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

CROWN WEST REALTY, LLC,

Petitioner/Appellant,

v.

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

Respondents.

REPLY BRIEF OF PETITIONER

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I. Introduction

This case is primarily one of statutory interpretation. But rather than construing the legislature's intent from its plain language, the Department of Ecology ("Ecology") tries desperately to create ambiguity so the Court will defer to its preferred interpretation that bears little resemblance to the statutory text. Its attempt fails. First, however, it is necessary to clear away some misconceptions that Ecology repeatedly emphasizes.

Ecology states as a matter of fact that Appellant Crown West Realty, LLC ("Crown West"), is attempting to transfer water rights to the state trust program as a prelude to selling the water rights. This assertion is not true. Crown West has never contemplated or attempted to sell these water rights and has no desire to do so. Ecology does not cite any evidence in the record to support its assertion because there is none. Further, such an assertion reveals a fundamental misunderstanding of why municipal water purveyors seek to protect their water rights from relinquishment.

Readily available potable water is a basic necessity of public health and safety. Serving this public need motivates water purveyors, like Crown West, to ensure that they can meet the growing need for such water in the best and most efficient way possible and to marshal their resources, including water rights, to that end. For these reasons, water purveyors always seek the highest and best use of their water rights by meeting

increased municipal demands in their service area, by expanding their service area, or wholesaling water to an adjacent municipality via an intertie. Because of this public duty, municipal water purveyors have no incentive to sell water rights, but rather to preserve and maintain them for future public need. Further, selling water for municipal purposes generates higher revenues than other uses, helping the purveyor maintain sufficient assets for operations and system improvements. This financial stability further aids public welfare by guaranteeing that purveyors will have the means to continue serving the public's potable water needs.

Public water purveyors must develop and protect a sufficient water supply for future growth, *see, e.g.*, RCW 70.119A.060(1)(b)(iv), meaning they usually have both perfected and unperfected (inchoate) quantities within their water rights portfolios that are being held for future development. Municipal service areas develop gradually with demands—from residential, commercial and industrial uses—that ebb and flow over time with organic growth, migration, commercialization, and economic development and redevelopment. The municipal and determined future development exemptions from relinquishment, RCW 90.14.140(2)(c), (d), paired with the “rights in good standing” legislation that protects inchoate water rights, RCW 90.03.330(3), give the certainty these purveyors need to

fulfill their fundamental and statutorily mandated role of providing potable water daily for nearly all persons in Washington State.

Municipal demands like those in the Spokane Industrial Park (“Park”) naturally vary as the customer mix (both owners and tenants) changes over time, often decades. The closure of a large business can take time to replace with other uses that require similar water flows. Without the protections against relinquishment, any reduction of water use could be an irreplaceable relinquishment of the water right, profoundly impairing further development.

Over the 60 years since its privatization, the Park’s developers and owners have invested over \$100,000,000 to improve the Park’s facilities. AR 000228. Like any municipality, the Park has a perpetual life: its access to highways, railroads, and dedicated utilities are irreplaceable, and its amenities (such as restaurants, fuel stations, day care, lodging, retail, and parking) provide tremendous value and convenience to resident businesses and governmental entities.

Ecology is also highly suspicious of Crown West’s attempted use of the state water trust program—calling it “speculation”—as if donating water to the trust is somehow contrary to the public weal. Here, too, Ecology misunderstands the economics of water rights. Given the requirement that purveyors hold water rights for future use, those rights do not generate any

present use, or income, to the purveyor. The trust program provides a solution, functioning like a bank vault into which a purveyor can deposit unused water rights and withdraw them at a later date as the demand increases. *See generally* RCW ch. 90.42.

Like a financial bank, a water bank can loan out water rights to downstream users in a reliable manner taking into consideration the nature and values of the water rights on deposit, the deposit period, and the risks of depositor withdrawal. Like a financial bank, the water bank would hold rights in reserve, diversify deposits, match loan terms to water right availability, and implement the many proven methods to control risk and ensure reliable long-term water loans based on water deposits that can be withdrawn at a specific time (or even at any time) for their original purpose.

