

FILED

SEP 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 304701

SCOTT CORNELIUS, PALOUSE WATER CONSERVATION
NETWORK, AND SIERRA CLUB PALOUSE GROUP,

Appellants,

vs.

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

Respondents.

BRIEF OF AMICI CURIAE AQUA PERMANENTE, ET AL.

David L. Monthie, WSBA No. 21618
DLM & Associates
519 75th Way N.E.
Olympia, WA 98506
(360) 357-8539

TABLE OF CONTENTS

Table of Authorities

I. Introduction. 1

II. Identity and Interests of Amici Curiae. 2

III. Statement of the Case. 7

IV. Argument. 8

 A. The RCW 90.44.130 requirement for the Department of Ecology to evaluate the “safe sustaining yield” of the aquifer applies because of the condition of the aquifer. 8

 B. Ecology is mandated to evaluate the “safe sustaining yield” of the aquifer under RCW 90.44.130, both under the statute’s plain meaning and under its obligation to consider the public interest as part of its review. 11

 a. RCW 90.44.130 provides Ecology with both authority and a duty to intervene when an aquifer is in decline, and reduce withdrawals to preserve the “safe, sustaining yield” of the aquifer. 11

 b. The obligation to review the “safe sustaining yield” of an aquifer applies to Ecology’s review of water rights changes as part of its consideration of the public interest. 13

 c. The state’s public trust duty, coupled with Ecology’s authority under RCW 90.44.130, means Ecology should have acted to protect the aquifer when processing the WSU change applications. . . . 15

 d. The MWL does not serve as a shield against Ecology’s obligation to assess safe sustaining yield. 18

V. Conclusion. 19

TABLE OF AUTHORITES

Washington State Cases

<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 670, 732 P.2d 989 (1987).....	16
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	9
<i>Five Corners Family Farmers v. State of Washington</i> , 173 Wn.2d 296, 268 P.3d 892 (2011).....	3, 5, 9
<i>Hubbard v. Dept. of Ecology</i> , 86 Wn. App. 119, 936 P.2d 27 (1997).....	4
<i>Kittitas Co. v. Eastern Wash. Growth Mgt. Hrgs. Bd.</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011).....	7
<i>Lummi Nation v. Washington</i> , 170 Wn.2d 247, 241 P.3d 1220 (2010).....	4, 18
<i>Okanogan Wilderness League v. Town of Twisp</i> , 133 Wn.2d 769, 947 P.2d 732 (1997).....	6
<i>Orion Corporation v. State of Washington</i> , 109 Wn.2d 621, 747 P.2d 1062 (1987).....	16
<i>Postema v. Pollution Control Hrgs. Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	4
<i>R.D. Merrill v. Pollution Control Hrgs. Bd.</i> , 137 Wn.2d 118, 969 P.2d 458 (1999).....	6, 12
<i>Rettkowski v. Dept. of Ecology</i> , 122 Wn.2d 219, 858 P.2d 232 (1993).....	16, 17
<i>Schuh v. Dept. of Ecology</i> , 100 Wn.2d 180, 187, 667 P.2d 64 (1983).....	14
<i>Serres v. Wash. Dept. of Retirement Systems</i> , 149 Wn. App. 569, 261 P.3d 173 (Div. 1, 2011).....	9
<i>State v. J.P.</i> , 149 Wn.2d 444, 450, 69 P.3d 318 (2003).....	9
<i>State v. Lodge</i> ,	

42 Wn. App. 380, 711 P.2d 1078 (1985).....	11
<i>Stempel v. Dept. of Water Resources</i> , 82 Wn.2d 109, 508 P.2d 166 (1973).....	14
<u>Other State Cases</u>	
<i>In re. Water Use Permit Applications for the Waiahole Ditch</i> , 94 Hawi'i 97, 9 P.3d 409 (2000).....	17
<u>Environmental Hearings Office Decisions</u>	
<i>Cascade Investment Properties Inc. v State of Washington</i> , PCHB Nos. 97-47, 97-48 (1997)	14
<i>OHA v. Dep't of Ecology</i> , PCHB No. 97-146 (2000)	6
<u>Session Laws</u>	
Laws of 2003, 1 st Spec. Sess, ch. 5	3, 18
<u>Statutes</u>	
RCW 90.03.290	14, 15
RCW 90.03.290(1)	12
RCW 90.03.290(3).....	12, 13, 14
RCW 90.03.330(3).....	18
RCW 90.03.560	19
RCW 90.44	9, 10, 12, 13
RCW 90.44.020	10
RCW 90.44.040	15
RCW 90.44.050	5
RCW 90.44.060	13
RCW 90.44.070	11
RCW 90.44.100	11, 12

