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No. 35610-8-III

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.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

I. **Introduction** 1

II. **Assignments of Error** 3

III. **Issues Presented for Review** 3

IV. **Statement of the Case** 3

V. **Argument** 9

A. Standard of Review 12

B. The Board Erroneously Interpreted RCW 90.03.015(4) to Require Active Compliance with the Definition of Municipal Water Supply Purposes for Every Five-Year Period from the Water Right's Inception to the Present ... 13

C. Crown's Use of Water Meets the Definition of Municipal Water Supply Purposes 17

D. CCWCB's Tentative Determinations of Validity and Extent of Crown's Water Rights Were Correct 24

VI. **Conclusion** 25

TABLE OF AUTHORITIES

Cases and Administrative Decisions

Cornelius v. Wash. Dep't of Ecology,
182 Wn.2d 574, 344 P.3d 199 (2015) 13, 15, 22

Cornelius v. Ecology,
PCHB No. 06-099, 2008 WL 5510405 (Jan. 18, 2008) 14

Lummi Indian Nation v. State,
170 Wn.2d 247, 241 P.3d 1220 (2010) 10

Jametsky v. Olsen,
179 Wn.2d 756, 317 P.3d 1003 (2014) 12

Pal v. Wash. State Dep't of Soc. & Health Servs.,
185 Wn. App. 775, 342 P.3d 1190 (2015)..... 12, 13

Pub. Util. Dist. No. 1 of Clark Cty. v. Pollution Control Hearings Bd.,
137 Wn. App. 150, 151 P.3d 1067 (2007)..... 12

R.D. Merrill Co. v. State, Pollution Control Hearings Bd.,
137 Wn.2d 118, 140, 969 P.2d 458 (1999)..... 23

State of Wash., Dep't of Ecology v. Theodoratus,
135 Wn.2d 582, 957 P.2d 1241 (1998) 9, 10, 15

Statutes and Administrative Codes

RCW 34.05.518 ..... 3, 8

RCW 34.05.570 12

RCW 90.03.015(4)..... *passim*

RCW 90.03.330(3)..... 10

RCW 90.03.560 16

RCW 90.14.140(d)(2) 1, 7, 9, 16

RCW 90.140.140-.180 ..... 7, 9

Laws of 2003, 1st Spec. Sess., Ch. 5 9

WAC 246-290-010 ..... 10, 18, 21

WAC 246-290-020 ..... 18, 20, 22

I. INTRODUCTION

This appeal requires the Court to interpret and apply RCW 90.03.015(4), which defines "municipal water supply purposes." Water used for such purposes is exempt from relinquishment under RCW 90.14.140(2)(d), hence the determination of whether a water right is for municipal water supply purposes is of great concern to Petitioner Crown West Realty, LLC ("Crown") and presumably to a number of other water purveyors whose rights may fall within RCW 90.03.015(4)'s ambit.

The State of Washington, Department of Ecology ("Ecology"), advocates an extremely narrow interpretation of "municipal water supply purposes," so narrow that portions of the definition are rendered meaningless. The effect of Ecology's position is to greatly reduce the number of water rights and water systems that would qualify for municipal characterization and the related exemption from relinquishment. In addition, by requiring "active compliance" with the definition the municipal exemption is rendered moot. But such a restrictive interpretation is unnecessary and indeed contrary to the statute's plain language.

In brief, Crown owns four water rights appurtenant to its property, the Spokane Business and Industrial Park ("Park"), located in Spokane Valley, Washington. Three wells were drilled on the property that predate the ground water code, enacted in 1945, and a fourth well was certificated

by Ecology with a priority date of November 5, 1973. The water rights associated with these wells authorize a combined total use of 9,274 acre-feet of water per year ("AFY"). In 2016, Crown filed four applications to, among other things, change the use of these water rights, conform the rights as being for municipal water supply purposes, and temporarily donate 5,874 AFY to the state trust water program for instream flows.

