rights qualify as rights for ‘municipal water supply purposes’ under RCW 90.03.015(4)?”).

IV. STATEMENT OF THE CASE

This *amicus* brief addresses a pure question of law, and therefore does not rely upon or analyze the facts of this case.

V. STANDARD OF REVIEW

The interpretation of the statutory definition of “municipal water supply purposes” is a pure question of law. The “error of law” standard applies, under which the court determines the meaning and purpose of the statute *de novo*. RCW 34.05.570(3)(d); *Pub. Util. District No. 1 of Pend Oreille Cty. v. Dep’t of Ecology*, 146 Wash.2d 778, 790, 51 P.3d 744 (2002) (“*Pend Oreille PUD*”).

VI. ARGUMENT

A. In *Cornelius v. Ecology*, the Supreme Court considered but declined to impose an “active compliance” requirement on the definition of “municipal water supply purposes.”

This appeal involves a key component of the 2003 Municipal Water Law (“MWL”).¹ The PCHB’s and Ecology’s “active compliance” interpretation of the definition of “municipal water supply purposes” (“MWSP”) in RCW 90.03.015(4) is utterly inconsistent with the Supreme Court’s decision in *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015). In *Cornelius*, the Court affirmed the validity of two water rights held by Washington State University (WSU) against Cornelius’ argument that those water rights, originally designated for “domestic” purposes, had been relinquished **because of nonuse** prior to 2003. The Court did not adopt Ecology’s or the PCHB’s “active compliance” standard, or even discuss it. *Id.* at 590-96. Had the Court interpreted RCW 90.03.015(4) to require the actual use of water, it would have reached a different result.

Ecology and the PCHB disregard *Cornelius* by mischaracterizing both the arguments before the *Cornelius* Court and the Court’s ruling. Ecology claims that the appellants in *Cornelius* did not assert “that Washington State

¹ Laws of 2003, 1st sp. s. ch. 5. WPUDA and WASWD adopt and incorporate the discussion of the history and context of the Water Code and the 2003 Municipal Water Law set forth in Part VI.A of the Washington Water Utilities Council Amicus Curiae Brief and Part IV.A of the Brief of Amicus Curiae Regional Cooperative of Pierce County and Spokane Aquifer Joint Board.

University failed to exercise its water rights in active compliance with the municipal definition.” Resp. Br. at 31. The PCHB similarly stated that “*Cornelius* did not involve a challenge to WSU’s active use of its water rights. There was no question as to whether WSU’s water use was consistent with the definition of municipal water supply purposes.” CP 20. Those assertions are wrong, because the *Cornelius* appellants did in fact claim that WSU failed to actively use its water rights. Ecology’s attempt to impose an “active compliance” requirement on the MWSP definition was squarely before the Court in *Cornelius*.

1. In *Cornelius*, the appellants contended that Washington State University’s water rights had been unused for more than five years prior to enactment of the MWL.

Two water right certificates, originally issued for “domestic” purposes, were primarily at issue in *Cornelius*. *Cornelius*, 182 Wn.2d at 582. *Cornelius* argued that those rights “had already been relinquished by operation of law” due to WSU’s “failure to use the water for more than five years prior to 2003.” *Id.* at 590. In other words, *Cornelius* contended that the rights had not been actively used for five or more years.² The PCHB

² Before the PCHB, *Cornelius* sought summary judgment that WSU’s Certificate No. 5072-A had been relinquished due to nonuse for five or more years before enactment of the Municipal Water Law. *Cornelius v. Ecology*, PCHB No. 06-099, 2008 WL 5510405, Order on Summary Judgment (January 18, 2008), at *1, *4. The PCHB denied his motion. *Id.* at *26 n.27. The PCHB concluded “as a matter of law that [WSU’s rights] are **categorically** exempt from relinquishment **without respect to non-use.**” *Id.* at *18 (emphasis added).

interpreted RCW 90.03.015 to characterize the present-day use of WSU's water rights, and then applied that characterization retroactively.

The PCHB applied the MWSP definition to determine “whether WSU is a municipal water supplier” and “whether the water rights associated with [WSU's wells] **are** rights for municipal water supply purposes under chapter 90.03 RCW.” *Cornelius v. Ecology*, PCHB No. 06-099, 2008 WL 5510405, Order on Summary Judgment (January 18, 2008) at *6-10 (emphasis added).

