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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; and
POLLUTION CONTROL HEARINGS BOARD

Respondents.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
RESPONSE BRIEF**

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I. INTRODUCTION

Appellant Crown West Realty, LLC (Crown West) is seeking to transfer portions of four water rights into the state's trust water rights program so they can be sold to allow new out-of-stream uses. The water rights have been largely unused for several decades. Water rights that go unused, in whole or in part, for five or more years are subject to relinquishment unless nonuse is excused under a statutory exception. Crown West serves water to commercial and industrial tenants at its industrial park and wants its reduced water use to be excused under the exception for water rights that are for municipal water supply purposes. The Pollution Control Hearings Board (Hearings Board) correctly concluded that this effort is contrary to law and stretches the definition of "municipal water supply purposes" in RCW 90.03.015(4) well beyond its intent.

On paper, the four water rights specify use of a total annual quantity of 9,274 acre-feet of water per year (AFY). However, the highest amount of water that may have been put to actual use under the rights is approximately 6,000 AFY, which occurred sometime between World War II and the early 1970s. Since that period of peak use, water use has declined to a recent level of 3,400 AFY. Notwithstanding this large drop

in water use, the Chelan County Water Conservancy Board (Conservancy Board) determined that all of the 9,274 AFY is valid and eligible for change and transfer, so that 3,400 AFY could continue to be exercised to supply water at Crown West's industrial park, and 5,874 AFY could be transferred to allow new water diversions by new users elsewhere.

The Conservancy Board's decision was erroneous because the water rights do not meet the definition of "municipal water supply purposes" under the water code, and, thus, cannot qualify for an exemption from relinquishment for municipal water rights that go fully or partially unused. For that reason, Ecology reversed the Conservancy Board's decision, and the Hearings Board affirmed Ecology's denial of the applications. This Court should likewise affirm because the Hearing Board's decision is soundly based on both the language of the statutory definition of the term "municipal water supply purposes" and the important principle that exceptions excusing the relinquishment of long unused water rights must be narrowly construed.

Crown West is attempting to advance a novel proposal that involves transferring rights to water that has been unused for several decades into the state water right trust program to allow new out-of-stream water uses in central Washington. Under this arrangement, Crown West would not cut back on any of the current water use at its industrial

park to offset the new uses that would occur elsewhere. Rather, water for the transfer would come from river flows, reducing those flows to the possible detriment of fish and other aquatic species, and other water right holders who have relied on the availability of the water while it has gone unused by Crown West.

The “use it or lose it” principle that is advanced by the relinquishment statute is an important tenet of Washington water law. Crown West is requesting the Court to adopt an expansive statutory interpretation of the term “municipal water supply purposes” that would impermissibly expand the exemption from relinquishment for municipal rights. This would allow the revival of long unused water rights. Crown West’s position should be rejected because it misreads the plain language of the definition, is contrary to legislative intent, and would cause harmful reductions in stream flows.

II. RESTATEMENT OF THE ISSUES

Based on the Appellant’s assignments of error, Ecology reframes the issues as follows:

1. 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)?
2. Did the Hearings Board rule correctly that the Conservancy Board failed to perform an adequate tentative determination of the extent

and validity of the four water rights to ascertain the correct quantities that are eligible for change?

III. COUNTER-STATEMENT OF THE CASE

A. Factual History

1. The Spokane Business and Industrial Park

Crown West owns and operates the Spokane Business and Industrial Park (Park), located in Spokane Valley. There are four groundwater rights appurtenant to the Park. Three of these rights are documented by statements of water right claims: Statement of Claim Nos. 001087, 001088, and 001089. AR 85, 87, 89.¹ In addition, one groundwater right is documented by a water right certificate: Certificate No. G3-22023C. AR 82–83. Each of the four groundwater rights authorize withdrawals from separate wells (points of withdrawal), but serve a common place of use that encompasses the area of the Park.

The site where the Park is located was first developed as a supply depot by the Navy during World War II. The first three wells were drilled in 1942 when the Navy first established the supply depot. AR 97. By April 1945, there were 127 residents at the naval depot, who lived in several residential structures, including single family homes that served as

¹ In referring to the administrative record (AR) compiled by the Hearings Board in this case, Ecology will refer to documents as they are enumerated in the Index to the Certified Record transmitted by the Hearings Board to this Court.

officers' quarters, garage apartments, barracks, and a fire station with residential quarters. AR 136. At this time, the water rights would have been exercised to serve the residential needs of those living at the naval depot, provide water for "victory gardens," operate a large cafeteria, and generate steam heat. AR 97. The naval depot continued to accommodate an unidentified number of personnel in some of the residential structures through 1958, when the naval depot was decommissioned. AR 137, 97.

In 1960, the naval depot was sold to Spokane Industrial Park, Inc. and the site began its conversion into an industrial park. AR 137. In 1970, Spokane Industrial Park, Inc. submitted the three statements of water right claims, each of which asserted beneficial use of water dating back to December 1942. AR 85, 87, 89. At that time, there were 78 industrial tenants employing approximately 2,500 people, and the water system also served two homes, an office, and a half-acre lawn. AR 401. The three water right claims have a priority date of December 1942, and collectively claim the right to use 5,080 AFY of water for "industry and domestic" uses. AR 85, 87, 89.

In 1973, Spokane Industrial Park, Inc. applied for an additional groundwater permit. AR 410. This application proposed to use a fourth well to withdraw up to 2,600 gallons per minute and 4,227 AFY of water. AR 411. Ecology granted a permit for 4,194 AFY of water in 1974.

AR 97, 411. Ecology issued Certificate No. G3-22023C for this water right in 1976. AR 82–83. The certificate has a priority date of November 5, 1973, and specifies the use of 4,194 AFY of water for “community domestic supply, manufacturing and industrial use.” *Id.*

Residential structures at the Park were reportedly used by company personnel or rented to other persons between 1960 and 1990, although it is unclear which structures were occupied and by how many people.

AR 137. The Conservancy Board’s record does not demonstrate that any residential structures were occupied at the Park between 1990 and 1998.²

Id. In 1998, a 65-room hotel opened in the Park. AR 137–38. The hotel can reportedly accommodate up to five guests in each room. *Id.* However, the record does not provide the hotel’s occupancy, the duration of guests’ stays, or any other information suggesting a residential pattern of occupancy. The Conservancy Board found that “[a]t the time of peak use, 5874 acre feet were being used when the park was still only about 2/3 built out with buildings.” AR 98. However, as the record reflects, neither the Conservancy Board’s decision nor any of its supporting documents

² The Conservancy Board’s record does not indicate whether the fire station was occupied between 1990 and 1998. *See* AR 136–37. However, during his deposition, Robin Gragg of Crown West testified that the fire station was occupied during that time by at least six firefighters. AR 445.

indicate when peak water use at the Park actually occurred or provide any factual support for the annual quantities that are asserted by Crown West.

