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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.

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I. INTRODUCTION

Appellants Scott Cornelius, et al., submit this brief in reply to the Department of Ecology's Response Brief (ECY Br.) and Brief of Respondent Washington State University (WSU Br.). Contrary to the Department of Ecology's (Ecology) assertion that Appellants are attempting to "eliminate" WSU's water rights, the real issues in this case revolve around (1) WSU's failure to properly maintain its water rights portfolio over the years and (2) Ecology's failure to fully evaluate and address WSU's history of non-use of its water rights, abetted by Ecology's *ultra vires* procedures for processing municipal water right amendments.

II. STATEMENT OF THE CASE

WSU, in its statement of the case, admits its historic non-use of its water rights and its actions leading to abandonment of Claim 098523. Cornelius' disagreements with certain factual and legal assertions, including WSU's alleged pumping from unauthorized wells, are discussed in the relevant sections below. *See, e.g.*, Sections III(D)(1), III(F)(2).

III. ARGUMENT

A. Standard of Review

All parties agree regarding the Administrative Procedures Act (APA) standards for the Court's review of the PCHB's decision. RCW 34.05.570(3). However, Cornelius disagrees that the Court must defer to Ecology in its legal interpretations of the provisions of the Municipal Water Law (MWL). Deference is due only where the statute is ambiguous and within the agency's expertise. *Port of Seattle v. Pollution Control Hrgs. Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). Here the MWL is clear and Ecology had no expertise administering such a new statute in 2006. Cornelius and Ecology also disagree on the standard for reviewing State Environmental Policy Act (SEPA) issues. *See* Section III(E)(2), *infra*. In addition, the Court

should review the PCHB's supplemental water right analysis under a *de novo* standard. See Section III(F)(4), *infra*.

B. Basic Elements of Washington Water Law

The parties agree, for the most part, regarding the fundamentals of Washington water law. Nevertheless, Ecology accuses Cornelius of being “muddled,” “confused,” etc. These remarks signal that the law is not settled, as Ecology asserts. For example, Cornelius contends that relinquishment applies to the unperfected portions of certificates. Ecology contends the opposite, but cites only authority discussing permits. The question is one of first impression. See Section III(D)(1), *infra*. Ecology contends that the Legislature delegated authority to the agency to import the “in good standing” proviso for inchoate water rights into the test for evaluating amendments to water rights. Cornelius contends there is no authority for this position. See Section III(F)(1), *infra*.

Five Washington appellate decisions resolve most issues presented in this appeal. *R.D. Merrill v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999), states Ecology's duties to tentatively determine the extent and validity of water rights in the amendment process, and to eliminate rights lost for non-use. *Lummi Nation v. State of Washington*, 170 Wn.2d 247, 241 P.3d 1220 (2010), discusses how those duties preserve the constitutionality of the MWL. *City of Union Gap v. Dep't of Ecology*, 148 Wn. App. 519, 195 P.3d 580 (2008), establishes that non-municipal water rights are lost for non-use, even when proposed for transfer to municipal purposes. *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997), establishes the standard for abandonment of a water right on facts very similar to WSU's situation. And finally, *Department of Ecology v. Grimes*, 121

Wn.2d 459, 852 P.2d 1044 (1993), establishes the law and standards for evaluating water efficiency and waste.

C. Constitutional Issues

The PCHB erred by concluding that (1) by virtue of the 2003 amendments, the purpose of WSU's non-municipal water rights were always municipal, and (2) WSU's rights were therefore always immune to loss for non-use. AR 85 at 11-12, 16, 33-34. The Board's conclusions violate separation of powers and due process constitutional protections.¹

1. Separation of Powers

Ecology first argues that the MWL merely clarified the definition of "municipal water supplier." ECY Br. at 20-21. Ecology attempts to create ambiguity where there is none. The issue is not whether WSU's two certificates were originally for municipal supply purposes – they were not. Water Certificates 5070-A and 5072-A were expressly designated as being for domestic, community domestic and stockwater purposes, categories historically distinct from municipal. Appellants' Opening Brief (Op. Br.) at 23-24. They were therefore ineligible for the relinquishment exemption of RCW 90.14.140(2)(d).² *Union Gap*, 148 Wn. App. at 531-32.

Ecology argues there is no separation of powers violation where the statute merely clarifies the definition of an ambiguous term, but the cited case is inapt. *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Mgt. Hrgs. Bd.*, 159 Wn. App. 270, 246 P.3d 222 (2011). *Kitsap* addresses a claim of legislative contravention of prior judicial decisions. The separation of powers claim here is addressed to adjudication of facts. Under the PCHB's

¹ In the alternative, the court could avoid the as-applied constitutional challenge by concluding that the PCHB misinterpreted the Municipal Water Law.

² Ecology argues there was ambiguity as to "what rights could qualify for the municipal exemption to relinquishment." ECY Br. at 18-19. This statement does not comport with Ecology's historic practice of relinquishing non-municipal rights. See Section III(D)(1), *infra*.

interpretation, the legislature inappropriately adjudicated facts that are judicial determinations, as in *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 271-72, 534 P.2d 114 (1975).

Kitsap does explain that legislation may not be applied retroactively, even when curative, if it affects vested rights. *Kitsap*, 159 Wn. App. at 278-79 (citing *Lummi Nation*, 170 Wn.2d at 270); see also *State v. Hendricks*, 103 Wn. App. 728, 742, 14 P.3d 811 (2000) (“Even a remedial or curative statute does not apply retroactively if it affects a substantive or vested right.”).

Cornelius, as a domestic well owner, has a vested right to use available water, by priority. *Lummi Nation*, 170 Wn.2d at 265; *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (domestic wells are “treated in the same way as other perfected water rights”). This includes the right to appropriate and use water that WSU relinquished or abandoned. RCW 90.14.160-.180 (“said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation...”). Cornelius has already suffered diminishing groundwater levels as a result of over-appropriation of the Grande Ronde Aquifer (GRA). AR 15, Att. 1 at 2 and Att. 1B; AR 32 at 2 and Att. 2, 3; Ex. A-31 at §4 (ll. 92-117); Exs. A-34, A-35, A-37, A-38. Restoring WSU’s lost rights further interferes with Cornelius’ vested right to use his allotted water.

Ecology next argues that because WSU applied for amendments after enactment of the MWL, and there was no previous adjudication of WSU’s water rights, there could be no separation of powers violation premised on a legislative adjudication of facts. This argument misconceives Cornelius’ challenge. Cornelius argues that the MWL, as interpreted by the PCHB, encroaches on a judicial function by adjudicating the fact of WSU’s prior relinquishment. Whether WSU relinquished its non-municipal rights prior to 2003 is a judicial determination:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose

and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter...

Lummi Nation, 170 Wn.2d at 264, quoting, *O'Brien*, 85 Wn.2d at 272. That WSU's rights were not previously adjudicated is immaterial. Just as the unconstitutional finding in *O'Brien* applied to numerous unspecified public works contracts that had not been adjudicated, the PCHB interpretation would unconstitutionally apply the MWL amendments to numerous unspecified water rights that have yet to be adjudicated, as well as the WSU rights.

Lummi Nation states that the "legislature made no attempt to apply the law to an existing set of facts," but that to do so would result in an improper adjudication. *Lummi Nation*, 170 Wn.2d at 263, 264-65. Ecology fails to distinguish between this facial decision and the instant as-applied challenge to the law. Cornelius alleges that the PCHB interpreted applied the MWL in a manner that would have the statute improperly legislate adjudicatory facts.