The PCHB approached the definition as follows:

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

Id. at *7 (emphasis added). The PCHB proceeded to analyze each of WSU's water rights “to determine if they meet the definition of ‘municipal supply purposes’ contained in RCW 90.03.015(4), either as specifically listed for that purpose, or as a ‘right generally associated with the use of water within a municipality.’” *Id.* at *8. The PCHB concluded that “each of WSU's water rights individually discloses its intended and actual purpose for municipal water supply under the statutory definition.” *Id.*

In characterizing WSU's water rights, the PCHB focused entirely on present-day circumstances – *i.e.*, the “intended and actual” use of the water rights at the time of the Ecology decision, rather than inquiring whether

WSU's water rights had "actively complied" with the definition in the past. *Id.* at *7; *6 n.5. Although the PCHB stated that it looked "for guidance" to Ecology's Policy 2030, *id.* at *8, it did not actually follow Policy 2030's direction to evaluate whether any of WSU's water rights had failed to "meet the definition" during any five-year period (*see* Ecology Policy 2030 at 3, AR 00145). Instead, the PCHB concluded that "they are **categorically** exempt from relinquishment without respect to non-use." *Id.* at *18 (emphasis added). The appellants asserted that determining that WSU's rights were municipal required a "retroactive" application of the MWL to unused water rights, which they argued was unconstitutional. The PCHB held that it lacked jurisdiction to review those constitutional claims. *Id.* at *10.

2. Ecology and Cornelius addressed the "active compliance" interpretation in their arguments to the Supreme Court.

The interpretation and application of the MWSP definition was at the heart of Issues 1 ("Is the MWL unconstitutional as applied to Cornelius?") and 2 ("Did the PCHB err by allowing Ecology to use a streamlined process for evaluating WSU's application?") before the Supreme Court. *Cornelius*, 182 Wn.2d at 584. Cornelius argued that the MWL could not be applied "without violating his due process rights and the separation of powers doctrine," which he claimed "were violated when Ecology and the PCHB 'reviv[ed]' WSU's allegedly relinquished water rights." *Id.* at 585.

Ecology argued in *Cornelius* – just as it does in this case – that because RCW 90.03.015(4) states that “[m]unicipal water supply purposes’ means a beneficial use of water,” the MWL “requires active compliance by conformance with the definition,” and that such conformance “occurs where a water right holder uses water for one or more of the categories of beneficial use” listed in the definition. Ecology’s Response Brief (April 16, 2012), *Cornelius v. Ecology*, No. 88317-3 at 12 (emphasis in original).³

Ecology also contended in *Cornelius* – as it does in this case – that the MWSP definition requires actual use in a five-year period, stating “if a water right does not meet the municipal definition for five or more years, then the water right would be valid only to the extent it had been beneficially used” and nonuse would result in relinquishment unless excused by one of the other relinquishment exemptions. *Id.* at 12-13 n.8.

Arguing that “WSU’s water rights reverted to the State and were relinquished when the non-use occurred,” the *Cornelius* appellants quoted from and replied to this exact “active compliance” portion of Ecology’s brief. Appellants’ Reply Brief (May 29, 2012), *Cornelius v. Ecology*, No. 88317-3 at 10 n.6.⁴ The *Cornelius* appellants argued that WSU’s water right did not

³ Ecology’s Response Brief in *Cornelius* is available online at <https://www.courts.wa.gov/content/Briefs/A08/883173%20%20Respondent%20Dept%20of%20Ecology.pdf>.

⁴ Appellants’ Reply Brief in *Cornelius* is available online at <https://www.courts.wa.gov/content/Briefs/A08/883173%20Appellant%20Reply.pdf>.

meet the municipal definition for five or more years due to nonuse – precisely the situation in which Ecology’s “active compliance” policy would have dictated a finding of relinquishment. *Id.* They also noted that “the court could avoid the as-applied constitutional challenge by concluding that the PCHB misinterpreted the Municipal Water Law.” *Id.* at 3 n.1. Thus, the issue of whether an “active compliance” standard should be imposed on the MWSP definition was squarely before the Court.

