NO. 97152-8

SUPREME COURT OF THE STATE OF WASHINGTON

CROWN WEST REALTY, LLC,

Petitioner,

v.

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

Respondents.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Appellant Crown West Realty, LLC is seeking to transfer long-unused 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. However, Crown West would not reduce any of its 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 water right holders who have relied on the availability of the water while it has gone unused by Crown West.

Crown West holds four water rights that collectively specify use of a total annual quantity of 9,274 acre-feet of water per year (AFY). The most water that has ever been used under these water rights is 5,874 AFY—which occurred sometime between World War II and the 1970s—and water use has since declined by approximately 2,000 AFY. Water rights that are once used and subsequently go unused, in whole or in part, for five or more years are relinquished.

Crown West wants its partial nonuse of its water rights to be excused under the statutory exemption from relinquishment for water rights that are for municipal water supply purposes. The Court of Appeals correctly concluded that Crown West's effort to expansively interpret the

term "municipal water supply purposes" is contrary to law and stretches the definition in RCW 90.03.015(4) well beyond legislative intent.

The published decision of the Court of Appeals is soundly based on both the express 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. Thus, Crown West's Petition for Review (Petition) does not involve any issue of substantial public interest that merits determination by this Court.

The "use it or lose it" principle that is advanced by the relinquishment statute is an important tenet of Washington water law. This Court should decline review of the Court of Appeals' decision because Crown West's position misreads the plain language of the definition of "municipal water supply purposes," is contrary to legislative intent, and would cause harmful reductions in stream flows.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

If this case is accepted for review, the issue presented is more fairly stated as follows:

Did the Court of Appeals and the Hearings Board decide correctly that Crown West failed to demonstrate that each of the four water rights qualify as being rights for "municipal water supply purposes" under RCW 90.03.015(4)?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case concerns four applications for changes of water rights associated with Crown West's Spokane Business and Industrial Park (Park), which is located in Spokane Valley. There are four groundwater rights appurtenant to the Park. Each of the rights authorize withdrawals from separate wells (points of withdrawal), but serve a common place of use that encompasses the area of the Park. AR 82–83, 85, 87, 89, 95.[1]

The Park was first developed as a supply depot by the Navy during World War II. The first three wells were drilled in 1942. AR 97. By 1945, there were 127 residents at the naval depot, who lived in several residential structures. AR 136. At that time, the water rights were exercised to serve the residential needs of those living at the naval depot. AR 97. The naval depot continued to accommodate an unidentified number of personnel in some of the residential structures through 1958, when it 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

[1] In referring to the administrative record (AR), Ecology will refer to documents as they are enumerated in the Hearings Board's Index to the Certified Record.

claims, The three water right claims 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. Ecology granted a permit in 1974, and later issued a certificate for this water right in 1976. AR 97, 411, 82–83. The certificate specifies the use of 4,194 AFY of water for "community domestic supply, manufacturing and industrial use." AR 82–83.

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 record does not demonstrate that any residential structures were occupied at the Park between 1990 and 1998. *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.

1. The Conservancy Board's approvals of Crown West's water right change applications

To advance its plan to sell excess water that it does not need at the Park, Crown West filed four applications for changes of groundwater rights with the Chelan County Water Conservancy Board (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.[2] The Conservancy Board conditionally approved Crown West's change applications in full.

A change of a water right can be approved only to the extent a water right is valid based on historical water use. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999). In evaluating an application for change or transfer of a water right, the Conservancy Board was therefore required to tentatively determine the validity and extent of Crown West's water rights to ascertain how much water is eligible to be changed.

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. With respect to the certificate, 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

[2] 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.

automatically perfected and valid for change because it qualified as a municipal water right. AR 97, 136.

The Conservancy Board also determined that any reduction in water use under the water rights was exempt from relinquishment because the four water rights qualified for the exemption from relinquishment for municipal rights under RCW 90.14.140(2)(d). AR 135–36. 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. Based on these findings, the Conservancy Board approved a "temporary donation" of 5,874 AFY of water into the state water right trust program 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.

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 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. Assuming the Conservancy Board was correct in finding that 5,874 AFY was the historical peak water use at the Park, water use has since declined by more than 2,000 AFY and over 3,000 AFY of the water has never been used 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, while the remainder 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.

2. The Department of Ecology's decision denying the water right change applications

In September 2016, the Department of Ecology reversed the Conservancy Board's four conditional approvals and denied Crown West's four change applications.[3] AR 2–6. 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

[3] 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, 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).

been perfected through actual beneficial use, or the amount of any subsequent reductions in use of the rights. AR 2–3. Further, Ecology concluded that the water rights do not qualify as being for municipal water supply purposes, and unused water resulting from reduced water use was therefore not shielded from loss by the municipal relinquishment exemption. AR 2. On that basis, Ecology found that the Conservancy Board erred in not ascertaining whether over 2,000 AFY of previously used but presently unused water was relinquished and invalid for change because of the large reduction in water use since the 1970s.