Giving retroactive effect to the municipal definitions would restore non-municipal rights already lost for non-use. The municipal definitions do apply to all certificates with prospective effect. *Lummi Nation*, 170 Wn.2d at 268, 271 (MWL did not resurrect water rights because RCW 90.03.015 "merely definitional;" no facial due process violation of RCW 90.03.386(2), similarly to other MWL sections, because "it operates only prospectively"). However, the PCHB interpreted the MWL definitions in exactly the manner the *Lummi Nation* court said would be unconstitutional, as having retroactive effect to restore WSU's previously lost water rights. *Lummi Nation*, 170 Wn.2d at 268 (MWL could be construed as constitutional because the "amendments by themselves" do not "resurrect any relinquished rights"). The Court should reject Ecology's largely irrelevant defenses and find that an as-applied constitutional separation of powers violation has occurred.

2. Due Process

The Board's interpretation of the 2003 amendments violates constitutional due process by depriving Cornelius of his vested water rights that include the right to use waters previously relinquished by WSU. Junior water right holders have a vested right to water not appropriated by senior rights. *R.D. Merrill*, 137 Wn.2d at 128. "Vested water rights cannot be deprived without due process of law." *Lummi Nation*, 170 Wn.2d at 265. "A retroactive law violates due process if the retroactive application of a statute deprives an individual of a vested right." *Hendricks*, 103 Wn. App. at 742; see p.4, *supra*.

The PCHB's interpretation also violates statutory protections that implement the constitutional due process right. AR 85 at 33-34. Cornelius' junior right is specifically protected from injury in the amendment process. RCW 90.03.380(1) ("The point of diversion...may be changed, if such change can be made without detriment or injury to existing rights"). Cornelius is not "seeking to elevate the status" of his water right, ECY Br. 23, but seeking to invoke the legal protections to which he is entitled under the amendment statutes. Cornelius does have a vested interest in the status of WSU's rights. Under the prior appropriation system, all rights to a given resource are interrelated. As a junior user, Cornelius is subject to curtailment if more senior rights need his water. However, Cornelius moves up the ladder of priority when relinquished rights return to the state. By reviving unused portions of WSU's certificates, the PCHB deprived Cornelius of his right to water that should be available to satisfy junior users. RCW 90.14.180 (when water rights are relinquished, "the waters affected by said right shall become available for appropriation in accordance with RCW 90.03.250.").

WSU mistakenly cites *Lummi Nation* for the proposition that senior rights may be "improved" without infringing a vested junior right. But the court there expressly stated that an

as-applied challenge might well prove injury or impairment. *Lummi Nation*, 170 Wn.2d at 266. This case is such an as-applied challenge and even more compelling since revival of WSU's lost rights allows it to pump more water, accelerating drainage of the aquifer to Cornelius' detriment.

WSU incorrectly asserts there was no due process violation because Cornelius' right vested before the *Theodoratus* decision.³ See *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Cornelius is not claiming an expectation that WSU's certificates were invalidated by *Theodoratus*. The due process violations here involve infringement of Cornelius' vested right to water that WSU relinquished before *Theodoratus*, along with improper exclusion of evidence at hearing. See Section III(E)(3), *infra*.

Finally, WSU's assertion that Cornelius waived his as-applied claims blatantly misrepresents the PCHB rulings.⁴ The Board expressly refused to decide the specific constitutional issues raised by Cornelius. AR 85 at 11, n.5, 16, 35. Cornelius sought clarification regarding the constitutional jurisdiction issue. The Board stated: "we decline to rule on any and all Appellants' constitutional claims, believing that they are more appropriately addressed by a court with jurisdiction to decide constitutional challenges to the validity of the MWL." AR 79 at 1-2 (emphasis added). WSU opposed the ruling that the Board lacked constitutional jurisdiction, and lost. AR 79, 85. If there is a waiver, it is WSU's failure to appeal the PCHB's jurisdictional ruling. The constitutional questions raised here are reviewable by this Court. Further, Cornelius is entitled to raise constitutional arguments under the APA, RCW 34.05.570(3)(a) (review of constitutional violation), and RAP 2.5(a) (manifest constitutional

³ It is evident that both Ecology and WSU want the Court to view this appeal as being identical to *Lummi Nation*. But the claims in this appeal, while predicated on separation of powers and due process protections, are different than those decided in the *Lummi Nation* facial challenge.

⁴ For example, WSU cites Cornelius' request to continue the PCHB hearing as evidence that he knew he had to put on evidence regarding any as-applied challenge. WSU Br. at 37, n.21. However, this request occurred a month prior to the Board's original ruling that it lacked jurisdiction to review constitutional issues. AR 62.

error). The Court should reject the PCHB's unconstitutional interpretation that the 2003 MWL amendments retroactively changed the purpose of and restored WSU's lost water rights.

D. MWL Primary Claims

1. Relinquishment

Ecology and WSU offer a cascading series of arguments that WSU did not relinquish its historically non-municipal Certificates 5070-A and 5072-A prior to 2003. First, they argue, the relinquishment statute does not apply because WSU has always "claimed" its two certificates for municipal purposes. Second, even if the certificates were not actually municipal, they were effectively municipal and thus exempt from relinquishment. Third, even if the relinquishment statute does apply, the MWL retroactively re-defined the two non-municipal certificates. Fourth, even if the non-municipal certificates were not retroactively re-defined, relinquishment is only effective at the time of hearing and not when the non-use occurred. Fifth, even if relinquishment is effective at the time of non-use, WSU's pumping from illegal points of withdrawal was sufficient to preserve the rights. Finally, even if WSU did not actually pump its rights from any wells (authorized or unauthorized), the relinquishment statute is inapplicable because it affects only those rights that were used and then lapsed for five years or more, and does not apply to never-perfected rights. Each of these arguments is wrong.

WSU's argument that its rights have always been "claimed" for municipal purposes has already been rejected by the courts.⁵ In *Union Gap*, a water user's unilateral assertions were not sufficient to establish the subject right as municipal and thus trigger the RCW 90.14.140(2)(d) relinquishment exemption. The court rejected the water right holder's argument to broadly

⁵ WSU did not raise this issue below, except as a footnote in a summary judgment reply brief. AR 55 at 3, n.4. WSU alludes to this problem, asking the Court to affirm the PCHB "on any basis." WSU Br. at 29. The argument is not well taken at this stage and should be rejected outright by the Court. RCW 34.05.554 (no new issues and exceptions).

construe the exemption that to “claim” a water right for municipal purposes, one “need only assert something or state as a fact one's belief.” *Union Gap*, 148 Wn. App. at 524. Objective evidence is required. Here, not only were Certificates 5070-A and 5072-A issued by Ecology for non-municipal purposes, *see* AR 27, Exs. 4, 5 and AR 31, Exs. 3, 4, but WSU actually applied for non-municipal uses. AR 23, Exs. 3, 4. WSU did not appeal Ecology’s determinations of purpose of use, or attempt to change the purposes of use of the two certificates at any time between 1962 and 2005. Because WSU’s unilateral assertions are not sufficient to “claim” the right as municipal, Ecology’s determination on the face of the certificate is dispositive. *See Union Gap*, 148 Wn. App. at 528. Indeed, designation of WSU’s certificates for domestic community supply and stockwater purposes had legal effect, since those purposes were legally distinct from municipal and subject to relinquishment. Op. Br. at 23-24. Ecology, and the courts, must give effect to the legal status of water rights.

As to the second argument, Ecology’s recognition of WSU’s water system as municipal is not sufficient for the relinquishment exemption. The individual water right must be municipal, not the system it contributes to. RCW 90.14.140(2)(d). Because WSU failed to legally claim the rights for municipal supply purposes within the meaning of RCW 90.14.140(2)(d), Certificates 5070-A and 5072-A did not qualify for the municipal exemption when non-use occurred. Those rights reverted to the state and were relinquished at that time. RCW 90.14.180.