The Chelan County Water Conservancy Board ("CCWCB") reviewed and conditionally approved the applications, but Ecology reversed the CCWCB's approvals for a variety of reasons, only one of which is relevant in this appeal. Ecology alleged that Crown's water rights did not currently "actively comply" with the statutory definition of municipal water supply purposes and had not continued to qualify for such purposes even if they did qualify at some earlier time.

Crown appealed Ecology's reversal to the Pollution Control Hearings Board ("Board"), which ruled only on the municipal status of Crown's water rights, affirming Ecology's position that these rights were not municipal under the three of the definitions of "municipal water supply purposes." On the basis of this conclusion, the Board concluded that the CCWCB's tentative determinations regarding the validity and extent of Crown's water rights were flawed. On Crown's motion, the Board issued a

Certificate of Appealability under RCW 34.05.518(3), and this Court granted Crown's motion for discretionary review.

II. ASSIGNMENTS OF ERROR

The Board erred in determining that Crown's water rights failed to qualify under the definition of "municipal water supply purposes" in RCW 90.03.015(4). On that basis, the Board further erred in concluding that CCWCB's tentative determinations of the validity and extent of Crown's water rights were flawed.

III. ISSUES PRESENTED FOR REVIEW

1. 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)?

2. Did the Board err in concluding that the CCWCB's tentative determinations of the validity and extent of Crown's water rights were flawed?

IV. STATEMENT OF THE CASE

In 1942, the Navy established a supply depot on the property that is now the Park. Administrative Record ("AR") 000097.[1] Three wells were

[1] This citation is to the Report of Examination in the CCWCB's Record of Decision for one of Crown's water rights. *See* AR 000091-100. The other three ROEs are substantially similar, except in ways irrelevant to the issues on appeal. *See* AR 000102-133. To streamline citations in this brief, Crown will cite to only one ROEs rather than to all four.

drilled that year to supply the depot with water. *Id*. Three groundwater rights claims, Nos. 001087, 001088, 001089, document these wells, all showing a priority of December 1942. AR 000085-89. Claim 001087 allows 1,350 gallons per minute with a yearly total of 2,178 AFY. *Id.* Claim 001088 allows 750 gallons per minute with a yearly total of 1,208 AFY. *Id*. Claim 001089 allows 1,050 gallons per minute with a yearly total of 1,694 AFY. *Id*. Within the first few years of the depot's existence, at least 130 Navy personnel and Marines lived there, and roughly 2,700 civilians worked at the depot full time. AR 000097. Buildings at the depot included officers' quarters, barracks, cafeteria, and a fire station with residential quarters. AR 000136. Water was also used for gardens and steam heat. AR 000097.

The Navy operated the depot until 1958, *id.*, and Ecology admits the Navy's use of the water during this period met the definition of municipal water supply purposes. AR 000194 (Dep. of Hutton at 46:10-19).

In 1960, the Navy sold the depot to the Spokane Industrial Park, Inc. AR 000137. After the sale, the residential structures remained inhabited by company personnel, or were rented to the public, until 1990. *Id*. Further, the CCWCBB found that the water rights at issue have consistently, since the beginning, "served thousands of persons' basic potable needs through lunch rooms, bathrooms, and other potable requirements." *Id*. In 1998, a hotel with 65 rooms (each accommodating up to 5 persons) was constructed and

has operated at high capacity ever since. *Id*. at 000137-38. By 2016, the Park served as the primary place of business for 194 business with 5,000-6,000 employees served by 338 water service connections. AR 000228. Tens of millions of dollars have been invested in the Park to expand and improve the facilities so that businesses can operate there successfully. *Id*. The use of water in the Park includes the full range of residential uses, including washing, cooking, drinking, bathing, irrigation, and the like. AR 000247.

The Park's water system is also intertied with the Consolidated Irrigation District #19, which provides thousands of residential service connections. 000251. The intertie's purpose is to allow either party to draw water from the other's system in the event of an emergency. 000450-51. The parties have not yet had need for such use, but the valves are regularly operated to exchange small amounts of water to ensure they would work correctly in an emergency. 000448-49.