In any modern economy, banks are a critical component of fully utilizing capital and making that capital available to the general public. The water bank, by emphasizing temporary deposits and loans, would play an identical function in the Columbia Basin to help ensure that valid water resources are fully utilized for the public benefit. With its claims of “speculation,” Ecology is actually promoting the hoarding of water by purveyors as part of their planning to meet future demands who have no other way of temporarily utilizing and earning income from their water rights.

Further, water banking can generate income for system modernization and for water conservation efforts that are generally unfunded and can erode revenue in a business that relies on water sales for income. The water bank can provide a revenue stream that would incentivize and fund conservation in a way that currently does not exist. Such financial motivation and means for modernization and conservation would likely prolong and enhance instream flows upstream where the quantity of water in stream has a proportionately greater ecological impact than downstream where the same water quantities are proportionately less meaningful to instream ecology.

As this discussion makes clear, Ecology's attempts to paint Crown West as a devious speculator in water rights seeking to make a profit at the expense of the environment and public good are not just wrong; they bear no resemblance to reality at all. Crown West is seeking to put to temporary, responsible use its valid water rights that it must retain for future planned development. Far from resulting in Ecology's alleged devastation, such a plan actually encourages conservation and greater water flows upstream where it is most needed.

II. Reply Argument

This case raises two main issues of statutory interpretation. The first is the relevant standard used to determine if a water right is used for

municipal purposes. Ecology has adopted an “active compliance” standard that has no basis in the statutory language. The second issue concerns the proper interpretation of “municipal water supply purposes” found in RCW 90.03.015(4). Ecology finds the statutory language rife with ambiguity and insists that the court should defer to its interpretation, which is so narrow as to render some of the described categories practically useless. Crown West contends the statute is quite clear and may be understood and interpreted according to its plain language, which supports a broader interpretation that Ecology is willing to admit and includes the use to which Crown West puts its water rights.

A. The Municipal Water Law Does Not Require Active Compliance.

It bears repeating that the 2003 Municipal Water Law was enacted for the express purpose of protecting older “pumps and pipes” certificates and defining municipal rights. Pumps and pipes certificates are water rights in good standing even if not perfected through beneficial use. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 256, 241 P.3d 1220 (2010); *see also* RCW 90.03.330(3). Ecology, however, seeks to undermine this purpose by requiring any water right owner claiming municipal use to prove that the right’s use has continued during each five-year period since its inception. Further, Ecology distorts Crown West’s position as defending a municipal

water right that is merely contemplated or intended for such use. This is not correct.

Ecology's assertion that the water must be beneficially used to meet the municipal standard is inherently incompatible with statutes intended to relieve the holder of the right from an active beneficial use requirement. A water right normally begins as a permit for a given amount of water. At this stage, however, it is an inchoate right, which is incomplete yet in good standing. *Lummi*, 170 Wn.2d at 253 (quoting *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 596, 957 P.2d 1241 (1998)). Permit inchoate quantities remain in good standing so long as the requirements of the law are fulfilled. For most rights, the requirements of the law include diligently developing the right within the allowed development schedule, taking into account the circumstances relevant to the enterprise. *Id.*

When the Supreme Court decided *Theodoratus* and ruled that beneficial use must precede the issuance of a certificate, calling into question the validity of pumps and pipes certificates, municipal purveyors feared that they would be found lacking in such diligence and that the inchoate quantities would lapse accordingly. Municipal rights develop over decades of time and necessarily depend upon the efforts of third party users that are not within the control of the purveyor, rendering municipal purveyors particularly vulnerable to any diligence standard. The rights in

good standing language included in the Municipal Water Law, RCW 90.03.330(3), was intended to relieve the municipal purveyor of the diligence standard, ensuring the right's continued availability for future growth. The law did not require that the right be actively used in any amount to qualify.