Ecology next argues that the MWL retroactively re-defined WSU’s non-municipal certificates as historically municipal. As discussed above, such retroactive definition violates constitutional provisions. *See* Section III(C)(1) and (2), *supra*.

WSU next argues that relinquishment occurs not at the time of non-use, but at the time of hearing. WSU confuses relinquishment by the right holder with an action by Ecology to enforce

the relinquishment once the non-use becomes known. It is the enforcement action that does not become final until after a hearing. WSU's water rights reverted to the State and were relinquished when the non-use occurred.⁶ See RCW 90.14.130 (right "has reverted"); RCW 90.14.160-.180. (right holder "shall relinquish" when non-use period accrues); *PUD No. 1 of Pend Oreille Cty. v. Dep't of Ecology*, 146 Wn.2d 778, 794, 51 P.3d 744 (2002) ("Ecology has authority to tentatively determine whether a water right has been abandoned or relinquished when acting on an application for a change..."); *R.D. Merrill*, 137 Wn.2d at 144 ("If, as plaintiffs contend, those were years of continuous nonuse (in whole or in part), relinquishment had already occurred.") (emphasis added).

WSU's next argument, that it actually pumped its non-municipal certificates at illegal points of withdrawal sufficient to preserve the rights, raises two problems. First, Washington courts have expressly rejected the argument that water rights are preserved by pumping from unauthorized wells or diversions.⁷ *Twisp*, 133 Wn.2d at 785-86; *R.D. Merrill*, 137 Wn.2d at 134-38; see Section III(F)(2). For this reason, Ecology's POL 1120 §7, which purports to recognize an unauthorized withdrawal exemption to forfeiture, is *ultra vires*. See Section III(D)(2), *infra*. Second, WSU's pumping records do not support its assertion that it was pumping its non-municipal rights from alternative wells. AR 52, Ex. 2 (Op. Br., App. 1). While the PCHB held that WSU preserved its non-municipal rights by pumping from unauthorized points of

⁶ Ecology precisely describes what happened here. "[I]f a water right does not meet the municipal definition for five or more years, then the water right would be valid only to the extent it had been beneficially used during that period, with any nonuse resulting in relinquishment of the right unless the nonuse is excused by one of the other exemptions to relinquishment provided in RCW 90.14.140." Ecology Br. at 12-13 n. 8.

⁷ Contrary to WSU's assertions, beneficial use alone does not preserve a right from forfeiture. See, e.g., *Dep't of Ecology v. Abbott*, 103 Wn.2d 686, 696, 694 P.2d 1071 (1985) (unauthorized change in purpose of use does not prevent forfeiture of water right); *Grimes*, 121 Wn.2d at 478-79 (wasteful water use is not beneficial and results in relinquishment of right).

withdrawal, it did not identify which rights at what quantities were pumped from which wells.⁸
AR 85 at 27, 38.

WSU also cites several out-of-state cases, but whether other jurisdictions support the unauthorized change exemption is neither established nor relevant. Washington courts have rejected the argument. Washington statutes require water users to obtain permission to move points of withdrawal, before the fact, in order to ensure protection of other water users and the source of water itself. RCW 90.44.100(2); *Lummi Nation*, 170 Wn.2d at 270-71; *see* Op. Br. at 41-42. Washington's relinquishment law sets forth twenty exemptions for non-use of water, but WSU's unauthorized change theory is not among them. RCW 90.14.140. The Court should reject WSU's suggestion to make new policy on relinquishment.

Finally, Ecology and WSU both argue that WSU's rights were immune to relinquishment because they were never perfected, i.e., that the relinquishment statute applies only to rights that were perfected then lapsed. As an initial problem, this argument asks the Court to treat Certificates 5070-A and 5072-A as if they are permits. The authorities cited by Ecology do hold that unperfected groundwater permits are not subject to relinquishment. They do not, however, immunize unperfected certificates. *See* RCW 90.14.150 and *Pend Oreille*, 146 Wn.2d at 802-03. Once certificated, all non-municipal rights, even those protected by the "in good standing" proviso of RCW 90.03.330(3), are subject to relinquishment for non-use. *Lummi Nation*, 170 Wn.2d at 254, 265 ("Until recently, it was not entirely clear what it took to perfect a water right," but after the 2003 MWL, pumps and pipes certificates "will be treated as any other vested right represented by a water right certificate." (emphasis added). To hold otherwise would render the relinquishment statute meaningless. *Theodoratus*, 135 Wn.2d at 595.

⁸ The declarations cited by the PCHB also do not indicate the quantities of water being pumped pursuant to Certificates 5070-A and 5072-A at alternative wells.

Contrary to Ecology and WSU's assertions, relinquishment applies to all certificated water rights not used for five years, not just perfected rights. The language of the statute is plain:

Any person hereafter entitled to divert or withdraw waters of the state through an appropriation authorized under RCW 90.03.330, 90.44.080, or 90.44.090... who voluntarily fails...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...

RCW 90.14.180 (emphasis added). See RCW 90.14.130 ("when it appears...that a person entitled to the use of water has not beneficially used his water right or some portion thereof...").

The statute nowhere states that unused water must have been put to use before it is eligible for relinquishment. This provision applies to all water right certificates. RCW 90.14.160-.180 ("All certificates hereafter [1967] issued by the department of ecology pursuant to RCW 90.03.330 shall expressly incorporate" the relinquishment rule). *Pend Oreille* does not save the argument. Careful reading reveals that the quoted portion of that case involves a "440 cfs . . . 1980 permit," not a certificate. *Pend Oreille* 146 Wn.2d at 802-03, citing RCW 90.14.150 (relinquishment statutes not applicable to permits). WSU "bears the burden of justifying its failure to use its water beneficially," and has not done so. *Union Gap*, 148 Wn. App. at 530.

In sum, Certificates 5070-A and 5072-A were not historically claimed for municipal supply purposes. WSU has never used certain portions of those certificated rights. Certificated rights are subject to relinquishment for non-use, including non-perfection. Relinquishment occurs at the time of non-use. The Court should conclude that WSU relinquished portions of Certificates 5070-A and 5072-A when it failed to use them.

2. Simplified Tentative Determination

Ecology used a "streamlined" approach to evaluate WSU's rights. WSU's annual pumping records demonstrated non-use, but following POL 1120 §5(c)'s "simplified tentative

determination” procedures, Ecology’s permit writer did not evaluate non-use.⁹ AR 31 Att. 1 at 22; *see* Exs. A-1, A-3, A-7, A-13, A-19, and A-24 (Reports of Examination at 3). This erroneous approach was based on Ecology’s misinterpretation of the MWL. Contrary to Ecology’s view, WSU’s lapsed and unused non-municipal rights were relinquished and not eligible for transfer. *See* Sections III(D)(1), *supra*, and III (D)(3), *infra*. Resurrecting WSU’s rights violates separation of powers and due process protections. *See* Sections III(C)(1) and (2), *supra*. Ecology may not use a policy, formal or informal, that contravenes statutory requirements. *Mills v. Western Wash. Univ.*, 170 Wn.2d 903, 911-12, 246 P.3d 1254 (2011).

Ecology argues that Cornelius’ challenge to Ecology’s use of POL 1120 is an improper rule challenge. But it is absurd to argue that Ecology may adopt and implement *ultra vires* policies unless they are challenged pursuant to APA rulemaking procedures. Cornelius may directly challenge Ecology’s application of POL 1120, including as unconstitutional. Aggrieved parties may and do challenge Ecology’s wrongful policies in PCHB appeals. *Theodoratus*, 135 Wn.2d at 587, 598 (water right holder challenge to Ecology’s change of *ultra vires* policy); *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 234, 858 P.2d 232 (1993) (water right holders challenge to Ecology’s illegal enforcement policies).