2. Crown West's water right change applications

Crown West wants to sell portions of the water rights appurtenant to the Park, to allow new water use in central Washington, while allowing use to continue at the Park unabated. To advance its plan to sell excess water that it does not need,³ Crown West filed four applications for changes of groundwater rights with the Conservancy Board. AR 53–71. The applications sought changes to all four of its water rights and transfers of portions of them to the state trust water rights program for instream flow purposes and the mitigation of new out-of-stream water uses distant from the Park.

In filing its applications, Crown West had several primary objectives. The applications sought to: (1) have the four water rights documented as being for municipal water supply purposes, (2) change the purposes of use authorized under the four rights to add instream flows and mitigation of out-of-stream uses, and landscape irrigation, as purposes of

³ In effect, Crown West is engaging in speculation with its water rights by attempting to sell portions of the rights that it does not need to provide water service to its tenants in the Park. Speculation in unused water rights is a disapproved practice. *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 784–785, 947 P.2d 732 (1997); see also *City of West Richland v. Dep't of Ecology*, 124 Wn. App. 683, 693–694, 103 P.3d 818 (2004). However, Ecology does not challenge the validity of Crown West's water rights for the purposes of providing water supply for commercial and industrial uses at its Park.

use, (3) add points of withdrawal (well locations) for each water right, to enable all of the rights to be exercised by using any of the four existing wells at the Park, (4) authorize the “temporary donation” of 5,874 AFY of water into the state trust water program for instream flows and mitigation of new out-of-stream use, in areas outside of the location of the Park. AR 53–55, 208.

3. The Conservancy Board’s application approvals

In June 2016, the Conservancy Board issued four substantially identical decisions and Reports of Examinations (ROEs) conditionally approving Crown West’s change applications in full.⁴

In evaluating an application for change or transfer of a water right, Ecology and water conservancy boards must perform a tentative determination of the validity and extent of the water right sought to be changed. A change of a water right can be approved only to the extent a water right is valid. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999); *Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Dep’t of Ecology*, 146 Wn.2d 778, 794, 51 P.3d 744 (2002). The Conservancy Board was thus required to perform a tentative

⁴ The four decisions and ROEs are substantially identical, except for the descriptions of the attributes of the particular water rights that are the subject of the decisions and ROEs. AR 91–133. To reduce redundancy, only one of the ROEs is referenced as an exhibit in this brief, which is the ROE for Water Right Change Application No. CG4-1087CL (CHEL 16-01). AR 91–100.

determination of the validity and extent of the Crown West's water rights to ascertain how much water is eligible to be changed. And because Crown West requested changes in the purposes of use of its groundwater rights to add instream flows and mitigation of new out-of-stream uses as new purposes, the Conservancy Board was required to determine the extent to which the rights have been perfected⁵ through actual beneficial use of water. *R.D. Merrill Co.*, 137 Wn.2d at 130 (changes of purposes of use of "inchoate" groundwater rights that have not been perfected through actual use are disallowed under RCW 90.44.100, the groundwater right change statute).

Based upon its assessment of historical water use, the Conservancy Board made tentative determinations that each of the three claimed rights and the certificated right were valid and eligible for change and for continued use at the Park to the full extent specified on the water right documents. AR 97–98. The Conservancy Board determined that the three claimed rights were perfected through actual use and determined the annual quantity for them based on a presumption that the well associated with each water right was pumped continuously at the maximum instantaneous quantity on a twenty-four hour per day, seven days per

⁵ "Perfection of an appropriative [water] right is a term of art, requiring that appropriation is complete only when the water is actually applied to a beneficial use." *R.D. Merrill*, 137 Wn.2d at 129.

week, year-round basis. With respect to Certificate No. G3-22023C, the Conservancy Board acknowledged that a large portion of the water right has never been used. Nevertheless, it concluded that the entire water right was automatically perfected and valid for change because it qualified as a municipal water right. AR 97, 136.⁶

The Conservancy Board also determined that any reduction in water use under the water rights was exempt from relinquishment. Thus, although the Conservancy Board found that the current water demand at the Park is 3,400 AFY, it determined that a much higher quantity of water remained valid for change. The Conservancy Board found that the four water rights qualified for the exemption from relinquishment for municipal rights under RCW 90.14.140(2)(d). AR 135–36. This determination was based, in part, on the Conservancy Board’s conclusion that a water right is exempt from relinquishment notwithstanding a reduction in water use for over five successive years if it is “authorized in a manner that contemplated municipal use.” AR 136.

Based on these findings, the Conservancy Board also approved a “temporary donation” of 5,874 AFY of water into the state water right

⁶ One of the issues that the Hearings Board did not need to reach relates to Crown West’s contention that an inchoate (never used) water right for municipal supply purposes is considered to be perfected and valid for change even if the water has never actually been put to use.

trust program⁷ for instream flows and mitigation of out of stream uses, while allowing Crown West to retain 3,400 AFY of water to continue providing water service at the Park. AR 91, 94–95, 217.

4. History of water use under Crown West’s water rights

Evaluating the consequences of the Conservancy Board’s decision requires understanding the history of water use that has occurred under Crown West’s four water rights since the establishment of the naval supply depot in 1942. On paper, the four water rights specify a combined maximum total annual quantity of 9,274 AFY. However, the Conservancy Board found that the highest amount of water that has ever been put to actual use under the four rights is 5,874 AFY, which occurred sometime in the period during and following World War II, up to the early 1970s. AR 98.

But, since that time, water use declined considerably. The Conservancy Board found that the highest annual quantity of water that has actually been used at the Park during the current era is 3,400 AFY, which was used during 2016. AR 135 (“The system demands are currently

⁷ The state trust water rights program is governed by RCW 90.42, which authorizes the establishment of “trust water rights” as a means to facilitate transfers of water rights.

3400 acre feet.”).⁸ Assuming the Conservancy Board was correct in finding that 5,874 AFY was the historical peak water use at the Park,⁹ water use has since declined by more than 2,000 AFY. And, because the water rights specify a collective maximum quantity of 9,274 AFY, that means over 3,000 AFY of the water has never been put to use at all.

Nonetheless, the Conservancy Board tentatively determined that all 9,274 AFY is valid and eligible for change, so that 3,400 AFY could continue to be used to supply water at the Park, and 5,874 AFY could be transferred to the state trust program for instream flows and the mitigation of new out-of-stream uses. This would allow up to 5,874 AFY of new water use to come out of the river at distant locations while use continues without reduction at the Park.

5. Ecology’s decision denying the water right change applications

On September 20, 2016, Ecology issued a decision reversing the Conservancy Board’s four conditional¹⁰ approvals and denying Crown

⁸ During his deposition, Daniel Haller, a consultant to Crown West, testified that the highest use during the current era was actually 3,384 AFY of water, which was used during 2016. AR 261–62.