3. The Supreme Court did not require “active compliance” with the “municipal water supply purposes” definition.

The Court rejected Cornelius’ “as applied” constitutional challenges **without** interpreting the MWSP definition to require actual use of water. *Cornelius*, 182 Wn.2d at 589-96. First, the Court held that the PCHB’s retroactive application of the MWSP definition to WSU’s certificates did not violate the separation of powers doctrine because it did not upset any adjudicative facts: “That is the precise general application of the MWL we found constitutional in *Lummi Indian Nation*.” *Id.* at 591. Rejecting Cornelius’ argument that a “domestic” purpose of use stated on a water right certificate precluded treating the right as “municipal,” the Court explained that “the legislature foresaw that too much weight might be placed on the characterizations of water rights holders and water rights use on certificates issued before ‘municipal’ was defined,” and enacted RCW 90.03.560 “to fix this problem.” *Id.* at 591. The Court held that the PCHB correctly confirmed

WSU's existing water rights under RCW 90.03.560, under which "WSU is deemed to have always been a municipal supplier." *Id.* at 593.

Next, the Court rejected Cornelius' due process claim that Ecology "resurrected a relinquished water right" by applying the MWSP definition: "We held in *Lummi Indian Nation* that merely relabeling a previously granted water right as 'municipal' does not violate due process, provided the water user falls under the new municipal definition." *Id.* at 594. The Court explained that "Ecology merely applied RCW 90.03.560 and RCW 90.03.015 retroactively to WSU to determine that WSU's water rights were valid and met the definition of 'municipal water supply purposes,'" which was "precisely the kind of action we found constitutional in *Lummi Indian Nation*." *Id.* The Court concluded that "it is the legislature's prerogative to categorize water uses and decide which categories will be relinquished by nonuse. It has done so with the MWL." *Id.* at 595.

Finally, the Court affirmed Ecology's "streamlined policy for making 'simplified' tentative determinations when relinquishment is not an issue":

Under this streamlined policy, Ecology's staff does not generally require applicants to demonstrate their year-to-year water use because relinquishment is not an issue. Intuitively, instances where Ecology permits the streamlined policy would include **when the water right is for a municipal water supply** under RCW 90.03.330(3), since **those rights are immune from relinquishment**. RCW 90.14.140(2)(d).

Id. at 595-96 (emphasis added). The Court rejected Cornelius' argument that "the MWL still required Ecology to look at WSU's historic nonuse of its

water rights and revoke any relinquished rights.” *Id.* at 596. Holding that Ecology appropriately applied RCW 90.03.560 and RCW 90.03.015 retroactively to WSU to determine that WSU’s rights met the MWSP definition, the Court concluded that “Ecology applying the streamlined policy to WSU is consistent with the MWL because WSU’s water rights were for municipal water supply purposes and immune from relinquishment.” *Id.*

The Court’s decision in *Cornelius* cannot be squared with an “active compliance” interpretation of the MWSP definition. The Court’s approach was exactly the opposite of Ecology’s. *See* Resp. Br. at 21 (“if a water right holder fails to use water in a manner that satisfies one of the statutory ‘municipal water supply purposes’ for five consecutive years, and fails to qualify for a different relinquishment exemption,” the unused water right is subject to relinquishment). The Court did **not** require analysis of whether WSU actually used its challenged water right certificate during consecutive five-year periods so as to “conform” to the MWSP definition.⁵

In this case, the PCHB should have followed the Court’s approach in *Cornelius* and applied the MWSP definition as written, recognizing “the

⁵ Although the Court did not explicitly discuss Ecology’s efforts to enshrine an “active compliance” requirement in the MWSP definition, that effort did not go entirely unnoticed. In dissent, three Justices explicitly rejected the PCHB’s interpretation of the words “means a beneficial use of water” to require a “present tense” application of the definition, pointing out that statutory definitions “frequently begin with ‘X’ means” *Cornelius*, 182 Wn.2d at 625 n.15 (Madsen, C.J., dissenting). Although it did not explicitly criticize the PCHB’s “present tense” interpretation of the words “means a beneficial use of water,” the Court majority did not endorse it, either.

legislature's prerogative to categorize water uses and decide which categories will be relinquished by nonuse." *Cornelius*, 182 Wn.2d at 595.