3. Perfection

One of the parties’ major disputes is whether those portions of WSU’s water rights that were never used or “perfected” were ineligible for transfer. WSU has never perfected about two-thirds of its rights, and Cornelius contends these quantities must be relinquished or rescinded. The perfection dispute concerns the requirements of RCW 90.44.100 as interpreted in *R.D.*

⁹ Ecology argues that its failure to conduct a year-by-year evaluation of historic use is cured by the PCHB’s *de novo* review of WSU’s pumping records. But, both Ecology and the PCHB operated on mistaken interpretations of the effect of the MWL on historic use. Moreover, the PCHB stated that it was not necessary to evaluate year-by-year perfection of WSU’s water use. AR 85 at 26-27. That it did not do so is acknowledged at ECY Br. at 27.

Merrill. Ecology argues the statute “expressly” allows amendment of unperfected certificates and that the “essence” of *R.D. Merrill* was that perfection requirements don’t apply to changes in groundwater “rights.” ECY Br. at 28-29. This reading overstates the case.

RCW 90.44.100 does authorize amendments to both unperfected permits and perfected certificates. But the statute is silent regarding unperfected certificates. Ecology presumes that silence to mean that permits and certificates are treated identically. *R.D. Merrill*, however, surgically distinguishes permits and certificates, explaining that permits are inherently unperfected because they are in the process of being put to use. Certificates, on the other hand, must be and are perfected before they issue.¹⁰ *R.D. Merrill*, 137 Wn.2d at 130. The general rule is that only perfected certificates and groundwater permits may be amended. This Court must decide whether the general rule applies to WSU’s unperfected certificates.

Cornelius contends, for three reasons, that the general rule bars amendment of the unperfected portions of WSU’s certificates. First, RCW 90.03.330(2) identifies the amendment process of RCW 90.44.100 as the operative moment at which Ecology must “revoke and diminish” unperfected municipal certificates. This statute applies the general amendment rule to WSU’s certificates. Ecology argues that RCW 90.03.330(3) effectively amended RCW 90.44.100 such that the agency need only analyze “good faith and diligence” when amending municipal rights. This contention is contrary to both legislative intent and *Lummi Nation*.

The legislature did not, *sub silencio*, amend RCW 90.44.100. Rather, it reaffirmed RCW 90.44.100 and case law interpretation of that statute by incorporating it into RCW 90.03.330(2),

¹⁰ *Pend Oreille and City of West Richland v. Dep’t of Ecology*, 124 Wn. App. 683, 103 P.3d 818 (2004), also do not discuss the transferability of unperfected groundwater certificates. Although the courts used the generic term “water rights” in those cases, the facts and discussion of amendments and relinquishment involved only permits. *Pend Oreille* cites *R.D. Merrill*, 137 Wn.2d at 130, where the court addressed amendment of unperfected permits. *Pend Oreille*, 146 Wn.2d at 791-92.

specifically authorizing Ecology to “revoke and diminish” municipal rights when amended. Municipal rights are therefore subject to the full “tentative determination of extent and validity” required by 90.44.100. The line of cases from *R.D. Merrill* to *Pend Oreille* to *Lummi Nation* hold that it is a full analysis of the historic use of a groundwater right that prevents infringement on other water users during the RCW 90.44.100 amendment process. *Lummi Nation*, 170 Wn.2d at 270-71. The legislature’s choice not to amend RCW 90.44.100 to limit analysis of municipal rights shows that the legislature did not intend the interpretation Ecology offers. *See Rivas v. Overlake Hospital Medical Center*, 164 Wn.2d 261, 270, 189 P.3d 753 (2008) (legislative silence following judicial interpretation of a statute indicates approval of judicial interpretation).

Second, the law of groundwater transfers does not allow amendment of unperfected certificates. *R.D. Merrill* 137 Wn.2d at 133 (“Insofar as RCW 90.44.100 allows amendment to a final certificate of groundwater right, as noted, a certificate only issues once the right has been perfected...”). Prior to enactment of the MWL, Ecology’s practice was to revoke and diminish unperfected quantities of water when certificates were tendered for amendment. Ecology does not admit this past practice, but it can be discerned through Ecology’s policies and PCHB decisions.¹¹ Ex. A-46 (POL 1060); *Paradise Lakes Country Club v. Dep’t of Ecology*, PCHB No. 92-24, Stipulation and Agreed Order of Dismissal (1-19-93) (settlement regarding rescission of unperfected public supply water right certificate).

Third, the court in *Lummi Nation* held that inchoate municipal certificates were to be treated like any other vested certificate, not like permits:

Further, while it may be possible to construe “rights in good standing” to mean that the legislature validated water rights that had been held invalid, the statute

¹¹ For a brief period after *Theodoratus*, Ecology attempted to implement a policy rescinding unperfected pump and pipes certificates into permit status. *See Lake Entiat Lodge v. Dep’t of Ecology*, PCHB No. 01-025, Findings of Fact, Conclusions of Law and Order at 8-10 (Findings of Fact XVIII-XXII) (11-27-01).

can also be construed to mean that such water rights will be treated like any other vested right represented by a water right certificate.

Lummi Nation, 170 Wn.2d at 265 (emphasis added). As discussed above, water right certificates were perfected before amendment.

This approach saves the MWL from constitutional infirmity:

Washington law still gives considerable process before any change can be made, and any impact on the rights of others will be at best collateral and indirect. *See Merrill*, 137 Wash.2d at 127, 969 P.2d 458 (department can approve changes to water rights only to the extent they are valid); RCW 90.44.100; RCW 90.03.380 (opportunity for review of system-capacity-based certificates).

Lummi Nation, 170 Wn.2d at 270-271 (footnote omitted). "If a right has not been beneficially used to its full extent, or if the right has been abandoned, then issuance of a certificate of change, in the amount of the original right, could cause detriment or injury to other rights." *Pend Oreille*, 146 Wn.2d at 794. This is why WSU's unperfected certificates may not be amended: the analysis required by RCW 90.44.100 protects Cornelius' water right from detriment or injury. The Court should follow the settled interpretation of the groundwater amendment statute.

E. MWL Derivative Claims

1. Introduction

It is undisputed that WSU's original wells cannot physically pump the full quantities allocated on its original water right certificates, and that WSU's water right amendments were expressly meant to facilitate WSU's ability to physically increase its pumping. AR 31, Att. 1 at 21. Increased pumping by WSU will exacerbate water level declines in the GRA. AR 15, Att. 1 at 2; AR 31, Att. 9, 10; Ex. A-31 (ll. 255-58). These accepted facts come were deemed irrelevant, and the PCHB refused to recognize the consequences of enabling WSU to physically

access more water. This failure affects three issues in this appeal: (1) SEPA analysis, (2) the impairment/public welfare test, and (3) the safe, sustaining yield mandate, each discussed below.