In 1970, at the same time the claims were filed with respect to the 5,080 AFY that had been perfected prior to 1945, three additional permits were filed for the same uses and the same wells, and Ecology issued three certificates, Nos. 7129-A, 7130-A, and 7131-A. AR 000097, 000402-07. These certificates were non-additive to the claims, but were to protect the water rights in the event a claim failed for any reason. *Id*. The certificates

matched the quantities in the claims except that two certificates, Nos. 7129-A and 7130-A, were for only half of the annual quantities as the claims (604 AFY and 1,090 AFY, respectively). Ecology's ROE for these applications indicates that 78 businesses were operating at the Park in 1970 with an estimated 2,500 employees. AR 000401. The ROE also stated that two homes, one office, and a half-acre of lawn were served by the three wells, which were integrated into a common system. *Id.*

On November 5, 1973, the Park applied for an additional groundwater permit to be used with a fourth well, which would be integrated into a common system with the other three wells. AR 000097. Ecology granted a permit in 1974 and a certificate in 1976 for this use, No. G3-22023C, authorizing 2,600 gallons per minute and 4,194 AFY. *Id.*; AR 00082-83.

In March of 2016, Crown filed four applications with the CCWCB to change the claims and the fourth additive certificate requesting, among other things, all of them to be conformed as being for municipal water purposes and temporarily donating some portion of the water to the State Trust Water Rights Program for instream flows. AR 000053-71. The CCWCB issued four conditional decisions granting these applications, making tentative determinations that the water rights were valid and eligible for change to the full extent requested and specified on the water rights

documents. AR 000091-141. The CCWCB also ruled that Crown met the definition of a municipal water supplier. *Id.*; *see* AR 000135-41.

On September 20, 2016, Ecology reversed the CCWCB's decision and denied Crown's change applications for a number of reasons. AR 00002-6. As relevant here, Ecology ruled Crown had failed to demonstrate that the water rights qualified as being for municipal supply purposes and that tentative determinations of the extent and validity of the water rights were inadequate. *Id.*

Crown appealed to the Board, and both parties moved for summary judgment. AR 000030-49; 000312-57. Of the many issues presented, the Board granted Ecology's motion on two. AR 000605-06. First, the Board determined that Crown had failed to demonstrate that its water rights qualified as being for municipal purposes through active compliance with the definition of "municipal water supply purposes" under RCW 90.03.015(4). Water rights are generally subject to relinquishment if unused for a period of five or more years without sufficient cause, *see* RCW 90.14.140-80, but if the water is for municipal water supply purposes, is exempt from relinquishment, RCW 90.14.140(2)(d).

Accepting Ecology's position as stated in a policy statement, *see* AR 000143-53 (POL-2030), the Board concluded that, to benefit from this municipal water designation, Crown must prove that its water rights

presently and "actively comply" "with the [statutory] definition through actual beneficial use of the water at the time a right is being characterized," AR 000596. That is, Crown must show its rights have been municipal in character during every five-year period from inception to present. Even though the parties agree that the water rights at issue were municipal when the Navy operated the depot, the Board determined that Crown's present use of the water rights does not fall within the statutory definitions relied on by the CCWCB. The Board granted Ecology summary judgment on this issue and the related question of the validity and extent of Crown's water rights, reasoning that because Crown's rights were subject to relinquishment, the CCWCB's decision that failed to adequately address potential relinquishment of the rights.

Crown appealed the Board's decision to Spokane County Superior Court, A-113 to A-114, while also asking the Board to issue a certificate of appealability under RCW 34.05.518(6), AR 00610-12. Ecology did not oppose the motion, and the Board granted it, finding that the purely legal issue of municipal water rights is of statewide importance. AR 000620-25. Crown timely filed a notice of discretionary review with the trial court, CP 49-87, and asked this Court to accept direct review of the Board's decision. The commissioner granted the motion and perfected this appeal.