B. Ecology's "ghost town" argument ignores controlling authority and does not justify imposing an "active compliance" requirement on the Legislature's MWSP definition.

Ecology argues that its "active compliance" interpretation of the MWSP definition is necessary to avoid "absurd scenarios" in which long-dormant water rights that once served vibrant but now depleted "ghost towns" and industrial facilities could be "revived." Resp. Br. at 29 n.18. This is a red herring. The doctrine of common law abandonment obviates any need for an "active compliance" requirement to address "ghost town" water rights.

In *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997), the Supreme Court held that a municipal water right unused for long periods could be lost under the common law doctrine of abandonment. The Court adopted the general rule that "long periods of nonuse raise a rebuttable presumption of intent to abandon a water right." *Id.* at 783. Moreover, "Twisp's continuing existence as a municipality" could not be relied upon to rebut the presumption. *Id.* at 785. The Court clarified that "common law abandonment and statutory forfeiture are quite different concepts," and that the relinquishment statute "clearly does not apply to claims of abandonment based upon nonuse before 1967." *Id.* at 784.

Five years after *Okanogan Wilderness League*, the Court reaffirmed the continued viability of the common law doctrine of abandonment in

Washington water law: “[T]o the extent any question may remain . . . as to whether the common law abandonment doctrine remains viable after 1967, we take this opportunity to put the matter to rest.” *Pend Oreille PUD*, 146 Wn.2d at 799. *Okanogan Wilderness League* and *Pend Oreille PUD* make clear that the common law doctrine of abandonment directly addresses “ghost town” situations, and provides a clear legal mechanism to guard against the “revival” of long-unused or long-forgotten municipal water rights.

The Municipal Water Law did not alter in any way the legal effect or operation of the common law doctrine of abandonment in Washington. *See Cornelius v. Ecology*, 182 Wn.2d at 603-04 (analyzing Cornelius’ abandonment claim without regard to MWL enactment).

Ecology’s “ghost town” argument flatly ignores the doctrine of abandonment, which is alive and well in Washington. This common law doctrine, including the presumption of intent to abandon arising from a long period of nonuse, applies to municipal and non-municipal water rights alike. A true “ghost town” water right would pose no risk of being “claimed for municipal water supply purposes” after 1967 (the date of enactment of the relinquishment statute), and would be entirely addressed through application of the abandonment doctrine. In sum, Ecology’s “ghost town” argument is itself absurd, making Ecology’s “active compliance” requirement an unnecessary solution to a contrived problem.

C. The “active compliance” interpretation ignores the plain language of the relinquishment exemption for water rights claimed for municipal water supply purposes.

Under the guise of “narrowly” construing the relinquishment exemption for water rights claimed for municipal water supply purposes (CP 17, 21; Resp. Br. at 20), the PCHB and Ecology engage in a transparently result-driven contortion of the MWSP definition. The PCHB held that to qualify for the relinquishment exemption in RCW 90.14.140(2)(d), “Crown must demonstrate that the water rights meet the active compliance standard concerning the beneficial uses set out in RCW 90.03.015(4).” CP 21.

The PCHB rejected the Conservancy Board’s interpretation – that a water right “authorized in a manner that contemplated municipal use” could be exempt from relinquishment under RCW 90.14.140(2)(d) – because that interpretation “**would have the effect of greatly expanding** the number of situations in which the exemption from relinquishment associated with municipal water will apply.” *Id* (emphasis added).

The PCHB’s result-oriented approach – divorced from the statutory text and the Legislature’s intent – mirrors Ecology’s assertion that “it strains credibility to suggest that the Legislature intended a perpetual relinquishment exemption for all water rights where municipal purposes were merely contemplated or intended, regardless of actual beneficial uses occurring under the water rights.” Resp. Br. at 27. But that is precisely the intention revealed by the actual language in the relinquishment statute.