The PCHB concluded that the amendments do not allow WSU to pump more water. The PCHB, Ecology, and WSU simply fail to recognize a distinction between legal authorization and physical capacity. Once physical capacity is expanded through consolidation, there is no barrier to WSU increasing its service area or its pumping.¹²

Ecology also argues that WSU could reconstruct its wells, or replace them, without resort to the groundwater amendment process. But this appeal does not concern a WSU self-help scenario.¹³ This appeal challenges Ecology's failure to comply with RCW 90.44.100 when it processed WSU's applications. WSU's possible self-help remedies do not relieve Ecology of its legal obligations to correctly administer the water code statutes. *Gendler v. Batiste*, ___ Wn.2d ___, 274 P.3d 346, 353-55 (2012) (State Patrol not relieved of duty to produce documents, notwithstanding another agency's privilege from disclosure for same records); *Wash. St. Coal. for the Homeless v. DSHS*, 133 Wn.2d 894, 913, 949 P.2d 1291 (1997) (DSHS not relieved of duty to comply with homeless aid statute because legislature enacted another statute addressing same topic). Importantly, the self-help procedures of RCW 90.44.100(3) could not have accomplished WSU's goal of integrating its system to pump all rights from all wells. WSU had to use the RCW 90.44.100(2) process to achieve that outcome.

The failure to acknowledge the physical impact of the consolidation of WSU's rights prevented enforcement of mandatory statutory protections for public interests and water users.

¹² WSU has already substantially increased water usage at its new golf course. AR 15, Att. 9; AR 31, Att. 6 and Att.

¹³ Ecology and WSU both cite Cornelius' statement on summary judgment that WSU could have used the well replacement statute to access more water. This is not the major admission Respondents make it out to be. The well replacement statute, like RCW 90.44.100(2), prohibits WSU from enlarging its rights or impairing other rights when replacing a well. RCW 90.44.100(3). The same legal principles mandating loss of rights for non-use apply under this self-help section of the law.

2. State Environmental Policy Act

Approving WSU's increased pumping capacity amendments will exacerbate GRA declines. Such declines are a significant adverse impact, and undisputed in the record. Nevertheless, Ecology denies any impacts, asserting that "the changes will not enable WSU to use more water than they would use without the requested changes of points of withdrawal." ECY Br. at 37. This assertion is patently wrong. The point of the amendments was to allow WSU physical access to more water. WSU (as lead agency) should have evaluated these impacts in its SEPA checklist and DNS, but did not. WAC 197-11-050, 197-11-060. That failure required Ecology to supplement WSU's analysis and evaluate the impacts pursuant to SEPA's "new information" rule. WAC 197-11-600(3)(b)(ii). "The procedural duties imposed by SEPA--full consideration to environmental protection--are to be exercised to the fullest extent possible to insure that the 'attempt by the people to shape their future environment by deliberation, not default' will be realized." *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 640, 860 P.2d 390 (1993), quoting, *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 490, 513 P.2d 36 (1973).

Cornelius contends that the PCHB erred in ruling: (1) that supplemental environmental analysis was unnecessary because WSU could legally exercise the full quantity of its original water rights with no impacts beyond the originally authorized pumping; and, (2) that GRA drawdown was not "new information" triggering supplemental SEPA review by Ecology. AR 85 at 48-49. These issues involve interpretations of statutes, which are questions of law. *Union Gap*, 148 Wn. App. at 526. A court's determination of questions of law under SEPA is *de novo*.¹⁴ *Dioxin/Organochlorine Center v. PCHB*, 131 Wn.2d 345, 352, 932 P.2d 158 (1997).

¹⁴ Even under the "clearly erroneous" standard argued by Ecology, the Court should conclude that a "mistake has been committed." *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 114, 508 P.2d 166 (1973).

The PCHB erroneously relied on WSU's "existing scheme of rights" to conclude that additional environmental analysis was not needed. *See* Section III(F)(I), *supra*. But even without admitting that WSU lost water rights for prior non-use, Ecology should have supplemented the SEPA analysis. The amendments would physically increase pumping capacity and therefore cause significant and adverse environmental impacts.¹⁵ WAC 197-11-444(1)(c)(iv), ("impacts are the effects or consequences of actions" which include "groundwater movement/quantity/quality"). *See* Section III(E)(1), *supra*. Ecology and WSU provide no substantive response on this issue.

Ecology posits that, because the agency was "aware" that GRA levels are diminishing, it was relieved of the duty to supplement the SEPA documents. This is a legally erroneous interpretation of the "new information" rule. The rule requires an agency to prepare new analysis if material information is not disclosed in the environmental documents at issue, here the WSU checklist and DNS. WAC 197-11-600(3)(b)(ii). The rule is addressed to the content of the DNS, not the agency's general knowledge.

The failure to include material information is important, because SEPA requires mitigation for adverse impacts, but only if they are identified through SEPA processes. WAC 197-11-030(2)(g), 197-11-660(1)(b), 197-11-350; *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 52, 252 P.3d 382 (2011) (to impose mitigation, agency need not prove, but must identify impact in SEPA process).¹⁶ By not supplementing WSU's DNS to

¹⁵ "A significant impact is established 'whenever more than a moderate effect on the quality of the environment is a reasonable probability.' [*Norway Hill Preservation and Protection Ass'n. v. King County Council*, 87 Wn.2d 267, 272, 522 P.2d 674 (1976)]; *Swift v. Island County*, 87 Wn.2d 348, 358, 552 P.2d 175 (1976)." *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 702, 601 P.2d 501 (1979). Here there is more than a reasonable probability of adverse impact to the environment.

¹⁶ Contrast *Preserve Our Island v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 542-44, 137 P.3d 31 (2006), where the Court found the "new information" rule inapplicable because the environmental impact at issue (propeller wash

identify GRA drawdown as an adverse impact, Ecology could not impose mitigation. Ecology's "awareness" of GRA declines did not satisfy SEPA requirements.

3. Impairment & Public Welfare

The PCHB held the physical impacts of Ecology's approval of WSU's water rights consolidation irrelevant to whether Cornelius' domestic water right would be impaired. AR 85 at 41-42; AR 89 at 34-35. The PCHB's misinterpretation of the MWL revived WSU's lost rights. *See* Section III(D)(1)-(3), *supra*. The consolidation will allow WSU to physically access more water. *See* Section III(E)(1), *supra*. Consolidation effectively enlarges WSU's rights, and exacerbates declines in GRA levels as WSU increases pumping. GRA declines will cause declining water levels in Cornelius' well. *Id.*

WSU argues that change in location determines impairment, not the exercise of the original, now relinquished and abandoned quantities. This ignores that the amendments as approved allow WSU to pump water to which it is no longer entitled. The two PCHB cases WSU cites to support its "change in location of pumping" theory are inapt. Neither case involved prior loss of the water right proposed for amendment. *Kile v. Ecology*, PCHB No. 96-131 (1997); *Andrews v. Ecology*, PCHB No. 97-20 (1997). In *Andrews*, the proposed change was denied due to potential location change impacts, emphasizing the legal protections afforded to junior rights in the RCW 90.44.100 amendment process. *Andrews*, at Conclusion of Law III.

By misinterpreting the MWL, the PCHB explicitly refused to consider the impact of overall increased pumping on Cornelius' well. This precluded Cornelius from demonstrating impairment, violating his due process right to defend his vested water right. *See Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) ("Instead, to constitute a violation, the

impacts on eel grass) was "thoroughly considered" in the environmental documents and mitigation measures imposed.

party must be prejudiced. Prejudice relates to the inability to prepare or present a defense.”).

The Court should reverse.

4. Safe, Sustaining Yield Mandate

The PCHB held, and Ecology argues, that the safe, sustaining yield mandate of RCW 90.44.130 need not be enforced because the amendments do not enlarge WSU’s originally authorized pumping. AR 85 at 44. Again, this ignores the physical consequences of amending WSU’s water rights. *See* Section III(E)(1) *supra*.

Ecology next argues that the safe, sustaining yield mandate does not apply to the groundwater amendment process. RCW 90.44.130 provides:

. . . The department . . . shall have the jurisdiction to limit withdrawals by appropriators of groundwater so as to enforce the maintenance of a safe sustaining yield from the groundwater body. . .