V. ARGUMENT

In 2003, the legislature passed a law to define the hitherto statutorily undefined concept of municipal water rights. *See* Laws of 2003, 1st Spec. Sess., Ch. 5 ("Municipal Water Law" or "MWL"). A municipal designation for water rights is significant as it exempts the right from relinquishment. RCW 90.14.140(2)(d). Generally, a water right will be relinquished if it goes unused for five years unless it falls within a proper exemption. *See* RCW 90.14.140-.180. Hence, the municipal characterization is of significant importance to the holder of the right.

Prior to 1998, the issue was of less importance because Ecology had routinely issued certificates for water systems based on "pumps and pipes" without regard to the actual use of that water. In other words, a permit holder could receive a certificate for the full amounts stated in the permit (both in terms of instantaneous quantities and annual quantities) even if the holder used less than those amounts. But the Washington Supreme Court in *State of Washington, Department of Ecology v. Theodoratus* opined that water rights should only be certificated to the extent of use, not system capacity. 135 Wn.2d 582, 587, 957 P.2d 1241 (1998). The court noted, however, that its decision did not apply to municipal water rights. *Id*. at 594.

As the Supreme Court later stated, the *Theodoratus* decision caused widespread consternation among water purveyors:

> 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 upon 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 Indian Nation v. State, 170 Wn.2d 247, 256, 241 P.3d 1220 (2010). The Municipal Water Law defined "certain nongovernmental water suppliers as municipal and [made] that definition retroactive," *id*. Interpreting that definition is the issue in this case, and it is one of first impression.

Of significant importance is that both *Theodoratus* and the MWL affirm that pumps and pipes certificates are rights in good standing. *See* RCW 90.03.330(3); *Lummi*, 170 Wn.2d at 256. Further, an inchoate right, which is a right that is not yet perfected, is

> 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.

Lummi, 170 Wn.2d at 253 (quoting *Theodoratus*, 135 Wn.2d at 596). Hence, Crown's non-additive certificates, which were issued during the

"pumps and pipes" era, are in good standing even to the extent they have not yet been perfected.

RCW 90.03.015(4) reads in part:

> "Municipal water supply purposes" means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use.

In response to an appeal interpreting the MWL, Ecology adopted an interpretive policy, POL-2030, that is advisory only. AR 000143. In this document, and to bolster its chances of success in the appeal contesting the statute, Ecology takes a very restrictive interpretation, which is further discussed below, of "municipal water supply purposes." Ecology equates municipal with residential (or domestic); that is, a water system must serve enough residences where enough people sleep for enough time (per the statute) to qualify for a municipal characterization. Nothing else will do, even if the statute includes a "nonresidential population." Per Ecology, those non-residents still must sleep in residences for the water uses to be municipal. In short, nonresidential means residential.

Crown advocates for a more natural interpretation, one in keeping with the traditional definition of "municipal," which was a broad category encompassing many different uses. More importantly, Crown's interpretation accords with the statute's plain language, allowing nonresidential to serve its natural meaning, as explained below.

Ecology's interpretation, which the Board adopted completely, is mistaken. The Court should reverse the Board's decision and remand for further proceedings.

A. Standard of Review.

Appeals from the Pollution Control Hearings Board are governed by the Administrative Procedures Act. *E.g.*, *Pub. Util. Dist. No. 1 of Clark Cty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 156, 151 P.3d 1067 (2007). The appellate court reviews the Board's decision, and may find it erred if it erroneously interpreted or applied the law. *Id.* (citing RCW 34.05.570(3)(d)). The court interprets statutes de novo. *Id.*

The goal of statutory interpretation is to ascertain and effect legislative intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). While the court accords great weight to an agency's interpretation of its governing statutes, it does so only if the statute is ambiguous, and not when the agency's interpretation conflicts with the statute. *Pal v. Wash. State Dep't of Soc. & Health Servs.*, 185 Wn. App. 775, 781, 342 P.3d 1190

(2015). Further, the Board's decision was rendered on summary judgment, which is also reviewed de novo. *Cornelius v. Wash. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015). Crown bears the burden to prove the Board's decision was in error. *Id*.