RCW 90.44.100(2).....	12
RCW 90.44.130	<i>passim</i>
RCW 90.54	11
RCW 90.54.010(1)(e)	11, 15

Washington Administrative Code

Ch. 173-539A WAC	4
------------------------	---

Washington Administrative Policies

Department of Ecology, Water Resources Program Policy 2030, “2003 Municipal Water Law Policy and Interpretive Statement,” (rev. May 7, 2012), at 7-8, at http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol2030.pdf ...	15, 19
---	--------

Treatises

James K. Pharris and P. Thomas McDonald, An Introduction to Washington Water Law (Washington State Office of the Attorney General, January 2000)	10, 13, 14
--	------------

I. INTRODUCTION

Aqua Permanente, et al, (collectively “*amici*”) offer this brief as friend of the Court.¹ The issue before the Court is whether the Department of Ecology was required to apply the safe, sustaining yield principles of RCW 90.44.130 when processing Washington State University’s (WSU) water right amendments.² Aqua Permanente, and the consortium of public interest organizations that join in this brief, are advocates for comprehensive and consistent management of Washington’s publicly-owned water resources to protect the interests of current and future citizens in the availability of the state’s water. The organizations’ members—described below—range from family farmers to conservation advocates. *Amici* are familiar with Washington’s water laws, and the necessity for properly administering them. Collectively, they oppose the Department of Ecology’s interpretation of RCW 90.44.130, and support the position taken, and relief requested, by the Appellants in this case.

In particular, *amici* are deeply concerned about the Department of Ecology’s (Ecology) refusal to even evaluate whether the Grande Ronde

¹ The proposed amici are: Aqua Permanente, Center for Environmental Law and Policy (CELP), Five Corners Family Farmers (FCFF), Friends of the San Juans (Friends), Methow Valley Citizens Council (MVCC), Okanogan Highlands Alliance (OHA), Okanogan Wilderness League (OWL), Protect our Peninsula’s Future (PPF), Protect Our Whidbey Water (POWW), RIDGE, and the Sequelitchew Creek Watershed Council.

² The appeal raises numerous other legal issues of importance to the amici, but the focus of this appeal will be on the “safe sustaining yield” issue.

Aquifer can provide a safe sustainable yield of water, under RCW 90.44.130, to meet the needs of existing water users, and future increased uses. In the face of uncontroverted evidence of a declining water table, and the large increase of water withdrawals sought by Washington State University (WSU) to irrigate an expanded golf course, Ecology has apparently chosen to wait until some future day, and some future undescribed set of circumstances, rather than to do now what the statute requires. That is not, and should not, be the proper course under the law.

II. IDENTITY AND INTERESTS OF AMICI CURIAE

Amici wish to highlight the stressed conditions of groundwater across the state, and the need for vigilance in administering the state's water laws in order to ensure that irreplaceable water resources are protected and preserved for future generations of Washingtonians. In most parts of the state, Ecology no longer issues new water rights, and new legal uses of water require amendments to existing water rights, as WSU is pursuing here. In particular, amici stress the necessity for, and the obligation of, the Department of Ecology to evaluate the "safe, sustaining yield" of any aquifer—as required by RCW 90.44.130—before making formal decisions with regard to changes in groundwater rights where there is evidence of groundwater overdraft. The increasing limitations on the use of surface water for water supplies in this state, including potentially

severe impacts to surface water sources from climate change and population growth, will put more stress on the state's groundwater resources. Streamflow requirements imposed under the federal Endangered Species Act have put historic uses increasingly at risk. In addition, the use of permit-exempt wells for large stockwatering operations could substantially affect aquifer conditions in those parts of the state where such businesses are expanding. See *Five Corners Family Farmers v. State of Washington*, 173 Wn.2d 296, 268 P.3d 892 (2011).