⁹ Ecology asserts that this figure of 5,874 AFY is higher than the actual peak water use because the Conservancy Board erred in presuming that the maximum instantaneous quantity authorized under the water rights was pumped on a continuous basis all year-round. This quantification issue was not reached by the Hearings Board and is therefore not before the Court in this appeal.

¹⁰ A water conservancy board prepares a record of decision on a water right transfer application that is transmitted to Ecology for review. RCW 90.80.080(1). Such a decision is conditional because the final decision on the application is made by Ecology,

West's four change applications. AR 2–6. Ecology's decision listed seven grounds for its denial: (1) an inadequate tentative determination of the extent and validity of the four water rights, (2) failure to demonstrate that the four rights qualify as being for municipal supply purposes, (3) improperly allowing the change of inchoate water and allowing an increase in consumptive water use, (4) failure to describe how other existing water rights within the place of use will be exercised, (5) failure to affirm that the proposed changes would not impair existing water rights, (6) a flawed consumptive water use analysis, and (7) failure to demonstrate that approval of the applications would not be detrimental to the public interest. *Id.*

Ecology concluded that the Conservancy Board failed to perform an adequate tentative determination because it did not determine either the extent to which the water rights had been perfected through actual beneficial use, or the extent of any reductions in use of the rights over time. AR 2–3. Further, Ecology concluded that the water rights do not qualify as being for municipal water supply purposes, and unused water was therefore not shielded from loss under the exemption from relinquishment for municipal water rights. AR 2. On that basis, Ecology

which can affirm, reverse, or modify the water conservancy board's decision after reviewing it to ensure "compliance with applicable state water law." RCW 90.80.080(2), (4).

found that the Conservancy Board erred in not ascertaining whether over 2,000 AFY¹¹ of water was relinquished and invalid for change because of the large reduction in water use since the early 1970s.

B. Procedural History

Crown West appealed Ecology's decision to the Hearings Board. Ecology moved for summary judgment on six of the eight issues raised in the case. AR 312–57. Crown West cross-moved for summary judgment on all of the eight issues. AR 29–49. After considering both motions, the Hearings Board granted summary judgment to Ecology and affirmed Ecology's reversal of the Conservancy Board's decision. AR 582–606.

The Hearings Board decided in Ecology's favor on two of the issues—which it deemed to be threshold issues—and dismissed the case. AR 606. First, the Hearings Board concluded that the Conservancy Board erred in finding that Crown West's water rights qualified as being for municipal water supply purposes. AR 594–606. Second, because the rights were not for municipal water supply purposes, they were not exempt from relinquishment, so the Hearings Board concluded that the Conservancy

¹¹ This figure is the difference between the 5,874 AFY peak use figure and the 3,400 AFY that was used during 2016. This amount of water is subject to relinquishment because it was perfected through actual use in the past but later went unused. In contrast, more than 3,000 AFY of the water authorized under Certificate No. G3-22023C is inchoate because it has never been perfected through actual use at all. This figure is the difference between the peak use of 5,874 AFY and the total of 9,274 AFY specified under the four water rights. This inchoate water is not relevant to the two issues presently before this Court, but is relevant to issues that were not reached by the Hearings Board.

Board's tentative determination of extent and validity was erroneous. AR 606. The Hearings Board concluded that the tentative determination was flawed because the Conservancy Board failed to evaluate whether portions of the water rights were invalid as a result of relinquishment due to nonuse. *Id.* Because the Hearings Board granted summary judgment based on these threshold issues, it did not reach the six other issues in the case.¹²

Crown West filed a petition for review of the Hearings Board's order in Spokane County Superior Court, while also seeking direct review by this Court under the Administrative Procedure Act (APA), RCW 34.05.518. AR 608–13. Ecology did not oppose Crown West's request for direct review, and this Court accepted review. AR 615–17.

IV. ARGUMENT

The Hearings Board correctly concluded that Crown West's four water rights do not qualify as being for municipal water supply purposes, and are therefore not exempt from relinquishment. In reaching this conclusion, the Hearings Board rejected Crown West's novel scheme to

¹² Should this Court reverse the Hearings Board's Order on Summary Judgment Motions, the proper remedy would be to remand the case to the Hearings Board for further proceedings on at least the six remaining issues that were not resolved on summary judgment (and, if necessary, for further fact finding or other consideration of the two issues that are the subject of this appeal).

sell long-unused water rights by broadening the municipal relinquishment exemption beyond legislative intent.

Because Crown West's water rights do not qualify for the municipal exemption, the Hearings Board also properly determined that the Conservancy Board performed an inadequate tentative determination of the validity and extent of the water rights by failing to adequately evaluate historical water use of the rights. Instead of evaluating the actual extent of beneficial use of Crown West's water rights, the Conservancy Board erroneously determined that all of the 5,874 AFY of water that purportedly was used during the period of peak use decades before was valid and eligible for change, regardless of the substantial reduction in use that followed.

This Court should affirm the Hearings Board's Order on Summary Judgment Motions because it correctly interprets and applies the definition of the term "municipal water supply purposes," and best effectuates the legislative intent underlying the relinquishment statute.

A. Standard of Review

The standard of review for this case is governed by the APA. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 584–85, 344 P.3d 199 (2015). The APA provides that "[t]he burden of demonstrating the

invalidity of agency action is on the party asserting invalidity,” which is Crown West in this case. RCW 34.05.570(1)(a).

Where, as here, the administrative decision under review was made on summary judgment, the reviewing court overlays the APA standard of review with the summary judgment standard. *Verizon Nw., Inc. v. Wash. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915–916, 194 P.3d 255 (2008). This Court conducts “review de novo, making the same inquiry as the Hearings Board.” *Cornelius*, 182 Wn.2d at 585.

The standards for review of “agency orders in adjudicative proceedings,” including the Hearings Board’s order in this case, are prescribed in RCW 34.05.570(3). “Agency action may be reversed where the agency has erroneously interpreted or applied the law, the agency’s order is not supported by substantial evidence, or the agency’s decision is arbitrary and capricious.” *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

Here, it is the “error of law” standard, RCW 34.05.570(3)(d), that applies because the Hearings Board decided the case on summary judgment. Under the “error of law” standard, review is de novo, but courts “give the agency’s interpretation of the law great weight where the statute is within the agency’s special expertise.” *Cornelius*, 182 Wn.2d at 585. “Because Ecology is the agency designated by the legislature to regulate

the State's water resources, RCW 43.21A.020, [. . .] it is Ecology's interpretation of relevant statutes and regulations that is entitled to great weight." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (citing *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998)).