B. The Board Erroneously Interpreted RCW 90.03.015(4) to Require Active Compliance with the Definition of Municipal Water Supply Purposes for Every Five-Year Period from the Water Right's Inception to the Present.

Before reaching the statutory definition of "municipal water supply purposes," a preliminary issue must be addressed. Every time Ecology examines a change-of-use application to determine if the water right meets the standard, the natural question arises: on what time period should the inquiry focus? This issue is significant for older water rights that have been used for many years, such as the water rights in this case.

Ecology has taken the view that "active compliance" is required, a phrase not found in the statute. AR 000144-45 (¶ 9). Ecology uses this phrase to mean far more than compliance with the standard at the time the right is characterized. Indeed, Ecology requires—at least in this case—that compliance with the standard be demonstrated for each five-year period from the right's inception to the present. From its POL-2030:

> If a water right does not meet the definition of a water right for municipal water supply purposes for 5 or more years, or does not otherwise qualify for the relinquishment exception . . . , then the water right would be valid only to the extent it

> had been beneficially used during that period, with any non-use resulting in relinquishment of the right . . . .

AR 000145 (¶ 9(d)).

The Board adopted the active compliance standard, reasoning that because the statutory definition is phrased in the present tense—"municipal water supply purposes" *means*—active compliance is mandated, that is, compliance with the statutory definition at the time the right is being characterized. AR 000595; *see also Cornelius v. Ecology*, PCHB No. 06-099, 2008 WL 5510405, at *7 (Jan. 18, 2008).[2] The Board did not specifically comment on the requirement of compliance in any five-year period, but it deferred to Ecology in adopting its standard. No court has yet considered whether Ecology and the Board are correct. This case is the first.

Ecology's position is thus that while municipal water rights are exempt from relinquishment, if they are not used for municipal purposes for any five-year period, then they are no longer municipal water rights and are subject to relinquishment. In other words, the protection from relinquishment for municipal uses is not really a protection because a purveyor can lose the status of being municipal in the same time period—five years—as for relinquishment, and hence relinquish its rights. Besides

[2] Deriving an active compliance standard from the legislature's use of the present tense is dubious as statutory definitions are nearly always phrased in this tense (e.g., "[term to be defined] means . . . .").

standing the purpose of the MWL (namely, to provide greater certainty for municipal water purveyors in light of the uncertainty caused by *Theodoratus*) on its head, not even Ecology requires strict proof of constant beneficial use in all circumstances.

In POL-2030, Ecology recognizes water held for or intended for future use, such as "future growth or supply needs, standby/reserve, backup or emergency," can conform to this standard, even if the water is not currently being put to beneficial use. AR 000144-45 (¶ 9(b)). Further, in *Cornelius*, Ecology used a streamlined process when evaluating the extent and validity of WSU's water rights. 182 Wn.2d at 595. When an application is received for change of use, Ecology examines the use year-by-year to determine if the right or some portion of it has been relinquished due to nonuse. *Id*. If an exemption to relinquishment applies, however, Ecology can use the streamlined process that forgoes the detailed year by-year analysis. *Id*. at 595-96. The Washington Supreme Court upheld the use of the streamlined process, rejecting an argument that the MWL required the detailed analysis to ensure unused rights were relinquished. *Id*. at 596.

The CCWCB concluded that the correct analysis is to determine if the right was "authorized in a manner that contemplated municipal use." AR 000136. The CCWCB determined that Crown's rights were so authorized and currently met the definition of use for municipal water

supply purposes. This analysis harmonizes nicely with *Cornelius* and with RCW 90.14.140(d)(2), which protects from relinquishment water rights "claimed for municipal water supply purposes." That is, if a water is claimed for (which can include intention for future use) municipal water supply purposes, the claim is sufficient to protect the water right from relinquishment.