The sole threat to pumps and pipes certificates following *Theodoratus* was the diligence standard. Interpreting the statute to impose "active compliance" imposes the very type of diligence standard that the statute was intended to relieve. Crown West's certificates were all authorized for uses that were municipal in nature. To interpret them as subject to an "active compliance" diligence standard makes them vulnerable in a way that jeopardizes the Park's ability to hold the rights for development for the same reasons stated above, just like any other municipal purveyor.

The municipal exemption to relinquishment, found at RCW 90.14.140(2)(d), applies to previously perfected rights. For the same reasons the legislature sought to protect the inchoate quantities of pumps and pipes certificates, it protected previously perfected municipal rights. Again, municipal purveyors often acquire and hold rights for extended periods of nonuse to fulfill their future planning obligations. Any diligence standard would threaten this necessary ability because municipal purveyors

are required to accommodate decades of potential growth that ebbs and flows in a manner not within their control. Delays and temporary decreases are common and would cause inherent uncertainty in a water right's extent and validity. Ecology concedes that all of Crown's claims were perfected as municipal rights. AR 000194.

Ecology's alleged "active compliance" requirement contends the beneficial use for municipal purposes must be continuous, or at least must not cease for a period of five years, or the water right will relinquish, exemption or no exemption. This position would require municipal water purveyors, which often maintain a portfolio of water rights, to ensure that each right is used at least for some municipal use every five years whether needed or not, whether convenient or not, whether possible or not, or the right will no longer be considered as used for municipal purposes and will be subject to relinquishment.

Of course, the statute says nothing whatsoever about any of this, so Ecology must resort to creative eisegesis, pouring all kinds of meaning into the phrase "beneficial use of water" found in RCW 90.03.015(4). But these four innocuous words cannot bear the weight Ecology places upon them. From these words, Ecology derives the requirement that the beneficial use not merely have happened at some point, but that it continue without major interruption indefinitely into future. That is, the water right must "actively

comply” with the definition at any given point in time. Phrased differently, to benefit from the municipal exemption—which protects unused water rights from relinquishment—the purveyor must in fact beneficially use the water. But if the purveyor was using the water, there would be no need for the exemption in the first place. Ecology’s interpretation effectively renders the exemption language meaningless.

Ecology claims this interpretation best comports with the overall relinquishment scheme of Washington water law. While relinquishment is part of the law, so too are the exemptions from relinquishment, including the municipal exemption. Ecology’s position has the effect of gutting the municipal exemption from relinquishment for water rights that have been used for municipal purposes. Ecology addresses this problem by stating that Crown West fails to appreciate the “substantial benefits” of the exemption. Resp. Br. at 28. Perhaps, though, it is Ecology that fails to appreciate the predicament of water purveyors that must ensure each of their rights, even if they were clearly used for municipal purposes at some time in the past, each continue with that use even if they are not presently needed.

Ecology further minimizes Crown West’s use of its water rights, which service the potable water needs of 5,000 to 6,000 people every day. The Spokane Industrial Park has seen massive investment—well over \$100,000,000—to develop the area for the 194 businesses and

governmental entities that call the Park home. AR 000228. The Spokane Industrial Park is a major, if not the major, incubator of jobs and economic opportunity in the Spokane area and much of Eastern Washington. Despite continuous development and redevelopment and notwithstanding the Park's provision of water for drinking, cooking, cleaning, and other domestic uses for thousands of people on a daily basis since 1942, Ecology does not consider this use municipal. As explained below, this position does not square with the statute, but it cannot be said that the benefits of municipal status are insubstantial to Crown West, Spokane Industrial Park, and the thousands of people who derive their livelihoods from this Park and its water supply.¹

Ecology also claims that its streamlined process approved in *Cornelius* does not undermine its position regarding active compliance. *See Cornelius v. Wash. Dep't of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015). But the streamlined process does not look year by year at the water right to determine if the use remained municipal in character the entire time. If

¹ Ecology cites *City of Union Gap v. Department of Ecology*, 148 Wn. App. 519, 195 P.3d 580 (2008), for the proposition that the "claimed for" language in the municipal exemption statute, RCW 90.14.140(2)(d), to mean more than subjective intent to use the water in a particular way in the future. *Union Gap* is not directly applicable, however, because in that case, the use of the water rights does not appear to have been municipal in character and the purveyor sought to change the use to municipal. Because the rights had not been municipal, they were subject to relinquishment. Here, it is undisputed that Crown West's water rights were municipal in character and the change of use application merely sought to confirm that characterization.