The municipal relinquishment exemption is straightforward and unqualified: “If such right is claimed for municipal water supply purposes under chapter 90.03 RCW.” RCW 90.14.140(2)(d). Other relinquishment exemptions contain explicit restrictions, qualifications, and provisos. *E.g.*, RCW 90.14.140(2)(a) (“and annual license fees are paid”); 90.14.140(2)(b) (“so long as withdrawal or diversion facilities are maintained in good operating condition”); 90.14.140(2)(c) (“to take place either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right”); 90.14.140(2)(f) (“as long as the lessee makes beneficial use of the right . . . and a transfer or change of the right has been approved”); 90.14.140(2)(i) (“provided the right is subject to an agreement not to divert” or “provided the right is banked”). Had the Legislature intended to impose a requirement of **actual use** to qualify for the municipal exemption from relinquishment, it would have done so in RCW 90.14.140(2)(d), not in the MWSP definition.⁶

By tying its conclusion to an interpretation of the MWSP definition, the PCHB ignored or misconstrued the plain language of the relinquishment exemption itself. The proper focus of the PCHB’s analysis should have been on the words “claimed for” in RCW 90.14.140(2)(d). *E.g.*, *City of Union Gap*

⁶ According to the Code Reviser’s technical drafting rules, definition sections “should not contain substantive provisions of law such as fees, penalties, or prohibited conduct” and should not be used “to specify requirements that must be met for receiving a license or conducting a business. These and similar matters should be treated in separate sections of the act.” Statute Law Comm., Office of the Code Reviser, Bill Drafting Guide 2017, Pt. II(11)(h), available at http://leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx.

v. Dep't of Ecology, 148 Wn. App. 519, 531-32, 195 P.3d 580 (2008) (unused water rights were not “claimed for municipal water supply purposes” because city did not own rights and did not file application to change rights to “municipal” purposes within five years of last use). Focusing on the “claimed for” language in the relinquishment statute would carry out the Legislature’s intent in chapter 90.14 RCW. It would also avoid convoluted applications of the MWSP definition with unanticipated consequences beyond the relinquishment context.

D. The “active compliance” interpretation is inconsistent with other provisions of the MWL addressing rights for municipal water supply purposes.

Under the “active compliance” interpretation, when a water right is not actually used for one of the enumerated categories in RCW 90.03.015(4), the right is not “municipal” under the definition. CP 27, 28; Resp. Br. at 24. This interpretation yields nonsensical results when applied to other provisions within the MWL addressing rights for “municipal water supply purposes” in ways that are incompatible with a requirement of **actual** beneficial use.

Section 9 of the MWL refers to “the planned future use of existing water rights for municipal water supply purposes, as defined in RCW 90.03.015, that are inchoate.” RCW 90.82.048(1) (Laws of 2003, 1st sp.s. ch. 5 §9). An inchoate right to water has not yet been put to beneficial use. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 596, 957 P.2d 1241 (1998).

Section 9 also refers to “water rights for municipal water supply purposes not

currently in use.” RCW 90.82.048(2). Section 14 of the MWL refers to “an unperfected surface water right for municipal water supply purposes.” RCW 90.03.570(1), (2) (Laws of 2003, 1st sp.s. ch. 5 §14). If actual beneficial use were required to meet the MWSP definition, MWSP rights “that are inchoate” would be an absurdity – as would MWSP rights that are “not currently in use” or “unperfected.”

In Section 6 of the MWL, the Legislature declared that water right certificates “issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015” based on system capacity (so-called “pumps and pipes” certificates) are rights “in good standing.” RCW 90.03.330(3) (Laws of 2003, 1st sp.s. ch. 5 §6). This was in response to the *Theodoratus* decision. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 255-57, 241 P.3d 1220 (2010). The Legislature also prohibited Ecology from revoking or diminishing “a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015” except to correct ministerial errors or in cases of misrepresentation. RCW 90.03.330(2). The impetus for this provision was an Ecology draft policy “which would have required all water rights based upon capacity to comply with the actual beneficial use requirement.” *Lummi Indian Nation*, 170 Wn.2d at 256.

In *Lummi Indian Nation*, the Supreme Court interpreted these MWL provisions to embrace municipal water rights that are not actively being used.

The Court rejected claims that the MWL unconstitutionally “resurrected” unused water rights, without relying upon or even remotely referring to Ecology’s “active compliance” interpretation of the MWSP definition:

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.