A streamlined process to determine the extent and validity of a water right when it is exempt from relinquishment makes sense, but such a process is not consistent with Ecology's policy statement quoted above. Per Ecology, a water right can lose its municipal status if five years pass without the water having been used for that purposes. But how would Ecology know of such an event unless the detailed year-by-year analysis was performed, the very thing the streamlined process eliminates? In practice, use of the streamlined process looks at two things: present use or intended use and the authorized use of water as stated in the certificate or claim. If the current or intended use fits within the municipal definition, and the water right authorizes a use consistent with municipal use, the streamlined process looks no further, and conforms the right for municipal purposes under RCW 90.03.560. Hence, Ecology's statement that a municipal use must be present for each five-year period does not work in practice.

This reality raises a question: how does Ecology decide when to use the streamlined process versus the full process? Presumably on the basis of whether a current use analysis finds a municipal use. But if it does, and the water rights documents confirm the propriety of such a use, then the process is finished. In short, if Crown can prove a present use that fits within the definition of "municipal water rights purpose" then it need not prove that such a use has always existed, year-by-year. Crown's water rights all list the purposes that are municipal in character (*e.g.*, domestic and industrial). AR 000082-89. If Ecology insists on a year-by-year analysis once the above standard is met, such a position would be arbitrary and capricious.

C. Crown's Use of Water Meets the Definition of Municipal Water Supply Purposes.

In RCW 90.03.015(4), three subsections give several ways of meeting the "municipal water supply purposes" standard, only two of which are relevant here.[3] Subsection (a) in turn lists two possible options: a beneficial use of water for "residential purposes through fifteen residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year." Subsection (c) allows water supplied "indirectly

[3] RCW 90.03.015(4)(b) defines "municipal water supply purposes" as water used "for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district." Crown does not contend this subsection applies to this case.

for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use" to be considered municipal water. Each of these subsections is addressed in turn.

Ecology's interpretive policy, POL-2030, borrows from the Department of Health's ("DOH") regulations to define "residential service connection." AR 000145. DOH regulations define a Group A community water system as one that provides "service to fifteen or more service connections used by year-round residents for one hundred eighty or more days within a calendar year." WAC 246-290-020(5)(a). Ecology adopts this definition for the phrase "residential service connection" in RCW 90.03.015(4)(a). Thus, in examining beneficial use of water, Ecology looks for (1) fifteen connections to (2) residences (3) inhabited by persons living there at least 180 days a year.

Borrowing further from DOH regulations, Ecology allows the use of "equivalent residential units" to achieve the fifteen service connections. AR 000146 (¶ 6). Hence, a single connection can count for a number of connections toward the statutory minimum of fifteen if the relevant criteria are met. *See* WAC 246-290-010(100), (101), (233). An example would be a large apartment building with a single physical connection but providing water to a large number of residents. Thus, for this initial language in subsection (a), Ecology depends on DOH to define the relevant terms. But

when DOH regulations do not suit Ecology's goals, as in the next portion of subsection (a), Ecology is quick to jettison DOH and adopt its own strained interpretation.

Subsection (a) contains another method of meeting the definition, that of providing "residential use" of water to a "nonresidential population" of at least twenty-five persons for at least sixty days a year. *Id*. Ecology interprets this subsection to mean that "the full range of residential water uses (e.g. drinking, cooking, cleaning, sanitation)" are provided to the nonresidential population. AR 000146 (¶ 10). So far so good. But then Ecology resorts to linguistic gymnastics to avoid the obvious meaning of the legislative language. Ecology insists that "nonresidential population" means a population that does in fact temporarily reside in the buildings to which the water is supplied, that is, the people must sleep in the facilities that, for lack of a better word, we shall call nonresidences. *Id*. Further, Ecology requires the *same* twenty-five nonresidents to live in the nonresidences for sixty days a year, creating a new category of persons—"temporary domiciles"—for these truly unique places. Ecology suggests possible examples of this incredibly odd definition as vacation homes and temporary farm worker housing. *Id*. It would indeed be a strange vacation home that housed the same twenty-five people for sixty days a year. It would even be a strange group of vacations homes that housed the same