The Court must interpret RCW 90.44.130, an important law which requires that groundwater be managed sustainably. Maintaining a sustainable water yield is critically important where entire communities rely on the diminishing GRA for drinking water. As even the PCHB acknowledged, “the Grande Ronde Aquifer is experiencing a long-term and troubling trend of declining water levels that, if not adequately addressed, will eventually threaten all water users in the basin.” AR 89 at 3. Yet Ecology has failed to hold the GRA to safe, sustainable pumping rates. This impending crisis is the Appellants’ fundamental motivation for bringing this appeal.

Ecology defends the PCHB ruling with conclusory and unsupported arguments. Ecology asserts, incorrectly, that the “first in time, first in right” rule set forth in RCW 90.44.130 applies only to establishment of new water rights. It is hornbook law that the “first in time” rule applies to all water rights in Washington throughout the life of the rights. RCW 90.03.010, 90.44.030; *Lummi Nation*, 170 Wn.2d at 253-54; *Campbell & Gwinn*, 146 Wn.2d at 9.

Ecology next asserts that the “first in time” sentence in the statute “obviously refer[s] to the decision-making process” of issuing a new permit. ECY Br. at 39. Ecology does not explain why it is obvious. Rather, the statute expressly gives Ecology jurisdiction to maintain a safe yield by “administering groundwater rights” and “limiting withdrawals by appropriators.” RCW 90.44.130. Cornelius contends that the term “groundwater rights” means existing rights, and that a “subsequent appropriator” is one who already has a water right, not a would-be appropriator, also known as an “applicant.” *See* RCW 90.03.290 (incorporated into the groundwater code via RCW 90.44.060, referring to “applications” and “applicants”). Ecology does not respond.

Ecology points out that RCW 90.44.100 does not refer to RCW 90.44.130, and concludes that it therefore cannot apply in the groundwater amendment process. Despite Ecology’s contention that RCW 90.44.130 is operative only at permitting, the permitting statutes also do not refer to the safe, sustaining yield requirement. *See* RCW 90.44.050, .060.¹⁷ Ecology fails to explain its contradictory interpretations. More importantly, the Legislature is empowered to add requirements to water code procedures as it deems necessary.

Ecology explicitly agrees with Cornelius that the PCHB interpretation renders RCW 90.44.130 meaningless. In Ecology’s view, the statute is repetitive of the water availability analysis for new water rights, and “does not add to or subtract from” RCW 90.44.100’s impairment analysis.¹⁸ ECY Br. at 40-41. This interpretation violates the rule that statutes should not be construed so as to render any portion superfluous. *Pend Oreille*, 146 Wn.2d at

¹⁷ RCW 90.44.060 does refer to .130’s authority to create groundwater areas or sub-areas, a section of the statute not at issue here.

¹⁸ RCW 90.44.060 (referring to RCW 90.03.290) already considers water availability for new permits. *See also* RCW 90.44.070 (prohibiting permits that would exceed “capacity of the underground bed . . . to yield such water within a reasonable or feasible pumping lift . . .”).

805; *Rettkowski*, 122 Wn.2d at 227, n.1. The safe, sustaining yield mandate has important meaning and must be implemented in the WSU amendment process.

Finally, Ecology incorrectly asserts that Cornelius has cited no authority. First, the plain language of RCW 90.44.130 is authority. Second, the Supreme Court has identified RCW 90.44.130 as a post-withdrawal enforcement remedy. *Campbell & Gwinn*, 146 Wn.2d at 17, n.8. Ecology does not address this case.

In sum, Ecology's response contains no legal authority or argument beyond the agency's self-serving assertion that the statute "obviously" does not apply to WSU's amendments. The Court should reverse and require Ecology to limit WSU's water rights to achieve safe, sustaining yield of the Grande Ronde Aquifer.

F. Water Code Claims

1. Reasonable Diligence

Cornelius contends that WSU's rights are subject to relinquishment as certificates, not reasonable diligence as permits. Yet Ecology argues that diligence is the only factor it may consider when processing amendments to pumps & pipes certificates.¹⁹ ECY Br. at 8, 15, 30. Even if the Court agrees with Ecology, WSU has not exercised reasonable diligence in putting its water to use. The policy basis for the reasonable diligence requirement is particularly compelling where, as here, the amount of water available from the groundwater system is actually decreasing. AR 89 at 3; AR 15, Att. 1 at 2 and Att. 1B. Water not used by a senior right holder returns to public ownership in order to satisfy other water rights or be re-appropriated. RCW 90.14.160-.180; *Lummi Nation*, 170 Wn.2d at 251-53.

¹⁹ WSU briefly describes water code diligence rules in its discussion of constitutional arguments, where it asserts that Cornelius "misstates the law concerning . . . reasonable diligence in perfecting a water right," WSU Br. at 30-31, but does not identify which law it believes to be misstated.

The PCHB erred in affording discretion to Ecology's arbitrary determination, especially given WSU's lengthy record of non-use and the complete absence of evidence showing future need or development plans for the unperfected certificates. It is undisputed that WSU has not used substantial portions of its water rights and actual use has declined from its all-time high in 1994 of 1,988 acre-feet to 1,466 acre-feet used in 2006. AR 52, Ex. 2. Some of WSU's non-use had extended nearly 45 years by the time of hearing. Only one of WSU's rights (Permit No. G3-28278P) contains a development schedule, the practical mechanism by which diligence conditions are imposed on water rights.

Cornelius has shown that WSU not only has no development schedule, but has no plans to use its water. WSU moved for summary judgment on this issue before the PCHB. As the non-moving party, this Court infers facts in Cornelius' favor. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 119, 11 P.3d 726 (2000). Ecology asserts that WSU "has continued to grow over time" and that WSU "only wants" to retain its paper water rights if it is directed to expand enrollment. ECY Br. at 45-46. But no evidence was presented demonstrating a correlation between growth in student enrollment and growth in water usage. In fact, WSU's use has actually decreased while enrollment increased. AR 49 at 2 (¶7). Insofar as Ecology asks the Court to create an exception to the diligence requirement for WSU's "unique" circumstances, that is a policy argument for the Legislature.²⁰ Finally, hanging onto paper water rights for undefined future use is speculative, in contradiction to the beneficial use policies of Washington water law. *Lummi Nation*, 170 Wn.2d at 253-54; *Theodoratus*, 135 Wn.2d at 595; *City of West Richland*, 124 Wn. App. at 693.

²⁰ WSU's circumstances are not unique. All municipal water suppliers are subject to a duty to serve water consistent with comprehensive plans. RCW 43.20.260. That WSU is subject to legislative mandated enrollment increases is not a basis to suspend diligence requirements.

The PCHB failed to apply the special diligence factors set forth in RCW 90.03.320 for municipal water supply permits. Ecology quotes this statute, but does not explain how it was applied to WSU.²¹ As such, Ecology's determination is not due deference. Even assuming this statute applies to WSU's certificates,²² the record contains no evidence regarding financing, the interplay between present-day conservation and future demand, or data about future supply needs. Nevertheless, the PCHB ruled that, notwithstanding the passage of 45 years, Ecology "was within its discretion" to find that WSU was exercising diligence. AR 85 at 26.