Under these circumstances, it is imperative that Ecology follow the legislative mandate to protect aquifers, and assure that only groundwater uses that safely preserve aquifers are authorized. Ecology should be diligent in protecting the public interest to ensure that all water right decisions consider the needs of future generations of Washingtonians. Moreover, the Legislature did not intend in enacting the 2003 Municipal Water Law³ that "municipal water suppliers" should evade Ecology's obligation to protect aquifers. This brief describes why *amici* believe Ecology's interpretation of RCW 90.44.130 is wrong, and undermines the broad water resource management responsibilities that the Legislature has given to that agency.

³ LAWS OF 2003, 1st. Spec. Sess., ch. 5; (SESSHB 1338).

Each *amici* organization, and its experience with water resource issues, is briefly described below:

Aqua Permanente is a Washington state non-profit corporation based in Kittitas County. Aqua Permanenté's members are family farmers who utilize junior priority surface water rights, and who are required to curtail water use during drought years. Based on the proliferation of permit exempt groundwater wells for new residential development, Aqua Permanenté successfully petitioned Ecology to close the upper Kittitas Valley to new, unmitigated groundwater uses. *See* Ch. 173-539A WAC.

The Center for Environmental Law & Policy (CELP) is a Washington state non-profit corporation with members located throughout Washington and headquartered in Seattle. CELP's mission is to protect and restore Washington's freshwater resources through science based management and sustainable use of the state's groundwater. CELP has litigated as both party and amicus curiae in numerous groundwater cases. *E.g., Lummi Nation v. State of Washington*, 170 Wn.2d 247, 241 P.3d 1220 (2010); *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d 726 (2000); *Hubbard v. Dept. of Ecology*, 86 Wn. App. 119, 936 P.2d 27 (1997).

Five Corners Family Farmers (FCFF) is a Washington state non-profit corporation based in Franklin County. FCFF's members are dryland wheat farmers who rely on groundwater to provide domestic water for

their homes. FCFF was plaintiff in a case challenging the state's interpretation of the groundwater exemption contained in RCW 90.44.050 to allow unlimited use of domestic wells for stockwater purposes. See *Five Corners Family Farmers v. Washington, supra*. FCFF's mission is to advocate for and protect the groundwater resources that provide sustenance for its members, and which are pumped from an aquifer system similar the Palouse Basin Aquifer that is the subject of this appeal.

Friends of the San Juans (Friends) is a nonprofit Washington corporation based in San Juan County, with approximately 2,000 members. Since 1979, Friends has worked to protect the land, air, sea, water, and livability of the San Juan Islands. In pursuing that mission, Friends promotes stewardship of the Islands' limited water resources, including the substantial portion drawn from groundwater.

Methow Valley Citizens Council (MVCC) is a Washington state non-profit corporation with members located in Okanogan County. MVCC advocates for sustainable water resource management that protects its members' water rights for both farming and domestic use, as well as stream flow and public uses of the Methow River and tributaries. MVCC has a long history of promoting responsible groundwater use, particularly as it relates to land use management, including land use comprehensive plans, shoreline management plans and critical areas ordinances.

Okanogan Highlands Alliance (OHA) is a Washington non-profit corporation based in northeastern Okanogan County with members located throughout the state. OHA's membership includes small farmers and families who use domestic wells. OHA is a long-standing advocate for protecting the public interest in groundwater, including challenges to water right transfers, with a focus on gold mine operations at Buckhorn Mountain. *E.g., OHA v. Dept. of Ecology*, PCHB No. 97-146 (2000).

Okanogan Wilderness League (OWL) is a Washington state non-profit corporation based in the Methow Valley. OWL advocates for sustainable management that protects its members' water rights, along with surface flows and hydraulically connected groundwater in the Methow River for the benefit of endangered fisheries and recreational use. OWL was plaintiff in two seminal water cases: *R.D. Merrill Co., v. PCHB*, 137 Wn.2d 118, 969 P.2d 458 (1999), *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997).

Protect Our Peninsula's Future (PPF) is a Washington state non-profit corporation with members located primarily on the northern Olympic Peninsula. PPF advocates for sustainable use of ground and surface waters, particularly in the Dungeness River basin near Sequim, to protect domestic uses and hydraulically connected surface waters that provide habitat for endangered salmon and other aquatic species.