B. Procedural Background

Crown West appealed Ecology's decision to the Pollution Control Hearings Board (Hearings Board) and the parties filed cross-motions for summary judgment on the eight issues raised in the case. 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 threshold issues. AR 606. First, it 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, and therefore not exempt from relinquishment, the Hearings Board concluded that that the Conservancy

Board's tentative determination of validity and extent was erroneous. AR 606. Because the Hearings Board granted summary judgment based on these threshold issues, it did not reach the six remaining issues.

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

IV. REASONS WHY REVIEW SHOULD BE DENIED

Petitions for review are governed by the four criteria set forth in RAP 13.4(b). Crown West contends that its Petition meets one of these criteria: that it involves issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4); *see* Petition at 6. Crown West cannot satisfy this criterion.

A. The Court of Appeals' Decision Presents No Issue of Substantial Public Importance That Should Be Determined by the Supreme Court

Crown West correctly explains that the Court of Appeals accepted direct review of the Hearings Board's decision under RCW 34.05.518, and that Ecology did not oppose Crown West's request to bypass the superior

court. One of the criteria for the Court of Appeals to grant direct review of a decision by an environmental hearings board is that "[f]undamental and urgent statewide or regional issues are raised." RCW 34.05.518(3)(b)(i).

Ecology acknowledged that the issue in this case over interpretation of the term "municipal water supply purposes" in RCW 90.03.015(4) was a fundamental and urgent statewide issue and that a decision by the Court of Appeals would provide clarity to Ecology and water right holders throughout the state. At that time, there were no appellate decisions interpreting RCW 90.03.015(4). However, since the Court of Appeals has issued a well-reasoned and correctly decided published opinion, it is now unnecessary for this Court to accept this case for review. The Court of Appeals has provided clarity on the interpretation of RCW 90.03.015(4), and how Ecology should apply it on a statewide basis. Accordingly, under RAP 13.4(b)(4), this case does not involve an issue "of substantial public interest that should be determined by the Supreme Court."

B. The Decisions of the Court of Appeals and the Hearings Board Are Correct

The Court of Appeals correctly affirmed the Hearings Board's decision that Crown West's four water rights are not for municipal water supply purposes under RCW 90.03.015(4) and are therefore not exempt

from relinquishment. This ruling was based upon the Court's conclusions that a water right must be used for one of the municipal water supply purposes defined in RCW 90.03.015(4) to qualify for the municipal relinquishment exemption, and a water right must be evaluated for compliance with the municipal purposes at the time an application for a water right change is filed. Petition Appendix (App.) at 28, 30–32. Because Crown West's water rights were not used for any of the prescribed municipal purposes at the time they were proposed for change, the Court properly concluded the rights did not qualify for the municipal exemption.

In particular, the Court determined Crown West's water rights were not beneficially used "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." Crown West advanced an expansive interpretation of this provision, asserting that it included serving potable water to employees at the Park. The Court rejected this argument, and reasonably concluded "that the term 'residential use' . . . includes use of water within a residential setting," but does not include the "[u]se of water for cleaning and drinking in an office, commercial, or industrial setting." App. at 39–40. The Court recognized the internal tension inherent in the statutory language "residential use of water for a nonresidential

population," and it gave import to both the statutory terms "residential" and "nonresidential population" *Id.* at 42–43. The Court's interpretation is reasonable and it is consistent with a narrow construction of a statutory exception that gives effect to the intent underlying the general relinquishment provisions. *R. D. Merrill Co.*, 137 Wn.2d at 140.

Crown West argues erroneously that the Court's decision should be reversed for four main reasons. First, it asserts that the Court erred because it deemed Department of Health (Health) regulations inapposite to the interpretation of RCW 90.03.015(4)(a). Second, it asserts the Court's ruling on the meaning of RCW 90.03.015(4)(a) is ambiguous and vague, and further review is therefore needed to provide clarity to lower courts. Third, Crown West argues that remand for further fact-finding was necessary, and last, it contends that the Court erred by considering an issue that was not properly before it on appeal.

1. Department of Health regulations are inapposite

First, Crown West suggests the Legislature modeled RCW 90.03.015(4) after Health regulations concerning Group A water systems, and argues that the Court erred by discounting the relevance of these regulations when considering the legislative intent underlying the Municipal Water Law. This is mistaken; the Court correctly recognized key differences between these regulations and RCW 90.03.015(4) in terms

of both language and purpose, and appropriately considered the regulations to be of little import. App. at 44–46.