Ecology were serious about active compliance, nothing less than a full analysis would do to ensure that no five-year period passed in which the water was not used for municipal purposes. Instead, if Ecology finds a past exempt use, it should stop any further historical review. Thus, a water right need not have actively complied with the statutory definition at all points in its history.

Ecology glosses over the undisputed fact that Crown West's claims were beneficially used for municipal purposes when first established. AR 000194. Crown West maintains that such use has continued since that time, a point Ecology disputes, but if Crown West is correct, that determination ends any historical analysis and the water rights should be conformed as for municipal purposes.

B. Crown West's Water Rights Comply with RCW 90.03.015(4)'s Definition of "Municipal Water Supply Purposes."

Ecology argues that the phrase "residential use of water for nonresidential population" in RCW 90.03.015(4)(a) is ambiguous. It is not. The tension that Ecology attempts to create between "residential use" and "nonresidential population" does not exist. Ecology itself interprets "residential use" to mean "the full range of residential water uses (e.g., drinking, cooking, cleaning, sanitation)." AR 000146. Crown West agrees that these uses—all potable uses—are what is meant by the phrase

“residential *use*,” with the emphasis on the word “*use*.” Conversely, the *population* to which this use applies is “nonresidential.” Ecology tries to have “residential” modify “population,” but the result is a twisted new category of “temporary domiciles,” which is found nowhere in the statute and likely nowhere in the state as this amounts to a very narrow category.

Ecology argues at length about how its interpretation is reasonable and best comports with the overall statutory scheme to encourage beneficial use and increase instream water flows for fish and other environmental concerns. But it so narrowly draws the boundaries of the “nonresidential population” that it is hard to imagine what might actually qualify. A vacation home for 25 people who live there for at least 60 days a year? A few mansions with very dedicated vacationers might meet this definition, or perhaps a group of homes with equally dedicated vacationers (but none that live there for six months or more, or the development would likely meet the residential service connection portion of the municipal definition in RCW 90.03.015(4)(a)). If the legislature intended for temporary farm worker housing to be the essence of this category of “temporary domiciles,” there surely are easier ways of saying so. But Ecology insists that its interpretation is reasonable.

Ecology objects to the use of Department of Health regulations, including the definition of “nonresident” found in WAC 246-290-

010(173).² The cited reason is that the resulting category of “nonresidential population” is just too big. It might include uses where people do not stay overnight, such as business or industrial uses. Setting aside the historic definition of “municipal,” which is a broad category that includes such uses, *see Cornelius*, 182 Wn.2d at 622 (Madsen, C.J., dissenting), the primary goal of statutory interpretation is to discern the legislative intent as stated in the plain language, *e.g., Blueshield v. State Office of Ins. Com’r*, 131 Wn. App. 639, 646, 128 P.3d 640 (2006), “Nonresidential” simply does not mean “residential,” no matter how much Ecology dilutes the term to suit its purposes.

Next, Ecology downplays the obvious parallels between the Department of Health Group A water system regulations and RCW 90.03.015(4), arguing that the specific statutory language is not found in the regulations. This argument is wide of the mark, however, because the Group A rules are more detailed than would be necessary to include in the statute. Instead, the legislature chose the two overall definitions that encompass all Group A systems, whether community or noncommunity, transient or nontransient. The chart included in the WAC makes this plain. Group A systems include those with 15 or more service connections or those serving

² Per DOH, Nonresident means “a person having access to drinking water from a public water system who lives elsewhere.”