Protect Our Whidbey Water (POWW) is a Washington non-profit organization based on Whidbey Island. POWW's advocates for sustainable use of groundwater and protection of their members' domestic groundwater rights. POWW members have suffered declines in their wells since the U.S. Navy began irrigating a golf course at its Oak Harbor base, threatening the sustainability of their shared aquifer.

RIDGE is a Washington non-profit corporation based in the Roslyn-Cle Elum area of Kittitas County. RIDGE advocates for sustainable water use in the Upper Yakima basin, and has worked water right transfers and municipal supply issues. RIDGE was plaintiff in the seminal case of *Kittitas Co. v. Eastern Wash. Growth Mgt. Hrgs. Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011), regarding water and land use.

The Sequelitchew Creek Watershed Council is a Washington state non-profit corporation based in Pierce County. The Council's focus is to prevent depletion of groundwater and protect hydraulically connected streamflows in the Sequelitchew watershed, near the City of DuPont.

III. STATEMENT OF THE CASE

Amici adopt and incorporate by reference the Statement of the Case set forth in Appellants' Opening Brief at 7-11. Facts of particular importance for the Court's evaluation include: (1) the Grande Ronde Aquifer in the Palouse Basin is in marked decline, threatening existing

water rights and water uses, and future beneficial uses of the aquifer's water; and (2) the purpose of use for which Ecology granted WSU's requested water rights change was, in part, for the additional irrigation required by the doubling in size of the WSU golf course.⁴ Given the undisputed evidence of declining aquifer levels, and increased uses of groundwater sought by WSU, it is hard to imagine a more compelling situation where Ecology should investigate the "safe sustaining yield," and take appropriate action. It is therefore important for this Court to provide direction to Ecology with regard to its duties under RCW 90.44.130.

IV. ARGUMENT

- A. The RCW 90.44.130 requirement for the Department of Ecology to evaluate the "safe sustaining yield" of the aquifer applies because of the condition of the aquifer

RCW 90.44.130 is a statutory requirement imposed on the Department of Ecology with regard to both management of water rights among appropriators in the same aquifer, and more general management of aquifers to assure a "safe sustaining yield" for all existing and future users of that water source. The statute's two purposes are reflected in the first two sentences of the section.

The Pollution Control Hearings Board (PCHB) held that RCW 90.44.130 applies only to issuance of new water rights, and that the

⁴ Ex. A-27, Att. 5, p. 3, 7 (Cornelius comments on DNS); AR 34, Att. 1.

changes in water rights sought by WSU did not invoke application of “safe sustaining yield” analysis. AR 85 at 11-18. This interpretation of law is in error. This Court reviews questions of statutory interpretation de novo. “When reviewing questions of law, [the reviewing court] may substitute [its] determination for that of the agency.” *Serres v. Wash. Dept. of Retirement Systems*, 149 Wn. App. 569, 261 P.3d 173 (Div. 1, 2011.)

The plain language of RCW 90.44.130 does not limit its application to the processing of new water rights, and neither Ecology nor the PCHB may read such a limitation into the statute. The Legislature could have but did not include such a limitation. A “fundamental objective when interpreting a statute is ‘to discern and implement the intent of the legislature.’” *Five Corners Family Farmers*, 173 Wn.2d at 305 (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). The court discerns the plain meaning of the statute, which is gleaned “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

The legislative context of Chapter 90.44 RCW, and the safe, sustaining yield language in RCW 90.44.130, makes clear that the Legislature never intended to restrict Ecology’s ability to act to arrest the decline of water aquifers only when a new permit application was before

it. Chapter 90.44 RCW was enacted by the Legislature in 1945 to provide a state process for “regulating and controlling” groundwater uses in the state, and to generally extend the principles of state regulation and permitting of surface water to both “appropriation and beneficial uses” of groundwater uses. RCW 90.44.020. Not only did Chapter 90.44 extend the prior appropriation doctrine to groundwater, but “the Legislature also extended the notion of public ownership to such water.” James K. Pharris and P. Thomas McDonald, *An Introduction to Washington Water Law* (Washington State Office of the Attorney General, January 2000), at V:9 (“Pharris and McDonald”). This treatise notes that “[t]he principle of ‘safe sustaining yield’ in the code further protects vested ground water rights against later appropriations.” *Id.* at V:13. While new permits are one type of later appropriation, a fully perfected junior appropriator could be curtailed to protect an aquifer as well. The Legislature enacted RCW 90.44.130 in 1945 as part of a regulatory scheme to protect both individual water appropriations and more generally the public’s interest in aquifer longevity. The limited interpretation of RCW 90.44.130 advocated by Ecology in this case is inconsistent with the broader legislative intent.