WAC 246-290-020, a Health rule defining Group A and Group B water systems, and RCW 90.03.015(4)(a) contain key differences in language and are therefore of limited relevance to one another. Group A systems include systems that "provid[e] water for human consumption," WAC 246-290-020(1), serving "fifteen or more service connections used by year-round residents," WAC 246-290-020(5)(a), or serving twenty-five or more people per day for sixty or more days within a calendar year. WAC 246-290-020(5)(b)(ii)(A), (B). In contrast, "municipal water supply purposes" includes the "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." RCW 90.03.015(4)(a). Unlike the municipal purposes described in RCW 90.03.015(4)(a), Group A systems are not limited to serving "residential purposes," "residential service connections," or "residential uses."[4] In short, nothing in WAC 246-290-020 provides insight as to legislative intent regarding the meaning of the words "residential use of water for a nonresidential population" in RCW 90.03.015(4).

[4] Although WAC 246-290-020(5)(b)(i) refers to "nonresidential people," which may appear similar to a "nonresidential population," it does not require that they use water in a residential manner.

To the extent that this Health rule is instructive, it would only suggest that the municipal purposes in RCW 90.03.015(4) are defined more narrowly than those uses served by Group A systems. Crown West asserts that the "residential use of water for a nonresidential population" should include potable water serving locations that people frequent on a daily basis even if they do not stay there overnight. Although Crown West's interpretation may be consistent with Health regulations, the statutory language of RCW 90.03.015(4)(a) plainly requires water to serve *residential* uses and *residential* purposes. The Court correctly recognizes that water is used for cleaning and drinking in "nearly every setting including commercial, industry, and agricultural settings, such that Crown West's broad view of the term would have few, if any, limits." App. at 40.[5]

Crown West is correct that the Court erroneously characterizes its water system as not being a public water system under WAC 246-290-020. However, this error is immaterial to the Court's decision and holdings. *See* App. at 46. Notwithstanding this

[5] Moreover, the Court appropriately recognized the different policy goals furthered by Health regulations and Ecology's implementation of RCW 90.03.015(4). *See* App. at 45–46. Health regulates drinking water purity for public health purposes. WAC 246-290-001(1), (2). In contrast, Ecology manages the environmental quality of the state's waterways, RCW 90.48.010, .030, and it supervises the use of the state's water resources. RCW 43.21A.064(1), (3). Public health regulations concerning drinking water are not probative of the legislative intent underlying a statute governing the allocation of water resources.

mischaracterization, the Court's analysis is correct because it accurately identifies key differences between Health's regulations and RCW 90.03.015(4) in terms of language and purpose. Consequently, the Court properly determined that Health's regulations were inapposite to the interpretation of RCW 90.03.015(4) concerning the "residential use of water for a nonresidential population."

2. There is no ambiguity in the Court of Appeals' decision that necessitates further review

Crown West also argues that further review is necessary because of purported ambiguities in the Court's decision. It erroneously claims that the Court's statutory interpretation of the "residential use of water by a nonresidential population" is too vague to apply. It also wrongly suggests that further judicial review is necessary to clarify how the Court's decision relates to this Court's decision in *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015).

The Court issued an appropriately narrow decision that only reached the issues that were necessary to decide the case before it. As explained in Sections IV.B and IV.B.1 above, the Court examined the relevant language of RCW 90.03.015(4)(a) and ultimately concluded that "that the term 'residential use' . . . includes use of water within a residential setting," but not the "[u]se of water for cleaning and drinking in

an office, commercial, or industrial setting." App. at 39–40. Moreover, "'residential use' should allow for independent living for weeks, if not months." *Id.* at 42. The Court's Opinion provides clarity on the interpretation of RCW 90.03.015(4), and explains how Ecology should apply it on a statewide basis. Applying this standard, the Court properly determined there was no evidence supporting a finding that the sixty-five room hotel in the Park served the residential use of water for a sufficient nonresidential population. *Id.* The Court did not need to issue a broader decision on hypothetical scenarios involving facts not properly before it.

Crown West also wrongly asserts that discretionary review is warranted because it is unclear how the decision relates to this Court's decision in *Cornelius*, 182 Wn.2d 574. *See* Petition at 9. Crown West appears to be reasserting a similar argument it made with respect to the Ecology's "active compliance" interpretation.[6]

[6] Ecology interprets the relinquishment statutes and the municipal exemption as requiring a water right to actively comply with the beneficial use definitions contained in RCW 90.03.015(4). That is, if a water right is partially unused for five consecutive years and is not used consistent with the municipal definitions during that period, then the right is subject to partial relinquishment. Crown West argued that this interpretation conflicted with *Cornelius*, which rejected a challenge to Ecology's streamlined process for making tentative determinations of extent and validity. *Cornelius*, 182 Wn.2d at 595–96. Although a tentative determination of extent and validity typically requires year-to-year evaluation of historical beneficial use to determine whether any amount of water has relinquished for nonuse, Ecology's streamlined process excuses this year-to-year showing in instances where it is certain that an exemption excuses relinquishment. *Id.*