B. Crown West's Water Rights Do Not Satisfy the Statutory Definition of "Municipal Water Supply Purposes"

The Hearings Board correctly determined that Crown West's four water rights are not entitled to the protection from relinquishment available to municipal supply water rights. Water rights are relinquished if they go unused, in whole or in part, for any period of five consecutive years after 1967, unless there is sufficient cause to excuse such nonuse. RCW 90.14.160–.180. But water rights that are "claimed for municipal water supply purposes" are exempt from relinquishment. RCW 90.14.140(2)(d). The term "municipal water supply purposes" is defined by four different categories of beneficial uses of water. RCW 90.03.015(4). Thus, to be protected from relinquishment under the municipal exemption, water rights must qualify as being for municipal purposes by satisfying the statutory definition.

On appeal, Crown West advocates for broad interpretation of the municipal relinquishment exemption that stretches it in two ways. First, it

argues the exemption excuses reductions in water use where municipal use is merely contemplated or intended, regardless of whether the water rights have actually been used for municipal purposes. Then, perhaps recognizing the weakness of this argument, it advances expansive interpretations of two of the four categories of beneficial uses included in the municipal definition to argue that it is actually using water for municipal purposes at its industrial park. Crown West's interpretations should be rejected because they are overbroad and would cause the exception to swallow the rule.

1. Water rights must be used in compliance with the statutory definition to maintain municipal status

The Hearings Board properly concluded that water rights must be used consistent with the statutory definition of "municipal water supply purposes" in order to maintain the relinquishment exemption for municipal water rights provided in RCW 90.14.140(1)(d). AR 599. This is critically relevant because the kinds of beneficial uses that Crown West's water rights have served have changed significantly through time. The municipal relinquishment exception protects municipal water suppliers from relinquishing portions of their water rights due to reductions in use associated with decreasing or fluctuating demands for water. But it does not allow municipal water rights to cease serving municipal water supply

purposes altogether, like Crown West's water rights have, and still qualify for the relinquishment exemption. The Hearings Board's conclusion is grounded in the plain language of the "municipal water supply purposes" definition and is consistent with the legislative intent of the relinquishment statute.

The underlying goal of statutory interpretation is "to determine and effectuate legislative intent." *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013). If possible, the plain meaning of the language should be given effect "as the embodiment of legislative intent." *Id.* When determining the plain meaning of a statutory exception, "the statutory context, related statutes, and the entire statutory scheme" is to be considered.¹³ *Id.* Additionally, "exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions." *Id.* (quoting *R.D. Merrill Co.*, 137 Wn.2d at 140).

"Municipal water supply purposes," is defined in terms of several different categories of beneficial uses of water:

"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

¹³ This is particularly true when interpreting water right statutes, which "almost always requires consideration of numerous related statutes in the water code." *Swinomish*, 170 Wn.2d at 582.

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.

RCW 90.03.015(4). Ecology interprets the relinquishment exemption for municipal water rights as requiring “active compliance by conformance with the beneficial use definitions in RCW 90.03.015(4).”¹⁴ AR 416. This means that 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, then the right remains valid only to the extent that it has been used. AR 417. The unused portion of the water right is subject to relinquishment. *Id.*

¹⁴ Additionally, in its 2003 Municipal Water Law Interpretive and Policy Statement, known as Policy 2030, Ecology considers there to be conformance with the definition when (1) water rights are listed in a water system plan or other document developed by a public water system in the water system planning process regulated by the Department of Health, or (2) water rights authorized for one or more of the categories of beneficial use included in the definition in RCW 90.03.015(4) have been integrated or consolidated through an Ecology action or procedure such that two or more water rights or water sources have alternate, well field, non-additive, or other relationships. AR 144–45. This provision in the policy requires specific planning and compliance with specific requirements that go beyond merely contemplating future use that falls within the municipal definition. While Crown West references these policy provisions in its brief, they are not at issue in this case because Crown West’s water rights could not qualify as being for municipal purposes under them, and never asserted that it could so qualify before the Hearings Board. *See* Brief of Petitioner at 15.

In upholding Ecology's statutory interpretation, the Hearings Board correctly pronounced that the definition of "municipal water supply purposes" requires actual use of water in compliance with one of the categories of uses set forth in the definition. AR 595 (citing *Cornelius v. Dep't of Ecology*, PCHB No. 06-099, at 11 (Jan. 18, 2008) (Order on Summary Judgment (as Amended on Reconsideration))). This interpretation is soundly based on the plain language of the definition. The statute includes the term "beneficial use of water," which is a term of art in Washington water law that means an actual use of water, rather than potential future use. In *Theodoratus*, the Supreme Court held that making "beneficial use" of water for the purpose of vesting a water right requires the actual use of water: "[a]pplication of water to 'beneficial use' and 'perfection' of an appropriative right are terms of art, with well-established meanings in western water law. Water must actually be put to beneficial use before a water right vests." *Theodoratus*, 135 Wn.2d at 589.

Requiring actual compliance best effectuates the intent of the relinquishment statute, which is "that water be beneficially used, and, if not, that water rights be returned to the state so that the water will be available for appropriation by others who will put the water to beneficial use." *R.D. Merrill Co.*, 137 Wn.2d at 140; *see also* RCW 90.14.010. The relinquishment provisions are part of the 1967 water rights claim

registration act, which sought to “eliminate uncertainty as to the existence of private water claims and to assist in enforcement of the beneficial use of waters in light of the state’s rapid growth.” *Dep’t of Ecology v. Adsit*, 103 Wn.2d 698, 700, 694 P.2d 1065 (1985); *see also* RCW 90.14.010. At the time, the state’s effective management of water resources was being hindered by the uncertain volume of pre-code water rights and the ongoing non-use of previously-allocated rights. *Adsit*, 103 Wn.2d 698 at 700; *see also* RCW 90.14.010; Laws of 1967, ch. 233, § 2. The Legislature set forth these findings in RCW 90.14.020, emphasizing the value of full beneficial use of water toward the state’s economic development. *See* RCW 90.14.020(2)–(5). Particularly, it found that “[a] strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state.” RCW 90.14.020(3). To that end, the Legislature provided for relinquishment of rights that are unused in whole or in part for five consecutive years. Such unused rights or portions of such rights “shall revert to the state, and the waters affected by said right shall become available for appropriation.” RCW 90.14.160–.180.

While promoting the tenet of “use it or lose it” by providing for relinquishment of unused water rights, the Legislature also provided an exception from relinquishment for water rights that are for “municipal

water supply purposes.” RCW 90.14.140(2)(d). But in doing so, it left the term “municipal water supply purposes” undefined. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 255–56, 241 P.3d 1220 (2010). This resulted in inconsistent application of the municipal relinquishment exemption—particularly as to whether private water supply companies qualified as municipal suppliers. *Id.* at 256. This ambiguity contributed to uncertainty amongst water users regarding “the validity of their water rights based on system capacity and whether their water rights were subject to relinquishment.”¹⁵ *Cornelius*, 182 Wn.2d at 588. To address this uncertainty, the Legislature passed the Municipal Water Law in 2003, which explicitly defined “municipal water supply purposes” for the first time. *Lummi Indian Nation*, 170 Wn.2d at 256.