In addition, the Supreme Court has directed courts to look at “related statutes” for guidance in interpretation of a given statutory provision. The fundamentals of water resource policy for the state, as

described in Chapter 90.54 RCW, require that Ecology's management ensures that "waters of the state are protected and fully utilized for the greatest benefit to the people of the state." RCW 90.54.010(2). "The long-term needs of the state require ongoing assessment of water availability, use, and demand." RCW 90.54.010(1)(e).

Finally, if, as Ecology asserts, the second sentence of RCW 90.44.130 simply restates the provisions of the first sentence, that second sentence is essentially duplicative of the requirement that Ecology evaluate potential impairment of existing water rights when reviewing water rights changes under RCW 90.44.100 and 90.44.070, rendering RCW 90.44.130 as surplusage. That statutory construction is firmly disfavored in the law. See *State of Washington v. Lodge*, 42 Wn. App 380, 389, 711 P.2d 1078 (1985).

- B. Ecology is mandated to evaluate the "safe sustaining yield" of the aquifer under RCW 90.44.130, both under the statute's plain meaning and under its obligation to consider the public interest as part of its review.
 - a. RCW 90.44.130 provides Ecology with both authority and a duty to intervene when an aquifer is in decline, and reduce withdrawals to preserve the "safe, sustaining yield" of the aquifer.

RCW 90.44.130 plainly states that Ecology "shall administer" groundwater rights under the principle of safe sustaining yield, and "shall have jurisdiction" to limit withdrawals in order to maintain safe

sustainable yields. These provisions of RCW 90.44.130 are distinct from the procedures in chapter 90.44 RCW—particularly RCW 90.44.100—for Ecology’s consideration of and decisions on water rights changes, yet are integrally related. Ecology concedes that it has the authority to evaluate “safe sustaining yield” under RCW 90.44.130, but asserts that it need not do so as part of an application for a water right change, in that it would be duplicative of the impairment analysis required under RCW 90.44.100. Ecology Response Br. at 40-41. Ecology fails to distinguish between protecting senior rights as part of the new permit process, and after-the-fact enforcement that is a part of the prior appropriation scheme.

A similar fallacy attends Ecology’s argument regarding the “water availability” test for new water rights. Applications for amendments to groundwater rights are subject to the same provisions required for new surface water rights. RCW 90.44.100(2). One such requirement is that Ecology find that water is available for new permits. RCW 90.03.290(3). However, *R.D. Merrill* states that the “water availability” prong of the test for new rights need not be performed for change applications. *R.D. Merrill v. PCHB*, 137 Wn.2d at 127. Because the Supreme Court has said that Ecology can skip the availability evaluation under RCW 90.44.100 and 90.03.290(1), the safe, sustaining yield statute provides a singularly important and independent safeguard, particularly when aquifer overdraft

is evident. This interpretation of RCW 90.44.130 is also consistent with the legislature's intent to protect the public's ownership of groundwater in enacting Chapter 90.44 RCW.

The obligation to assess the safe sustaining yield of an aquifer as part of any water rights processing is implicit in RCW 90.44.130.

Ecology's straightjacketed reading of the statute confounds the statute's language, as well as common sense. Ecology should analyze the safe sustaining yield for any aquifer in decline, and particularly here. This Court should conclude that the mandatory language of RCW 90.44.130, coupled with uncontroverted evidence of the aquifer's decline, triggers Ecology's duty to exercise its authority under this section, and that the failure to do so is contrary to law.

- b. The obligation to review the "safe sustaining yield" of an aquifer applies to Ecology's review of water rights changes as part of its consideration of the public interest.