Washington courts have held that rights unperfected for fifty years are lost for lack of diligence. *Abbott*, 103 Wn.2d at 696. Yet, under Ecology's reasoning, a pumps and pipes certificate holder may sit on its rights for decades, possibly centuries, without taking steps to perfect its water rights. This is why permits are given perfection schedules, in order to measure diligence, and why certificates, that do not have perfection schedules, are subject to relinquishment. Ecology equated the "in good standing" proviso of the MWL, RCW 90.03.330(3), with reasonable diligence requirements. Ecology and the PCHB did not evaluate WSU's diligence objectively. The diligence ruling should be reversed.

2. Abandonment

For 30 years, WSU failed to pump water from Well No. 2, to which Claim No. 098523 is appurtenant. This fact establishes a legal presumption that the claim was abandoned. *Twisp*, 133 Wn.2d at 783. The PCHB erred by not beginning its analysis with this presumption. Even without the presumption, several documents, all created by WSU, prove the university's

²¹ Ecology mischaracterizes Cornelius' argument. Cornelius does not argue that the PCHB was wrong to consider "flexibility," but that it did not do so in a manner that comports with RCW 90.03.320. Op. Br. at 39.

²² Ecology asserts that RCW 90.03.320 "applies to prematurely issued 'pumps and pipes' certificates," but cites no legal authority. ECY Br. at 43-44. It is undisputed that Ecology did not "fix a time" for the "application of the water to the beneficial use . . .," RCW 90.03.320, and thus it is not even clear that Ecology did apply the statute to WSU's unperfected certificates.

intentional abandonment of the claim. These include the “water right self assessment” contained in WSU’s 2002 Water System Plan (WSP), WSU’s draft applications for the water right amendments, and communications between WSU’s water system manager and Ecology staff. For example, WSU’s pre-application correspondence to Ecology expressly omits mention of Claim 098523 as an existing water right. AR 18, Att. 4 at 37-38, Att. 5 at 1-4, Att. 6 at 4, Att. 7.

Given thirty years of non-use, WSU bore the burden to prove it had not abandoned the claim. WSU argues (1) it was actually pumping from an unauthorized point of withdrawal, (2) the documents do not mean what they say and, (3) the university did not “officially” abandon the claim. These arguments are not sufficient to rebut the presumption of abandonment or the evidence documenting WSU’s intent to abandon Claim 098523. CR 56(c).

With respect to the 2002 WSP, WSU fails to acknowledge or explain why it used the term “abandoned” to describe Claim 098523.²³ Instead it argues that adjacent columns in the WSP tables list the Claim’s instantaneous and annual quantities as existing water rights. But the totals shown at the bottom of the columns do not equate to the sum of the numbers in the table.²⁴ The tables do not prove that WSU intended to pump Claim 098523 from another well, nor that it was intended to function as an active water right for existing or future use. With respect to its consolidation applications, WSU only included Claim 098523 in its materials after talking with Ecology staff. In this respect, this case is strikingly similar to *Twisp*, where Ecology staff recommended inclusion of the city’s abandoned water right in its application form. *Twisp*, 133 Wn.2d at 773; Ex. 51 at 2-3. WSU’s actions, as evidenced in the documentary record, show

²³ Contrary to WSU’s assertion, the term “abandoned” in this document refers to the status of the water right, not the well.

²⁴ WSU did not offer these tables as evidence or otherwise discuss them in its summary judgment briefing. Rather, the PCHB included discussion of this “proof” of lack of intent in a footnote in its summary judgment order. AR 85 at 35, n.19. The record contains no explanation of what the tables mean.

ample evidence of intent to abandon Claim 098523 and no evidence that it intended to keep it as an existing water right.

WSU next argues there was no “official University decision” to abandon the water right. WSU Br. at 42. But intent is determined with reference to the “conduct of the parties.” *Twisp*, 133 Wn.2d at 781. WSU’s agent, Gary Wells, was the longstanding superintendent of the WSU water right system, and was authorized to process amendments to WSU’s water rights. Ex. 51. Mr. Wells knew WSU’s water system better than anyone and served as a chief witness in this case. His conduct was WSU’s conduct. Viewed objectively, that conduct included preparing and distributing various documents expressly stating that WSU had abandoned Claim 098523.

WSU next argues that, after Well No. 2 stopped producing, it pumped Claim 098523 quantities from Well 3. There are three problems with this argument. First, in 1978, WSU was not aware that Claim 098524, the water right appurtenant to Well 3, was invalid. WSU *actually* pumped Well 3 with the intent to exercise Claim 098524, not 098523. In fact, Gary Wells testified that he believed Claim 098524 was a valid right. AR 51 at 3 (¶8). This is a *post hoc* argument of convenience that does not reflect reality.

Second, a review of WSU’s water pumpage chronology shows no correlation between Wells 2 and 3. As pumping from Well No. 2 fell to zero, pumping in Well No. 3 also declined.²⁵ AR 52, Ex. 2 (Op. Br., App. 2). Further, WSU produced no documentation to substantiate its claim that its intent was to pump Claim 098523 from Well No. 3.

²⁵ WSU asserts that “Cornelius would have this Court ignore entirely the undisputed fact that WSU continued to pump water from Well No. 3 . . .” WSU Br. at 43. On the contrary, Cornelius asks the Court to closely examine the WSU pumping records and evaluate the factual underpinnings of the PCHB’s ruling that WSU “moved” the Well 2 water right to Well 3 after 1978. A close examination reveals that this alleged shift in pumping did not occur.

Third, Washington courts have expressly rejected the “unauthorized change” argument. In *Twisp*, the seminal Washington case on abandonment, Ecology asked the Court to rule that “an unauthorized, unprotested change in point of diversion is not evidence of abandonment but instead is evidence of nonabandonment.” *Twisp*, 133 Wn.2d at 785. The court rejected this argument, finding that “the town illegally began to draw water from a new source without regard to the 1912 right” and therefore abandoned its original right. *Twisp*, 133 Wn.2d at 785-86. *R.D. Merrill* ruled that an illegal diversion did not perfect a surface water claim, making it ineligible for transfer. *R.D. Merrill*, 137 Wn.2d at 134-38. Ignoring these decisions, WSU cites a 1973 treatise, published 24 years before *Twisp*. WSU also cites Ecology’s POL 1120. As discussed in Section III(D)(2), *supra*, Ecology cannot rely on policies that contradict statutes and case law.²⁶ *Theodoratus*, 135 Wn.2d at 600; *Campbell & Gwinn*, 146 Wn.2d at 19.

Finally, WSU raises a new argument, asserting that its three water right claims represent two rights sharing three wells. This argument cannot be raised for the first time before the Court of Appeals. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). Judicial review is confined to the issues argued and record developed before the PCHB. RCW 34.05.558. Adjudicating factual questions about mistakes in WSU’s water right claim forms here would deprive Cornelius of the opportunity to develop and present relevant factual evidence. *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 515, 553 P.2d 107 (1976). Finally, if WSU believed it had filed inaccurate claim forms, its remedy was to seek amendments pursuant to RCW 90.14.065. The third level of judicial review of an unrelated agency action is not the appropriate forum for WSU to argue for the first time that it made mistakes when filling out water right claim forms filed in 1974.

²⁶ Neither WSU nor Ecology address Cornelius’ argument that Ecology cannot adopt a policy that changes a fundamental attribute of a water right, such as its point of withdrawal, without going through formal APA rulemaking. Op. Br. at 42-43, citing *Hillis v. Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997).

In sum, WSU's thirty years of non-use established a presumption of abandonment of Claim 098523, and ample evidence demonstrated intent to abandon. The Court should reverse.