Crown West conflates two distinct analyses: a quantitative analysis concerning the amount of water historically used, and a qualitative analysis regarding the types of uses a water right serves. While the streamlined process excuses this quantitative analysis, it does not preclude a qualitative examination of the types of beneficial uses

The Court found it unnecessary to rule on the validity of Ecology's "active compliance" interpretation based upon the facts of this case. *See* App. at 29, 35, 47. Thus, there was no need for the Court to rule on a hypothetical question regarding whether "active compliance" is consistent with the Supreme Court's ruling in *Cornelius*. *See id.* at 47; *see also Lummi Indian Nation v. Dep't of Ecology*, 170 Wn.2d 247, 256 n.1, 241 P.3d 1220 (2010) (an appellate court need not address every argument raised in briefing). In sum, Crown West fails to articulate how the Court's decision conflicts with *Cornelius* because no such conflict exists.

3. Remand for additional fact-finding was unnecessary

Crown West further contends that remand to the Hearings Board is necessary to determine whether water serving the sixty-five room hotel qualifies as "residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year" under RCW 90.03.015(4)(a). Crown West argues that because the Court interpreted the statute differently than the Hearings Board did on summary judgment, different facts are therefore relevant. Specifically, Crown West claims that "the parties did not focus on the length of time guests stay at the hotel." Petition at 17. This is incorrect. This issue was thoroughly

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occurring under the rights—indeed, a necessary prerequisite to the streamlined process is a determination that a relinquishment exemption applies in the first instance.

disputed at the Hearings Board, with the parties advancing different interpretations of RCW 90.03.015(4). Ecology argued that statutory language referred to temporary domiciles, while Crown West contended that it included potable water serving the Park's employees. *See* AR 36–37, 338–41,474–75, 508, 534–35, 556–57.

In light of Ecology's argument that the statutory language referred to temporary domiciles, Crown West had ample opportunity to supplement any factual assertions contained in the Conservancy Board record to demonstrate the existence of a genuine issue of material fact. Between the Conservancy Board record and the materials that were provided in support of the summary judgment briefing, however, there is no information concerning the hotel's occupancy or the duration of guests' stays supporting a reasonable inference that the hotel served as a temporary residence, capable of supporting independent living for an extended duration, such that water use at the hotel could qualify under the Court's interpretation of RCW 90.03.015(4)(a). *See* AR 36–37, 137–38, 338–41, 446, 507–08, 534–35, 604; *see also* App. at 42–43. Consequently, remand for further fact-finding was unnecessary and reversal of the Court's decision is unwarranted.

4. The Court of Appeals' decision was limited to issues properly before the Court

Last, Crown West unpersuasively contends that the Court erred by considering "an issue not on appeal," asserting that the Court improperly assumed a decision in Crown West's favor would enable new water uses to come out of streamflows. Petition at 16. Crown West's applications sought to add purposes of use to include mitigation, and the Conservancy Board conditionally approved the applications to allow water to be provided for "[i]nstream flows and [m]itigation for [o]ut of [s]tream [u]ses." AR 53–71, 93, 104, 115, 126. Adding mitigation as a purpose of use plainly contemplates facilitating new water uses away from the Park, and the Court properly acknowledged the predictable outcomes of Crown West's proposal.

In any event, the Court's analysis does not rely upon any conclusion that Crown West's water rights will be used to allow new uses away from the Park if the proposed changes are approved. In reaching its decision, the Court limited its analysis to evaluating the applicability of the municipal relinquishment exemption to Crown West's water rights and did not otherwise opine on the other issues that were raised before the Hearings Board but were not reached. *See* App. at 22–48. In short, the Court simply commented on the practical consequences of a ruling in

Crown West's favor, consistent with the proposal described in the Conservancy Board's conditional decision.

V. CONCLUSION

Crown West's request for discretionary review fails to meet the criteria of RAP 13.4(b). Ecology respectfully requests that the Supreme Court deny Crown West's Petition for Review.

RESPECTFULLY SUBMITTED this 30th day of May 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 30, 2019, I caused to be served State of Washington, Department of Ecology's Answer to Petition for Review in the above-captioned matter upon the parties herein via the Appellant Court Portal Filing system, which will send electronic notifications of such filing to the following:

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DATED this 30th day of May 2019 at Olympia, Washington.

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May 30, 2019 - 4:50 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Crown West Realty, LLC v. Pollution Control Hearings Board, et al.
Superior Court Case Number:	17-2-03125-3

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