Applications for groundwater rights must comply with the same standards as apply to applications for surface water rights under the Water Code. RCW 90.44.060. Part of Ecology's evaluation must determine whether the application is detrimental to the public interest, RCW 90.03.290(3), and this provision applies to change applications for groundwater rights. *See Pharris and McDonald at VI:26.* The elements of

the public interest test are not defined in statute or WAC. However, collectively they “invoke the application of the general environmental and water management policies enacted by the Legislature.” *See Pharris and McDonald* at IV:39. The Supreme Court has endorsed the use of the public interest to preserve the state’s regulatory scheme, deny a water right change, and to require Ecology to avoid potentially broad environmental harm within its water rights decisions. *See Schuh v. Dept. of Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983); *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 508 P.2d 166 (1973). Consistent with the statutory obligation under RCW 90.03.290(3) for Ecology to investigate “all facts relevant and material” to the application before it, Ecology must consider the “total environmental and ecological factors to the fullest in deciding major matters.” *Stempel* at 117.

Evaluation of the public interest is a separate and distinct requirement for water rights decisions under RCW 90.03.290.⁵ In this

⁵ Ecology states, in its Report of Examination, that the change is in the public interest. However, the evaluation did not fully explore, for instance, whether alternative sources of water—such as reclaimed water—could be used to irrigate the golf course. Ecology has in the past denied groundwater rights to protect the resource, “even when the other elements of the prior appropriation system would dictate a different result.” *Pharris and McDonald*, at IV:40, citing *Cascade Investment Properties Inc., v. State of Washington*, PCHB Nos. 97-47, 97-48 (1997) (denying a senior applicant where a junior applicant’s request is more consistent with the

case, Ecology did not substantively evaluate this required prong.⁶ Had Ecology done so, it would have assessed the state of the aquifer, and whether the proposed consolidations—irrespective of potential impairment—were consistent with sustainable use sufficient to satisfy the Legislature’s declaration that “[t]he long-term needs of the state require ongoing assessment of water availability, use, and demand.” RCW 90.54.010(1)(e). The absence of any assessment of the safe sustaining yield of the Grande Ronde Aquifer, as required under RCW 90.44.130, or more broad components of the public interest, render Ecology’ evaluation incomplete under RCW 90.03.290.

- c. The state’s public trust duty, coupled with Ecology’s authority under RCW 90.44.130, means Ecology should have acted to protect the aquifer when processing the WSU change applications.

The state’s water resources, including its groundwater, belong to the people of the state. RCW 90.44.040. The state therefore has a duty, as

stated legislative preference for water service by municipalities, and to avoid water quality concerns with additional septic systems).

⁶ Ecology’s own interpretation of the law states that a request for a change in a groundwater right, even if held by a municipal water supplier, must include a determination of whether the change would be detrimental to the public interest. *See* Water Resources Program Policy 2030, “2003 Municipal Water Law Policy and Interpretive Statement,” (rev. May 7, 2012), at 7-8 (“Policy 2030”), at <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol2030.pdf>.

trustee for the people, to follow general principles of trusteeship, which is principally to make decisions that preserve and protect the trust. That trust responsibility may be exercised by the Court using its inherent authority. The public trust doctrine exists in Washington, recognized by the Supreme Court to protect and preserve the state's navigable waters. *Orion Corporation v. State of Washington*, 109 Wn.2d 621, 747 P.2d 1062 (1987) (access to navigable waters and shorelines); *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987) (the state may not dispose of its interests in the waters of the state in a way that substantially impairs the public's right of access unless the overall public interest is promoted).

The Supreme Court declined to apply the public trust doctrine in a groundwater/surface water rights context in *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993). The majority's decision in that case relied principally on the existence of provisions in the Water Code for adjudications, and a disinclination to go beyond the traditional limitation of the doctrine to navigable waters. The Court majority did state that if the doctrine were applied, the "guidance" for its application "is found only in the Water Code." *Rettkowski*, 122 Wn.2d at 233.

The dissent in *Rettkowski* pointed out that the doctrine's origins had the broader objective of preserving natural resources "common to all," and avoiding the "destabilizing disappointment of expectations in

common,” and that it is not limited, “either in application or theory,” to the traditional protection of navigable waters. *Id.* 240 (dissent of Guy).