25 or more people for at least 60 days a year. WAC 246-290-020 (Table 1).³

All subcategories of Group A systems stem from these two definitions.

The legislature chose exactly these two categories to define “municipal water supply purposes” in RCW 90.03.015(4)(a). Its intent is clear: to include all of the possible Group A water systems in the municipal category, which is consistent with the historic meaning of “municipal,” a broad term encompassing domestic, business, and industrial uses. Essentially, Ecology wants to limit all municipal use under this statutory definition to residential and nothing but residential. In short, municipal means residential. No canon of construction can justify such a distortion of the statutory language.

As argued by Crown West in its opening brief, the natural interpretation of the statutory language is that “municipal water supply purposes” includes systems serving 25 nonresidents (who do not have to be the same people, nor do they have to sleep in non-residences served by the system) for 60 or more days a year. Crown West’s system easily qualifies under this standard at all times and is a municipal system exempt from

³ See also RCW 70.119A.020(4) (“‘Group A public water system’ means a public water system with fifteen or more service connections, regardless of the number of people; or a system serving an average of twenty-five or more people per day for sixty or more days within a calendar year, regardless of the number of service connections; or a system serving one thousand or more people for two or more consecutive days.”).

relinquishment. Under Ecology's streamlined procedure, no historical review is necessary, Ecology's lengthy review in its brief notwithstanding.

Finally, Ecology dismisses the Crown West's intertie with a neighboring municipal system as insufficient to meet the municipal definition under RCW 90.03.015(4)(c). The intertie serves as an emergency backup for the neighboring system, but it is planned for delivering water to adjacent municipalities that require water to meet projected growth. Specifically, Ecology suggests that such an intertie is merely incidental and does not meaningfully use water. But emergency interties are integral to coordinated water system planning, *see* RCW 70.116.030(1), WAC 246-290-132(4), the purposes of which include ensuring that water systems meet the needs of the surrounding area and assisting public water systems to meet standards of quality, quantity, and pressure, RCW 70.116.020.

A serious winter storm can and has resulted in power outages for weeks. To avoid freezing pipes in unheated homes and businesses, people often flow water constantly, which creates problems when most municipal systems have only few days of water storage and no electrical power to pump more. The Park has its own dedicated electrical substation, enormous storage capacity to meet industrial fire flow requirements, and dedicated backup generators. Its municipal neighbor is clearly the real beneficiary of the intertie. Without the service area flexibility that comes with municipal

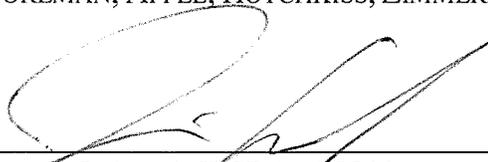
status, the Park's system may be seen as unable to provide a vital backup supply to thousands of homes and businesses as intended. For this additional reason, Crown West's water rights are municipal and exempt from relinquishment. The Pollution Control Hearings Board erred in ruling to the contrary and in consequence, erred in questioning the tentative determination of the extent and nature of the rights. The Court should reverse that decision.

III. Conclusion

Crown West respectfully asks the Court to reverse the Pollution Control Hearings Board's decision and to remand for further proceedings.

Dated this 20th day of April, 2018.

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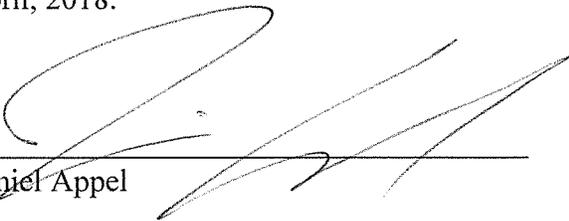
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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington that on April 20, 2018, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter upon the parties herein via the Appellate Courts' Portal filing system, which will send electronic notifications of such filing to the following:

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Dated this 20th day of April, 2018.


Daniel Appel