In doing so, the Legislature specifically defined municipal water supply purposes in terms of four categories of beneficial uses of water. *See* RCW 90.03.015(4). If water is not being used consistent with one of these four categories, then the water right is not for municipal water supply purposes and the municipal relinquishment exception does not apply. For that reason, the Hearings Board correctly concluded that water rights must

¹⁵ Another factor contributing to this uncertainty was the Supreme Court’s decision in *Theodoratus*. There, the Court held that water right certificates cannot be based on system capacity, but must instead be based upon the quantity of water applied to beneficial use. *Theodoratus*, 135 Wn.2d at 586–87.

be used in active compliance with the statutory definition of municipal water supply purposes to qualify for the municipal relinquishment exemption.

2. Claiming a water right for a contemplated future municipal use is insufficient to exempt the right from relinquishment

Crown West advances a strained interpretation that broadly expands the municipal relinquishment exemption by asserting that a water right is exempt from relinquishment if it was “authorized in a manner that contemplated municipal use.” Brief of Petitioner 15–16 (quoting AR 136). Because the relinquishment exception protects rights that are “claimed for municipal water supply purposes,” Crown West contends it is sufficient that a water user *intends* to use water in the future for municipal purposes, regardless of the actual beneficial uses that are served. Crown West’s expansive interpretation must be rejected as contrary to both the plain statutory language and the underlying intent of the relinquishment statute.

The Supreme Court’s interpretation of the similarly-phrased “determined future development” relinquishment exemption undermines Crown’s West’s argument. Under RCW 90.14.140(2)(c), a water right that “*is claimed for* a determined future development to take place either within fifteen years of . . . the most recent beneficial use of the water right” is exempt from relinquishment. RCW 90.14.140(2)(c) (emphasis

added). To qualify for the exemption, the future development must be determined—“conclusively or authoritatively fixed”—within the five year period of nonuse for which the relinquishment exemption is sought. *R.D. Merrill Co.*, 137 Wn.2d at 143–44. This means that a water user must establish a specific development plan before the right is unused for five years. In other words, claiming the right involves more than contemplating a future use—it involves taking specific actions within the five-year period of nonuse

Likewise, in *City of Union Gap v. Department of Ecology*, 148 Wn. App. 519, 531–33, 195 P.3d 580 (2008), this Court rejected a similarly broad interpretation of the “claimed for” language in the context of the municipal relinquishment exemption. In considering whether the appellants’ nonuse of their water right was excused under the municipal relinquishment exemption, the Court concluded that a water right holder must timely assert its water rights for municipal water supply purposes within the five-year nonuse period. *Id.* at 532. Furthermore, the Court pronounced that actual compliance with the municipal definition is required: “[m]unicipal water supply purposes’ requires a showing of a specific beneficial use.” *Id.* at 531–32.

To qualify for a relinquishment exemption by claiming that a right is for municipal water supply purposes, the right must be beneficially

used, consistent with the statutory language of RCW 90.03.015(4), for one of the defined municipal water supply purposes before a five-year period of nonuse elapses. *See* section IV.B.1, above. Had the Legislature intended to exempt water rights where future municipal use is merely “contemplated,” it could have included an exemption for water rights claimed for *future* municipal water supply purposes, or defined municipal water supply purposes as including intended future uses of water, rather than “a beneficial use of water” for certain prescribed purposes.¹⁶ In short, 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 the actual beneficial uses occurring under the rights.¹⁷

Crown West further argues that Ecology’s interpretation of RCW 90.03.015(4) essentially nullifies the municipal relinquishment

¹⁶ As explained in footnote 14 above, Ecology’s Policy 2030 identifies a mechanism whereby a municipal water supplier may conform a right with the municipal definition by identifying the right for use in their water system plan. This provision in the policy requires specific planning and compliance with specific requirements that go far beyond merely contemplating future use that falls within the municipal definition.

¹⁷ Furthermore, Crown West’s broad interpretation is contrary to the underlying intent of the relinquishment statute because unused rights could be immunized from relinquishment simply by claiming a contemplation to use water for a municipal purpose long after such water use was reduced and was made available to other users or remained in the river to support fish and other environmental values. *See R.D. Merrill Co.*, 137 Wn.2d at 143 (Not requiring a development to be fixed within the five-year nonuse period defeats “the general relinquishment provisions, because a water right holder whose rights are subject to relinquishment for five years nonuse could otherwise decide *after* five continuous years of nonuse to plan a future development in order to avoid relinquishment.”).

exemption: “a purveyor can lose the status of being municipal in the same time period—five years—as for relinquishment, and hence relinquish its rights.” Brief of Petitioner at 14. But in making this assertion, Crown West understates the substantial benefits associated with the exemption.

Municipal water suppliers may experience fluctuations in water demand from year-to-year for many reasons. Indeed, demand from a municipal water supplier may decline over time due to conservation efforts even as water is used to serve new development. *See Cornelius*, 182 Wn.2d at 602–03 (commenting that conservation efforts at Washington State University had resulted in declining water use even as it developed new facilities and increased enrollment). The municipal relinquishment exemption protects against relinquishment of portions of municipal water rights associated with decreasing or fluctuating demand. But it does not allow a municipal water supplier to stop serving municipal water supply purposes altogether. For instance, a water system serving water through at least fifteen residential service connections would be protected from relinquishing a portion of its water right if conservation efforts resulted in declining water use. However, that same water system would not maintain its protection from relinquishment if it *ceased serving any residential*

service connections at all, and, instead, for example, provided water for agricultural irrigation purposes for five or more consecutive years.¹⁸

3. Ecology’s policy regarding streamlined tentative determinations does not excuse Crown West from statutory relinquishment provisions

Additionally, Crown West asserts that the compliance standard described in Ecology’s Policy 2030 conflicts with a streamlined process for making tentative determinations of extent and validity that is described in a separate Ecology policy document. Crown West suggests that Ecology’s standard is unlawful because Crown West is entitled to have its rights evaluated under the streamlined process, which excuses a year-to-year examination of historic use for rights that are exempt from relinquishment. *See* Brief of Petitioner at 17. This argument is flawed because it conflates the two distinct analyses implicated in making tentative determinations of the validity of water rights and evaluating rights for active compliance with the municipal definition.

¹⁸ Ecology’s approach also prevents absurd scenarios where water rights that were used in the distant past to serve large communities that later ceased to exist because of the closure of an industrial facility such as a mill, or other economic changes, could be revived. Not requiring compliance with the definition would allow the revival of water rights that have not been used for decades, which could reduce instream flows and harm aquatic species, or impair the ability of other water right holders to use water under rights that they had been able to exercise after water use ceased at such a “ghost town.” The importance of maintaining adequate instream flows to support fish and other values are emphasized in the Supreme Court’s decision in *Swinomish*.