Since then, other Western states have broadly applied the public trust doctrine to water resource management, including protection of groundwater. The Supreme Court of Hawai’i recently applied the doctrine in an adjudication of rights on Oahu to essentially restrict surface water uses in order to protect groundwater. *In re. Water Use Permit Applications for the Waiahole Ditch*, 94 Hawi’i 97, 9 P.3d 409 (2000). That Court cited Arizona and Idaho cases that recognized the “judicial accountability” of the executive and legislative branches to provide “a level of protection against improvident dissipation of an irreplaceable resource.” *Id.* at 59, and cases cited therein. Here, the Court should play the same role, to ensure protection of the Grande Ronde Aquifer for the people of the state generally.

This case offers an opportunity to apply the public trust doctrine in a fashion consistent with both the majority and minority opinions of *Rettkowski v. Dept. of Ecology*, 122 Wn.2d 219 (1993). At issue is whether the public resource—the water in the Grande Ronde Aquifer—must be protected against the current and future instability that will be occasioned by continuing declines in the aquifer’s levels. Ecology already has both general authority under the Water Code, and the safe sustaining

yield authority of RCW 90.44.130 to regulate water use. By failing to implement the safe, sustaining yield mandate, Ecology is ceding the public trust to private interests—namely a golf course.

- d. The MWL does not serve as a shield against Ecology’s obligation to assess safe sustaining yield.

This case is one of the first to interpret the 2003 Municipal Water Law (MWL). As such, the Court should not follow the broad reach of Ecology’s argument which misconstrues the MWL to eviscerate other longstanding provisions of the Water Code as part of its intent to resolve ambiguities over municipal water supply rights.

In enacting the MWL, the Legislature wanted to legalize ambiguous water rights, but not to the detriment of other water rights holders, or to the state’s longstanding water rights procedures and the due process protections they afford.⁷ Unused municipal water supply rights received protection against relinquishment to the extent that they had remained rights “in good standing.” RCW 90.03.330(3). Rights held by, or obtained by, a municipal water supplier that were not issued as “municipal

⁷ In upholding the constitutionality of the MWL against a general facial challenge, the Supreme Court repeatedly stated that it would consider those issues when presented a case with supporting facts, and that this very appeal might provide it with such an opportunity. *Lummi Nation v. State of Washington*, 170 Wn.2d. 247, 258 n. 4, 241 P.3d 1220 (2010).

water supply” rights still had to go through the water rights change process to be converted to municipal water supply rights. RCW 90.03.560.

Moreover, proposed changes to municipal water supply rights under the MWL must go through Ecology’s change process. Thus, change in use of the “inchoate” quantities of water under those rights must also go through determinations by Ecology of extent and validity, and detriment to the public interest. *Policy 2030*, at 7.

In this case, the mere existence of paper water rights held by WSU, but not used for decades, does not act as a shield to prevent analysis of the expanded use of those rights and impacts of their exercise on existing rights or exacerbation of the overdraft of the Grande Ronde Aquifer.

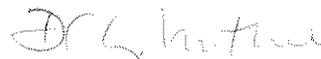
V. CONCLUSION

This Court is being asked to reject a decision by the Department of Ecology to allow WSU—as a newly-determined “municipal water supplier”—to resurrect old water rights, unused for decades, in order to use an ancient and declining aquifer to keep the grass green on a WSU golf course that the university doubled in size. The consequences of this decision will incontrovertibly affect existing Palouse Basin water rights holders who are already seeing declines in their groundwater supplies, prevent future uses of the aquifer, create or exacerbate existing conflicts over water use and management, and increase stresses on water

management in the face of climate change, population growth, and future expansion of WSU. The Court's decision will also serve as precedent for management of groundwater elsewhere in the state, including the many areas where water levels are in decline, or diminishing groundwater leads to depletion of surface water sources.

As advocates for proper management of the state's water resources for current and future generations, *amici* respectfully request that this Court reject Ecology's approach. For reasons set forth above, we request that the Court grant the relief requested by Appellants, and remand the case to Ecology for a decision consistent with the law and with its obligations to make water management decisions in the broad public interest.

DATED this 25th day of September, 2012.



David L. Monthie, WSBA #18772

DLM & Associates

Attorney for *Amici Curiae*