3. Reasonable Efficiency and Waste

WSU's wasteful golf course irrigation was an issue on appeal. WSU moved for summary judgment. In response, Cornelius submitted photos demonstrating pristine, 20,000-year old groundwater running off bare hillsides and evaporating into extreme heat, asserting that this constituted a sufficient demonstration of waste to preserve the issue for hearing. The purpose of this evidence was to demonstrate the *Grimes* factors for determining "water duty" and waste. *Grimes*, 121 Wn.2d at 468-73. Cornelius further asserted that WSU's wasteful irrigation, in the context of a declining aquifer system that supplies water for two communities, is properly considered in the groundwater amendment process. *See Grimes*, 121 Wn.2d at 472.

Neither WSU nor Ecology proffered facts disputing Cornelius' assertion of waste at the golf course. AR 57 at 6-11; AR 55 at 16. Ecology did admit, however, that were it required to evaluate waste, that might have caused the agency to condition the amended rights "to ensure that WSU irrigates its golf course efficiently." AR 57 at 10, n.8. The PCHB granted summary judgment to WSU, ruling that (1) non-expert observations regarding WSU's wasteful water use were insufficient to create a genuine issue of fact and (2) water use efficiency is considered via enforcement action, not groundwater amendment proceedings. AR 85 at 27-28.

WSU first argues that, because it was using less water overall on campus, it was not accountable for wasteful water use at its new golf course.²⁷ WSU cites no authority for the proposition that efficient use in one area excuses wasteful use elsewhere. On the contrary, efficiency and waste are often evaluated by inquiring into different components of a water

²⁷ WSU appears to have abandoned the argument that expert testimony was required in order to create a genuine issue of material fact.

system. For example, the *Grimes* court evaluated both crop water duty requirements and the conveyance efficiency of the water user's ditch. *Grimes*, 121 Wn.2d at 471-73.

WSU next asserts that the PCHB did not actually rule that waste is unreviewable in the water right amendment process. However, that is precisely what WSU argued below. AR 55 at 16. The PCHB ruling responds directly to WSU's argument and was a basis for rejecting Cornelius' claim of waste. The issue is properly before the Court.

WSU then argues, incorrectly, that water waste cannot be considered in the groundwater amendment process. The efficiency of use and/or waste of a water right are elements of beneficial use. *Grimes*, 121 Wn.2d at 468. Beneficial use is one of the four tests for new water rights, RCW 90.03.290, incorporated into the groundwater code at RCW 90.44.060; *Lummi Nation*, 170 Wn.2d at 251-53. As one of the four tests, beneficial use must be considered in the groundwater amendment process, which requires Ecology to "make findings as prescribed in the case of an original application," including beneficial use. RCW 90.44.100(2); *R.D. Merrill*, 137 Wn.2d at 131-32. Ecology therefore must evaluate the efficiency and/or waste associated with groundwater rights when amending them.²⁸ Because standards for efficiency change over time, WSU is wrong to argue that the efficiency of use is determined for all time when a water right is first issued. *Grimes*, 121 Wn.2d at 473.

Finally, WSU argues that Cornelius' allegations of waste, if true, would not "alter the extent and validity of WSU's water rights." This argument directly contradicts *Grimes*, which held that wasted water is relinquished and reverts to the state. *Grimes*, 121 at 478-79. The Court should reverse the PCHB and remand for evaluation of WSU's water waste.

²⁸ Ecology's POL 1120, the tentative determination guidance, directs permit writers to "consider whether the water quantities diverted or withdrawn are consistent with a reasonable water use in accordance with Ecology v. Grimes." AR 23, Ex. 2 at 4 (§6(b)(i)).

4. Supplemental Water Permit

WSU's Permit G3-28278P is supplemental to three primary rights, one of which, Claim 098524, is invalid. AR 18, Ex. 3. Cornelius contends that because the primary right is invalid, the dependent supplemental right is invalid too. Authorizing the invalid quantities incorporated into the supplemental permit contravenes the rule that "the combined total withdrawal from original and additional . . . wells shall not enlarge the right conveyed by the original permit or certificate." RCW 90.44.100(2)(c). Claim 098524 "conveyed" nothing, and inclusion of its quantities in Permit G3-28278P improperly enlarged the right.

Ecology argues that Permit G3-28278P: (1) contains an aggregate cap that is unrelated to the underlying primary rights; (2) must expressly state that it becomes invalid if one of the primary rights is invalid; and (3) according to agency POL 1040, is an "alternative" right.

The G3-28278 application was controversial, protested by the Idaho Department of Water Resources and others. AR 16, Ex. 5. To address community concerns, the ROE is replete with statements discussing the supplemental nature of the right. For example:

WSU proposes to develop a new well, well No. 7, as a supplemental source of water for the university campus. Three existing wells, presently on-line, are considered to have a very limited future. It is the expressed intent of WSU to bring the proposed well on-line as a direct substitute for these wells as they eventually decrease in productivity, or fail."

...

The applicant [WSU] is advised that, consistent with the expressed intent, any authorization made pursuant to this application will be for supplemental water only. The waters to be appropriated from Well No. 7 will serve to replace, as necessary, those waters originally authorized or claimed for appropriation from Wells No. 1, 3 and 4.

...

Both protestants expressed deep concern over additional, large scale, ground water appropriations being authorized from this basin. However, WSU is not requesting water in addition to those already authorized or claimed. As specified in this report, a permit, if issued, will authorize withdrawals from Well No. 7 only as a supplement to existing rights.

AR 16, Ex. 5 at 1-2. Permit G3-28278P was obviously intended to depend on the three primary, underlying rights. Further, the “aggregate cap” Ecology argues for sets a maximum, not a minimum, for the supplemental quantities. The document does not require that the right shall not fall below 2500 gpm, nor does it prohibit deducting the invalid quantities of Claim 098524.

Contrary to Ecology’s assertion, the original G3-28278 ROE does contain a caveat regarding potential invalidity of the primary claims, citing RCW 90.14.081. AR 16, Ex. 5 at 2. Ecology’s is incorrect to argue that water right documents must expressly incorporate every relevant aspect of the water code, such as the prohibition on enlargement. Even assuming this premise, however, the disclaimer Ecology argues as necessary is actually present in a key document creating the water right.

Ecology’s guidance document also does not support its argument. Assuming the permit is properly characterized as an “alternate” right, POL 1040 indicates such rights are used “to meet or augment an existing water right.” AR 37, Ex. 1 at 3 (emphasis added). It is undisputed that Claim 098524 is not an existing water right. AR 18, Ex. 3. Ecology’s logic would retroactively validate illegal claims. The ROE language quoted above indicates the supplemental permit is more properly a “standby/reserve” right, which Ecology admits “cannot be exercised when the primary right is not valid.” ECY Br. at 49.

WSU argues that substantial evidence supports the PCHB decision. But the PCHB ignored the ROE findings in its final order, instead focusing on a single statement in the permit. The Board interpreted Ecology’s POL 1040 to hold that the supplemental quantities of G3-28278P are not “legally dependent” on the existence of the underlying primary rights, based on the supplemental right having a later priority date. AR 89 at 30-31. The application of this test was a question of law, reviewed *de novo* by the Court. *Grimes*, 121 Wn.2d at 466. Further, the

PCHB ignores the history of the right, including the ROE findings that describe Ecology's intent in creating the right. The permit writer who testified regarding the ROE did not originally prepare that document and was in no better position to interpret it than any other reviewer, including this Court. The finding is not supported by substantial evidence because it is premised on faulty assumptions.

IV. CONCLUSION

Appellants Cornelius, et al, request the Court to reverse the PCHB decisions on WSU's water right amendments and remand the matter for further proceedings as set forth in Section V of Petitioners' Opening Brief.

V. ATTORNEY FEES

Cornelius renews his request for attorney fees. *See* Op. Br. at 49.

DATED this 29th day of May, 2012.

Respectfully submitted,

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