By policy, Ecology provides a streamlined process for making simplified tentative determinations that excuses a year-to-year evaluation of historic beneficial use under a water right when relinquishment is not an issue, as it plainly is in the scenario in this case. *Cornelius*, 182 Wn.2d at 595–96. As explained in section IV.C, below, tentative determinations are required by RCW 90.44.100 and RCW 90.03.380 because water rights can be changed only to the extent that they remain valid. *Id.* at 595. In making tentative determinations, beneficial use of a water right must therefore be evaluated on a year-to-year basis to determine whether any portion of the water right has been relinquished for nonuse. *Cornelius*, 182 Wn.2d at 595; *see also R.D. Merrill Co.*, 137 Wn.2d at 127. However, if a relinquishment exemption applies to the water rights, evaluating the extent of historic use of a water right on a year-to-year basis serves no purpose.

Before the streamlined process can be utilized, there must be a determination that a relinquishment exemption applies. Unless an exemption applies, full or partial relinquishment of a water right that goes unused is mandatory. *See* RCW 90.14.160–.180 (“any person . . . who voluntarily fails, without sufficient cause, to beneficially use all or any part of said right to withdraw for any period of five successive years . . . shall relinquish such right or portion thereof.”) (emphasis added). Ecology has no authority to waive compliance with the relinquishment statutes by

foregoing a determination that non-use is excused. Ecology therefore applies the streamlined process subject to the requirements of the relinquishment statute, and the streamlined process cannot be applied unless it is first determined that a relinquishment exemption is applicable.

Here, the Hearings Board properly concluded that Crown West's water rights were not for municipal water supply purposes under RCW 90.03.015(4); thus, Crown West's water rights cannot be evaluated under the streamlined process.

The Hearings Board was also correct in reasoning that the Supreme Court's decision in *Cornelius* did not overrule or otherwise affect Ecology's policy requiring active compliance with the municipal definition. AR 598–99. In *Cornelius*, the Court ruled that the streamlined process could be applied to excuse a historic evaluation of the extent of beneficial use of Washington State University's water rights where the rights were exempt from relinquishment. *Cornelius*, 182 Wn.2d at 596. The Court's decision did not include any analysis of Ecology's policy requiring active compliance with the municipal definition because there was no assertion by the appellants in that case that Washington State University failed to exercise its water rights in active compliance with the municipal definition. Thus, *Cornelius* simply did not address the issue squarely presented in this case.

In sum, Crown West is mistaken in asserting that the policy allowing streamlined tentative determinations excuses it from having to demonstrate its active compliance with the municipal water supply purposes definition. Ecology's policy providing for the streamlined process only applies when a party can demonstrate that any nonuse of a water right is exempt from relinquishment, and, here, Crown West's water rights have not been exercised in compliance with the definition of municipal water supply purposes for several decades.

4. The water rights have not been used for municipal water supply purposes

The Hearings Board properly concluded that none of the four water rights were presently being used for municipal water supply purposes consistent with RCW 90.03.015(4). This statute defines four distinct municipal water supply purposes, three of which are relevant to the Hearings Board's decision. The first half of RCW 90.03.015(4)(a) provides the first relevant purpose, which is the beneficial use of water "[f]or residential purposes through fifteen or more residential service connections." The other half of RCW 90.03.015(4)(a) provides the second relevant purpose, which is "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." And the third relevant purpose is the use of

water for municipal water supply purposes “indirectly . . . through the delivery of treated or raw water to a public water system for such use.” RCW 90.03.015(4)(c).¹⁹

The undisputed facts in the record show that Crown West failed to meet its burden to demonstrate that its water use has satisfied any of these sub-definitions. *See R.D. Merrill Co.*, 137 Wn.2d at 140–41 (the party claiming a relinquishment exemption bears the burden of demonstrating the exemption applies).

a. The water rights have not supplied water for residential purposes through fifteen or more residential service connections since 1945

The Hearings Board properly concluded that the four water rights have not been used to supply water for residential purposes through fifteen or more residential service connections consistent with RCW 90.03.015(4)(a) during the relevant time period. AR 601–02.

Nowhere in its brief does Crown West assert that the Hearings Board erred in concluding that this standard was not satisfied. *See* Brief of Petitioner at 18–19. Thus, Crown West waives any argument that its water rights have satisfied this sub-definition of municipal water supply

¹⁹ The only sub-definition not relevant to this case provides that a municipal supply purpose includes a beneficial use of water “for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district.” RCW 90.03.015(4)(b).

purposes. *Yakima Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 146 Wn. App. 679, 698, 192 P.3d 12 (2008) (issue not argued in brief was waived). Even if the challenge had not been waived, the Hearings Board's conclusion that the water rights have not supplied water through fifteen or more residential service connections is amply supported by the administrative record, and should be affirmed.

The Hearings Board correctly concluded that the water rights were not presently providing water for residential purposes through fifteen or more residential service connections based on its finding that there were either insufficient physical service connections, or equivalent residential units, which is an alternate measure of service connections associated with multifamily housing. AR 601. Although the three water right claims apparently served a sufficient number of residential service connections or equivalent residential units during World War II, the record does not support a finding that there have been sufficient year-round residents since the naval depot was converted into an industrial park. *See* section III.A.1, above. Moreover, the water right documented by Certificate G3-22023C has never served sufficient residential service connections or equivalent residential units because the application was filed in 1973, long after the site was converted into an industrial park. AR 82–83, 97.

b. The water rights have not supplied water for residential use for a nonresidential population in compliance with the statute

The Hearings Board correctly determined the four water rights were not being used to provide for residential use of water for a nonresidential population of at least twenty-five people for at least sixty days per year, as required by RCW 90.03.015(4)(a). Ecology interprets this provision to apply to water rights serving temporary domiciles, while Crown West argues that this provision should apply broadly to any water rights serving potable water to a sufficient number of people, including employees at industrial and commercial facilities who do not stay there overnight. Crown West's interpretation should be rejected because it ignores the statutory context, and fails to narrowly construe the relinquishment exemption.

(i) Ecology's interpretation of ambiguous statutory language best advances the overall legislative purpose

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012). When faced with an ambiguous statute, "the interpretation which better advances the overall legislative purpose should be adopted." *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5

(1976). Courts also give great weight to the interpretation of an agency charged with implementing the statute. *Port of Seattle*, 151 Wn.2d at 593.

Reading RCW 90.03.015(4) as a whole, the phrase “residential use of water for a nonresidential population” is ambiguous because there is an inherent tension between “residential use of water” and “use of water for a nonresidential population.” Whereas the “residential use of water” implies that water is being used in a residence, the “use of water for a nonresidential population” implies use by people who reside elsewhere.