Id. at 268-69 (emphasis added; footnote omitted). Ecology’s argument that “[i]f water is not being used . . . then the water right is not for municipal water supply purposes” (Resp. Br. at 24) would render RCW 90.03.330(2) and (3) inapplicable to “pumps and pipes” water rights that are not “actively” being used, disqualifying some municipal water rights from these important protections afforded by the MWL. This is contrary to a core purpose of the MWL – to “confirm[] the good standing of water certificates issued under the former system.” *Lummi Indian Nation*, 170 Wn.2d at 257.

E. The “active compliance” interpretation directly conflicts with the MWL conservation and water use efficiency provisions.

The PCHB’s and Ecology’s interpretation of the MWSP definition to require actual beneficial use of water is completely at odds with the water conservation goals and preferences embedded in the MWL. A central feature of the MWL is the linkage between flexibility and water conservation. The Legislature provided more security and flexibility to municipal water suppliers in managing their water rights, while requiring municipal systems

to increase their investment in water conservation measures, improve water use efficiency, and meet higher system leakage standards. *See* RCW 90.03.386 (MWL Section 5); RCW 70.119A.180 (MWL Section 7) (Laws of 2003, 1st sp.s. ch. 5 §§5, 7).

The Legislature intended these conservation measures to substitute for beneficial use of municipal water rights. *See* RCW 70.119A.180(1) (expressing legislative intent to establish water use efficiency requirements); RCW 90.03.386(3) (requiring municipal water suppliers to implement water conservation). The water system plan for any municipal system with 1,000 or more connections must describe “the projected effects of delaying the use of existing inchoate rights . . . through the addition of further cost-effective water conservation measures before it may divert or withdraw further amounts of its inchoate right for beneficial use.” RCW 90.03.386(3). Ecology is required to consider water conservation efforts in fixing a reasonable amount of time for a municipal water supplier to put its water rights to beneficial use. *Id.*

It is impossible to square these legislative directives with an “active compliance” requirement under which water rights that are not “actively” used would cease to be “municipal” under RCW 90.03.015. Instead of fostering compliance with the MWL’s water use efficiency goals and requirements, interpreting the MWSP definition to require actual use of water would have the contrary effect. It would compel municipal water systems to

use their water rights to avoid relinquishment, despite express statutory direction under the MWL to employ conservation to delay the use of MWSP water rights. An “active compliance” requirement would compromise decades of planning and preparation by water utilities for conservation and long-term growth, placing water rights claimed for municipal water supply purposes at risk of relinquishment. This would be utterly contrary to the legislative intent underlying the MWL.

VII. CONCLUSION

The WPUDA and WASWD urge the Court to reverse on Issue 1; to remand to the PCHB for further proceedings; and to direct the PCHB to apply the plain text of the MWSP definition in the context of the entire statutory scheme relating to municipal water rights without “active compliance.”

Respectfully submitted this 3rd day of May, 2018.

LAW OFFICE OF THOMAS D. MORTIMER



Thomas D. Mortimer, Jr., WSBA No. 12244
(206) 447-9036

TUPPER MACK WELLS PLLC



Sarah E. Mack, WSBA No. 12731
Lynne M. Cohee, WSBA No. 18496
(206) 493-2300

*Attorneys for Amici Curiae Washington Public
Utility Districts Association and Washington
Association of Sewer & Water Districts*

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served a copy of the foregoing Brief of Amici Curiae Washington Public Utility Districts Association and Washington Association of Sewer & Water Districts upon the parties via the Appellate Courts' Portal filing system, which will send electronic notifications of such filing to the last known email addresses of the following:

Mark Peterson
Peterson & Marquis
1227 First Street
Wenatchee, WA 98801

By email to *markp@nwi.net*

Daniel J. Appel
Foreman Appel Hotchkiss &
Zimmerman PLLC
124 N. Wenatchee Avenue
Wenatchee, WA 98801

By email to *daniel@fahzlaw.com*

Alan M. Reichman
Clifford Kato
Office of the Attorney General,
Ecology Division
P. O. Box 40117
Olympia, WA 98504-0117

By email to *AlanR@atg.wa.gov*
and *CliffordK@atg.wa.gov*

DATED this 3rd day of May, 2018 at Seattle, Washington.


Sarah E. Mack, WSBA No. 12731