twenty-five people for sixty days a year, unless such homes were in a residential subdivision that would likely satisfy the first definition in subsection (a). The requirement that the persons be the "same" twenty-five persons is not supported by even POL-2030 and appears to have been just fabricated by Ecology staff and counsel specifically for this case.

Ecology is happy to rely on DOH's regulations for the first definitional phrase in subsection (a), but it rejects the remainder of DOH's very sensible rules for Group A non-community water systems. DOH separates such systems into two subgroups: nontransient and transient. WAC 246-290-020(5)(b). The former provide service to at least twenty-five of the same nonresidential people for 180 or more days within a year. *Id*. The latter provide water to groups of "[t]wenty-five or more different people each day for sixty or more days within a calendar year," or to "twenty-five or more of the same people each day for sixty or more days, but less than one hundred eighty days within a calendar year." *Id*. Examples of nontransient water systems might include those serving "a school, day care center, or a business, factory, motel, or restaurant with twenty-five or more employees on-site." *Id*. Examples of transient water systems might include those serving "a restaurant, tavern, motel, campground, state or county park, an RV park, vacation cottages, highway rest area, fairground, public concert facility, special event facility, or church." *Id*. With the exception of the

vacation cottages (and extremely few of those, if any at all), Ecology rejects all of these examples. AR 000146 (¶ 11).

Ecology cherry-picks its way through DOH regulations without really explaining why it rejects the natural interpretation of "nonresidential population"[4] and insisting that the phrase really means residential, albeit on a temporary basis. Ecology is importing its concept of "residential" from the phrase "residential service connection"—meaning the people have live in the houses for at 180 days a year—into the phrase "nonresidential population" and concludes that the latter must mean people still residing at the service location, just for a shorter period of time. In short, per Ecology, these persons are "nonresidential" because they don't live there for 180 days a year. That is indeed a strange definition of nonresidential.

The legislature's choice of definitional categories strongly suggests its intent to pattern RCW 90.03.015(4) after DOH water system regulations. It chose service of fifteen residential service connections, matching the DOH's definition of Group A community systems, or service to at least twenty-five people for at least sixty days a year, matching the most inclusive DOH definition of Group A non-community systems. *Compare* RCW

[4] DOH regulations define resident as "an individual living in a dwelling unit served by a public water system. WAC 246-290-010(216). "'Nonresident' means a person having access to drinking water from a public water system who lives elsewhere. Examples include travelers, transients, employees, students, etc." WAC 246-290-010(173).

90.03.015(4)(a) *with* WAC 246-290-020(5)(a), (b). This conclusion is reinforced by the legislature's use of the adjective "residential" to modify "use"—everyone agrees what this phrase means—and its use of the adjective "nonresidential" to modify "population." Ecology wants "residential" to modify both nouns and so must construct the odd category of "temporary domicile" to suit its purposes; "nonresidential population" simply cannot have its normal meaning, as given in DOH regulations: persons who use the system's drinking water while living elsewhere.

When RCW 90.03.0015(4)(a) is interpreted according to its plain language, Crown's water systems presently meet the definition of "municipal water supply purposes." The 5,000 to 6,000 employees who daily work at the Park and use the water for all manner of residential uses (e.g., drinking, cooking, cleaning, sanitation) easily satisfy the requirement of twenty-five nonresidents for at least sixty days a year. And Crown's water rights authorized use for domestic and industrial use, the combination of which falls within classic definition of municipal use: "Of the many types of beneficial use, municipal use is the broadest because it encompasses the multitude of uses made of water in a city, from supplying homes, businesses, and industries, to watering lawns and golf courses and providing recreational water in lakes and swimming pools." *Cornelius*, 182 Wn.2d at 622 (Madsen, C.J., dissenting) (quoting Jay F. Stein, James C. Brockmann,

Cynthia F. Covell & John C. Peck, *Water Use and Reuse: The New Hydrologic Cycle,* 57 Rocky Mt. Min. L. Inst. § 29.02 (2011)). Ecology's interpretation, by contrast, rejects this historic definition in favor of a restrictive definition based solely on domestic use.