By published policy, Ecology interprets “residential use of water for a nonresidential population” as meaning “that the full range of residential water uses (e.g. drinking, cooking, cleaning, sanitation) are provided under the water right” to serve temporary domiciles occupied by nonresidents. AR 418. Thus, to qualify for the relinquishment exemption, a water right must serve at least twenty-five nonresidents who stay overnight for sixty or more days each. AR 362. However, this standard cannot be “met by aggregating populations of different transients who may stay overnight for only a few days each.” *Id.* Examples of water systems holding rights meeting this standard could include those serving vacation homes and temporary farm worker housing. AR 418.

Ecology’s interpretation is reasonable and best carries out the statutory intent of encouraging beneficial use of water and making unused

water available for appropriation or to stay instream to support fish and environmental values. RCW 90.03.015(4)(a) provides two different sub-definitions of municipal water supply purposes. The first concerns water systems serving residents—“[m]unicipal water supply purposes’ means a beneficial use of water . . . [f]or residential purposes through fifteen or more residential service connections.” RCW 90.03.015(4)(a). The second definition is less clear, relating to water used by nonresidents—“[m]unicipal water supply purposes’ means a beneficial use of water . . . 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.” *Id.* Reading these definitions together, Ecology interprets both as regarding residential structures—the first relates to year-round residents while the second relates to part-time occupants of temporary domiciles who use water in a similar manner. This is a reasonable interpretation that resolves the internal tension between the words “residential use of water” and “use of water for a nonresidential population.”

Crown West insists on broadly interpreting this sub-definition by equating “residential use for a nonresidential population” with potable water uses by employees at the industrial park. It further asserts that a nonresident should be defined using Washington Department of Health

(Health) regulations, as “a person having access to drinking water from a public water system who lives elsewhere.” WAC 246-290-010(173). The Hearings Board correctly rejected such an expansive interpretation.

AR 603. The municipal relinquishment exemption must be construed narrowly to effectuate the legislative intent underlying the relinquishment statute—encouraging beneficial use of water and making unused water available for appropriation. *R.D. Merrill Co.*, 137 Wn.2d at 140. Crown West’s interpretation substantially expands the ambit of the municipal relinquishment exemption to include any water system serving potable water to twenty-five or more persons for sixty days, even if such persons do not stay overnight, which would include many commercial and industrial facilities. In other words, under this broad reading, “residential use” could include residential, commercial, or industrial uses.

(ii) Ecology’s interpretation of RCW 90.03.015(4) is also consistent with relevant regulations

Crown West asserts that Ecology’s interpretation of RCW 90.03.015(4)(a) is flawed because the statute is patterned after Health regulations, but Ecology allegedly only selectively references such regulations in its statutory interpretation. Crown West appears to assert that the municipal supply purpose for “residential use of water for a nonresidential population” in RCW 90.03.015(4)(a) is patterned after the

definition of Group A non-community transient water systems provided in WAC 246-290-020(5)(b)(ii)(A). *See* Brief of Petitioner at 21–22. This assertion is mistaken because the statutory language does not align as closely with Health’s rule as Crown West claims.

As Ecology explains in its Policy 2030, aspects of the statutory definition for municipal water supply purposes overlap with Health regulations concerning Group A water systems to a limited extent.²⁰ AR 417. But regulations concerning Group A non-community systems are inapposite to the municipal supply purpose regarding the “residential use of water for a nonresidential population.” RCW 90.03.015(4)(a). Group A non-community transient water systems provide “water for human consumption” to “[t]wenty-five or more different people each day for sixty or more days” per year. WAC 246-290-020. But the Legislature chose very different language in defining the municipal water supply purpose “for providing residential use of water for a nonresidential

²⁰ For instance, similar to Health’s definition of Group A community water systems, the Legislature defined one of the municipal supply purposes in terms of the number of residential service connections. *Compare* RCW 90.03.015(4)(a) (“For residential purposes through fifteen or more residential service connections.”), *with* WAC 246-290-020(5)(a) (“Community water system means any Group A water system providing service to fifteen or more service connections used by year-round residents for one hundred eighty or more days within a calendar year.”). The water code does not define the term “residential service connection,” and the statutory context does not clearly indicate the Legislature’s intent. Thus, Ecology chose to interpret this undefined term in harmony with WAC 246-290-020(5)(a) to mean “service connections used by year-round residents for one hundred eighty or more days within a calendar year.” AR 417–18.

population that is, on average, at least twenty-five people for at least sixty days a year.” RCW 90.03.015(4)(a). The terms “residential use of water” and “for a nonresidential population” do not appear together in Health’s regulations concerning Group A water systems. And none of the municipal water supply purposes in RCW 90.03.015(4)(a) are defined in terms of providing “water for human consumption.” Ecology therefore interpreted the statutory language in light of the critical differences in language between RCW 90.03.015(4)(a) and Health’s regulations and correctly determined that referencing inapposite regulations would not be appropriate to define the ambiguous statutory phrase “residential use of water for a nonresidential population.”

Furthermore, Crown West is also wrong in asserting that Ecology inappropriately rejects the historic definition of municipal water use, which includes a broad range of beneficial uses, in favor of a much more restrictive interpretation. Crown West’s reliance upon a historic understanding of the types of water uses that are considered to be for municipal purposes is inappropriate because the Legislature defined municipal purposes in RCW 90.03.015(4) in terms of four specific kinds of beneficial uses. Once a water right is exercised consistently with one of these minimum thresholds, and therefore qualifies as a municipal water right, then a broader range of “beneficial use[s] of water under the right

generally associated with the use of water within a municipality” also qualify as being for municipal water supply purposes.

RCW 90.03.015(4).²¹ Because Crown West’s water rights fail to meet the minimum threshold to qualify as municipal water rights under the definition, its rights cannot qualify as being municipal simply because “commercial” and “industrial” uses fall under the list of “associated” uses that can be served by municipal water rights.

In sum, Crown West’s reading of the municipal water supply purpose for providing a beneficial use of water for “residential use for a nonresidential population” is flawed because it interprets statutory terms out of the proper context and it fails to narrowly construe the relinquishment exception. Ecology reasonably interprets the ambiguous statutory language as being applicable to water rights serving part-time occupants of temporary domiciles. This Court should therefore reject Crown’s assertion that the municipal relinquishment exemption is broadly available for water systems serving potable water to employees at industrial and commercial facilities.

²¹ “If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right generally associated with the use of water within a municipality is also for ‘municipal water supply purposes,’ including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes.” RCW 90.03.015(4).

c. There has not been a nonresidential population of twenty-five or more people

Crown failed to use its four water rights in active compliance with this municipal water supply purpose because there has not been a nonresidential population of twenty-five or more people at the Park since 1967. After the naval depot was converted into an industrial park, residential structures that had originally accommodated military personnel were occupied by employees or rented to the public. AR 137. However, the record does not establish the number of structures occupied, the number of occupants accommodated, or the duration of the occupants' stays. *See id.* Aside from a fire station that accommodated a minimum of six firefighters, there were no residential structures occupied between 1990 and 1998. *See* AR 136–37, 445. Thus, the record contains no evidence supporting a reasonable inference that there were twenty-five or more people staying overnight at the Park between 1967 and 1998.