Crown's water rights and usage meet the definition of "municipal water supply purposes" in subsection (a). The Board incorrectly deferred to Ecology's strained interpretation and concluded that Crown's usage is not for municipal purposes.[5] This Court should reverse the Board's decision and remand for further proceedings.

Crown's usage also meets the definition in subsection (c) of RCW 90.03.015(4) relating to water supplied indirectly to a public water system for the purposes listed in the previous subsections. Crown's agreements with the Consolidated Irrigation District #19 to supply that public system, which indisputably is a municipal supplier, on an emergency basis obligate Crown to provide water for municipal purposes. Ecology counters that no water has actually been used for this purpose other than minimal amounts exchanged periodically to ensure the intertie's valves are working properly,

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[5] Another rule oft cited by Ecology and Board is that exceptions to general statutory provisions should be narrowly construed. *E.g.*, AR 000601 (citing *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999)). This rule should not be used to support the narrowest imaginable interpretation regardless of the statute's language. The legislature's intent is paramount, and the most direct way of discovering that intent is to give the words used their natural meaning.

and hence Crown fails to use water as contemplated in the statute. Crown's obligation remains, however, and if Ecology prevails in reducing Crown's claims to reflect current usage—the municipal exemption from relinquishment not applying to protect Crown's rights perfected status—then Crown's ability to have any water to supply the irrigation district should an emergency ever materialize would be jeopardized. In short, Ecology's interpretation jeopardizes this and many other purveyors' intertie agreements.

Crown's intertie agreements are for the supply of water indirectly for municipal purposes. The Court should reverse the Board's contrary decision and remand for further proceedings.

D. CCWCB's Tentative Determinations of Validity and Extent of Crown's Water Rights Were Correct.

The second issue presented in this case is the whether CCWCB's determinations of the validity and extent of Crown's water rights were proper. Solely on the basis of its ruling on municipal water rights, the Board granted summary judgment to Ecology on this issue as well, affirming Ecology's reversal of the CCWCB's decision. The Board considered the determinations to be flawed because the CCWCB did not examine Crown's water rights for relinquishment as they are not, per the Board, municipal and exempt.

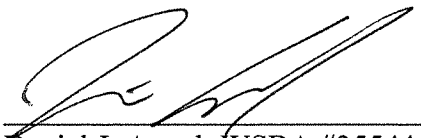
Resolution of this issue depends on the Court's analysis and interpretation of RCW 90.03.015(4) and its application to Crown's water rights. If the Court reverses the Board on that issue, it should do so on this issue as well.

VI. CONCLUSION

Crown respectfully asks this Court to reverse the Board's decision and remand for further proceedings.

Dated this 22 day of January, 2018.

FOREMAN, APPEL, HOTCHKISS & ZIMMERMAN, PLLC



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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington that I am over the age of eighteen and not a party to this action, and that on January 22, 2018, I caused to be served a true and correct copy of the foregoing document via the Appellate Court Portal Filing System, which will send electronic notifications of such filing to the following:

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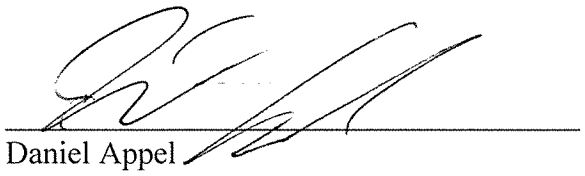

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