In 1998, a 65-room hotel was established in the Park. AR 137–38. Again, the record does not establish the hotel's occupancy, the duration of the guests' stays, or any other information relating to the pattern of occupancy.²² *Id.* Thus, the Hearings Board properly found there was no

²² If, notwithstanding the lack of factual support in the record, the Court finds that this definition was met before 1990, and, then, after 1998 through occupancy of the hotel, the water rights would still be subject to partial relinquishment through over five

evidence that the hotel was occupied by the same twenty-five guests who stayed at least sixty days per year. AR 604.

Assuming, arguendo, that this Court accepts Crown West's broader reading of "a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year," which allows the aggregation of different nonresidents who stay only a few nights each, Crown West nevertheless failed to demonstrate its water rights served such a population. Although the Hearings Board did not make findings regarding the water rights' historic compliance with the definition of municipal supply purposes, the record does not support a finding that there were twenty-five or more nonresidents prior to 1998, when the hotel opened. Although an unidentified number of individuals may have occupied the fire station and single-family residences, the record does not demonstrate this number ever exceeded twenty-five. *See* section III.A.1, above. Accordingly, this Court should therefore conclude the water rights were not exercised "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." RCW 90.03.015(4)(a).

years of reduced use between 1990 and 1998 when there were no residential structures on the site.

d. The water rights have not supplied water indirectly through delivery to a public water system for municipal water supply purposes

Last, the Hearings Board correctly determined that the four water rights have not satisfied RCW 90.03.015(4)(c), which defines municipal water supply purposes as the beneficial use of water indirectly through delivery to a public water system for municipal water supply purposes. Although Crown West has maintained an emergency intertie with Consolidated Irrigation District #19 since 2000, the intertie has never been operated to deliver water. Crown West now asserts that its mere agreement to provide water through the intertie is sufficient. This argument should be rejected.

Municipal water supply purposes includes the beneficial use of water “indirectly for [municipal water supply purposes under RCW 90.03.015(4)(a) and (b)] through the *delivery* of treated or raw water to a public water system for such use.” RCW 90.03.015(4)(c) (emphasis added). Satisfying this standard requires more than the incidental conveyance of water to a public water system—it requires the intentional delivery of water for actual use. AR 363.

The water rights have never been used to deliver water to Consolidated Irrigation District #19 through the intertie. Crown West and Consolidated Irrigation District #19 first entered the intertie agreement in

2000, and the intertie is to be used only during an emergency. AR 450–51; *see also* AR 426 (listing the intertie as an unmetered emergency source of water). Crown West has never operated this intertie, except for when it tests the system control valve to ensure the intertie remains operational. AR 448–49. The water systems incidentally exchange small amounts of water when the control valves are tested, but this exchange is not intended to supply water from one system to another for beneficial use by customers. *Id.* Because the statutory language of RCW 90.03.015(4)(c) requires intentional delivery of water for beneficial use—and not the conveyance of a small amount of water incidental to routine maintenance—Crown West’s water rights have never satisfied this sub-definition.

Crown West now ignores the plain statutory language and argues that the intertie agreement obligates it to deliver water to Consolidated Irrigation District #19 in an emergency and relinquishment of its water rights would jeopardize its ability to fulfill this obligation. However, RCW 90.03.015(4)(c) plainly defines a municipal water supply purpose as the delivery of water to a public water system: “ ‘Municipal water supply purposes’ means a beneficial use of water . . . 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.” Entering an agreement to deliver

water on an emergency basis does not constitute the delivery of water.

Accordingly, this Court should reject Crown West's claim that its water rights satisfy the requirements of RCW 90.03.015(4)(c).

C. The Conservancy Board Failed to Perform an Adequate Tentative Determination of Extent and Validity of Crown West's Water Rights

Based on its conclusion that Crown West's four water rights fail to qualify as being for municipal water supply purposes, the Hearings Board properly concluded that the Conservancy Board failed to perform an adequate tentative determination of the validity and extent of the rights.

AR 606.

In evaluating an application for change or transfer of a water right, Ecology and water conservancy boards must perform a tentative determination of the validity and extent of the water right sought to be changed. The change of a water right can only be approved to the extent it is valid. *R.D. Merrill Co.*, 137 Wn.2d at 127; *Pub. Util. Dist. No. 1 of Pend Oreille Cty.*, 146 Wn.2d at 794. Thus, in reviewing the applications, the Conservancy Board was required to perform a tentative determination of the validity and extent of the water rights to ascertain how much water is eligible to be changed.

A tentative determination generally involves evaluating historic beneficial use of the right on a year-to-year basis to determine whether any

portion of the right has been relinquished for nonuse. *Cornelius*, 182 Wn.2d at 595; *see also R.D. Merrill Co.*, 137 Wn.2d at 127 (requiring a tentative determination to approve a change under RCW 90.03.380.). However, when relinquishment of right is not an issue, then Ecology's streamlined policy for making simplified tentative determinations provides that this year-to-year analysis of historic beneficial use is unnecessary. *Cornelius*, 182 Wn.2d at 595–96.

The Conservancy Board failed to perform an adequate tentative determination of extent and validity because it erroneously found that Crown West's water rights are exempt from relinquishment under the municipal exemption. The Conservancy Board essentially applied the streamlined process in finding that peak water use amounted to 5,874 AFY, all of which was exempt from relinquishment and therefore valid for change, even though current water use is no more than 3,400 AFY. Because the rights are not exempt from relinquishment, a year-to-year evaluation of historic use is necessary to determine the extent to which the rights remain valid for change. Furthermore, this failure means there is no assurance that the change will not impair existing rights due to the revival of water use that has not occurred and taken water out of the river for several decades. The Hearings Board's decision on this issue is correct and should be upheld.

V. CONCLUSION

The Hearings Board correctly rejected Crown West's novel scheme to sell long-unused portions of its water rights to enable new water uses elsewhere while the Park's water use continues unabated. This long-unused water is not exempt from relinquishment because the water rights have not served municipal water supply purposes for several decades. These rights could only be considered municipal rights under the broadest interpretation of the relinquishment exemption. Such an interpretation causes the exception to swallow the rule and must be rejected.

For the foregoing reasons, this Court should affirm the Pollution Control Hearings Board's Order on Summary Judgment Motions and uphold Ecology's denial of Crown West's water right change applications.

RESPECTFULLY SUBMITTED this 21st day of March 2018.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on March 21, 2018, I caused to be served a copy of State of Washington, Department of Ecology's Response Brief in the above-captioned matter upon the parties herein via the Appellant Courts' Portal filing system, which will send electronic notifications of such filing to the following:

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DATED this 21st day of March 2018 in Olympia, Washington.


JANET L. DAY, Legal Assistant

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